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THE LAWYERS REPORTS ANNOTATED

BOOK XLVIII

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE, WITH FULL ANNOTATION.

BURDETT A. RICH, EDITOR, AND
HENRY P. FARNHAM, ASST.

ROCHESTER, N. Y.

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LAWYERS' REPORTS

ANNOTATED.

PENNSYLVANIA SUPREME COURT.

Carrie LOUGHIN

v.

James McCAULLEY *et al.*, Appts.

(186 Pa. 517.)

1. The provision of a state Constitution against limitation of liability for injuries resulting in death cannot prevail over the act of Congress permitting limitation of liability for maritime losses.
2. The limitation of liability of the owners of vessels, for maritime losses, by U. S. Rev. Stat. 1878, § 4283, may be administered in an action at law against them in a state court to recover for death caused by a collision.
3. The method for limitation of the ship owner's liability for maritime losses provided in the act of Congress of 1851 by transfer to a trustee is not exclusive; but the limitation may be claimed under a general denial in an action at law.

(July 21, 1808.)

A PPEAL by defendants from a judgment of the Court of Common Pleas, No. 2, for Philadelphia County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed.*

The facts are stated in the opinion.

Messrs. H. L. Cheney, John F. Lewis, and John G. Johnson, for appellants:

The defendants should have been permitted to show what fractional parts each owned in the tug, and the value of the tug.

There can be no question but that the court of common pleas of Philadelphia had jurisdiction to try this case if the tort was committed within the limits of the state.

American S. B. Co. v. Chase, 16 Wall. 533, 21 L. ed. 372; *Sherlock v. Ailing*, 93 U. S. 100, 23 L. ed. 819; *McCullough v. New York & N. S. B. Co.* 20 U. S. App. 570, 61 Fed. Rep. 304, 9 C. C. A. 521; *Wallace v. M'Connell*, 13 Pet. 138, 10 L. ed. 95; *Taylor v. Carryl*, 20 How. 583, 15 L. ed. 1023; *Mallett*

Notes.—Administration of Federal laws in state courts.

I. *Introductory.*

II. *Civil laws.*

III. *Criminal and penal laws.*

I. *Introductory.*

The difficulty encountered in reaching a correct answer to the question suggested by the note—a difficulty to which so great a master of constitutional law as Judge Story has contributed by statements in some of his opinions and in his work on the Constitution—has arisen mainly from the tendency to confuse the jurisdiction of the court with the subject-matter over which it is exercised, and the failure to discriminate between the source of jurisdiction and the source of the rights which are the subjects of the jurisdiction. That such jurisdiction and rights may have different sources is illustrated by the practice of the courts of enforcing rights arising out of acts of a foreign country.

This illustration is used by Hamilton in the *Federalist* (No. 82), where he expresses his opinion that unless the state courts are expressly excluded by acts of Congress they will take cognizance of the causes to which those acts may give birth.

Judge Story, however, in his work on the Constitution (vol. 2, 5th ed. p. 535) says: "And it is only in those cases where, previous to the Constitution, state tribunals possessed jurisdiction independent of national authority that they can now constitutionally exercise a concurrent jurisdiction." He evidently considered this

proposition a corollary of the proposition stated by him in *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97, that Congress cannot confer any of the judicial power of the United States upon the state courts.

This line of argument ignores the possibility that the state courts may, under the state Constitution and state laws, have jurisdiction enabling them to lay hold of new rights as they arise, whatever the source of those rights may be. It was evidently the origin of his *dictum* in *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97, that state courts cannot take direct cognizance of cases arising under the laws of the United States, since no such jurisdiction existed before the adoption of the Constitution, and it cannot be conferred by Congress. Justice Bradley indicates the fallacy of the argument when he says in *Ciaflin v. Houseman*, 93 U. S. 130, 23 L. ed. 833, that the *dictum* is only true as to jurisdiction (not rights) depending on United States authority.

The same confusion with reference to jurisdiction and rights is apparent in *Voorhies v. Frisbie*, 25 Mich. 478, 12 Am. Rep. 291, which denied the jurisdiction of a state court over an action by an assignee in bankruptcy, under § 35 of the bankruptcy act, to set aside a transfer by the bankrupt as a preference in violation of the act, upon the ground that the right as declared upon by the bill was wholly created by the act. The court says that the state courts can exercise no new "powers" wholly dependent on, and conferred by, statutes of the United States. The minor premise of the argument evidently is that if a state court were to take

v. Dexter, 1 Curt. C. C. 178, Fed. Cas. No. 8,988.

That the action occurred on a navigable river did not defeat the jurisdiction of the state court, if the place was within the boundaries of the state.

American S. B. Co. v. Chase, 16 Wall. 532, 21 L. ed. 372; *McCullough v. New York & N. S. B. Co.* 20 U. S. App. 570, 61 Fed. Rep. 364, 9 C. C. A. 521.

If the court could hear the case at all, it certainly could hear the defense to it.

23 U. S. Stat. at L. 57.

The limitation of the owner's liability is a necessary incident to the ownership of vessel property, and all rights of action against owners as such are limited by this act.

The Rebecca, 1 Ware, 187, Fed. Cas. No. 11,619; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. ed. 465;

cognizance of a case arising out of the laws of the United States it would be exercising a "new power" wholly dependent on, and conferred by, statutes of the United States. The major premise is undoubtedly correct, and, so far as the minor premise is true, the conclusion against the state court's jurisdiction is justified; but it is not necessarily true, since the state court may have inherent power, not at all dependent on acts of Congress, adequate to the enforcement of new rights, although such rights emanate from acts of Congress.

Gilbert v. Priest, 65 Barb. 444, made a similar decision, based on much the same reasoning. It was, in effect, overruled by *Cook v. Whipple*, 55 N. Y. 150, which points out that the jurisdiction of the state court over the subject-matter does not depend upon the source from which the subject-matter emanates.

Justice Washington in *Houston v. Moore*, 5 Wheat. 1, 5 L. ed. 19, accepts the doctrine of *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97, that Congress cannot confer any of the judicial power of the United States upon the state courts, but explains it, and shows that, while it prevents Congress from conferring jurisdiction upon state courts, it does not, so long as Congress does not exercise its undoubted power to make the jurisdiction of the Federal courts exclusive, prevent the state courts from exercising jurisdiction, even over causes arising out of the acts of Congress, if they can find the requisite authority in their own inherent powers. The opinion states and adopts Hamilton's position already alluded to.

Justice Washington's explanation of the doctrine has been generally followed by the later cases, and is expressly approved in *Clafin v. Houseman*, 93 U. S. 130, 23 L. ed. 833.

It is thus apparent that the state courts must look to their own inherent powers for the source of their concurrent jurisdiction over cases arising out of the Federal laws, and that the only purpose subserved by the provisions of acts of Congress purporting to confer such concurrent jurisdiction is to negative the exclusive jurisdiction of the Federal courts, or to withdraw the classes of cases to which they relate from the exclusive jurisdiction previously conferred upon such courts.

II. Civil laws.

Under the influence of the doctrine of *Houston v. Moore*, 5 Wheat. 1, 5 L. ed. 19, it was held in *Delafeld v. Illinois*, 2 Hill. 150 (an action by the state of Illinois against a citizen of New York), that the Federal Constitution did not divest the state courts of pre-existing 48 L. R. A.

Walker v. Western Transp. Co. 3 Wall. 150, 18 L. ed. 172; *Butler v. Boston & S. S. Co.* 130 U. S. 555, 32 L. ed. 1023, 9 Sup. Ct. Rep. 612.

It cannot be objected that the defendants should have pleaded specially the act of 1884, because the Pennsylvania procedure act of May 25, 1887, provides expressly, "special pleading is hereby abolished," and "the only plea in the action of trespass shall be not guilty."

Even under the act of 1851, it has been most distinctly asserted, and reasserted, that the benefits of a limitation of liability to the value of the vessel could be obtained in other ways than by the procedure referred to in the act, and under the rules of the Supreme Court.

The Scotland, 105 U. S. 24, *sub nom. National Steam Nav. Co. v. Dyer*, 26 L. ed.

jurisdiction, and that, therefore, Congress did not violate the Constitution in failing to make the jurisdiction of the United States Supreme Court in suits by a state against a citizen of another state exclusive, notwithstanding that the judicial power of the United States is declared by the Federal Constitution to extend to such suits.

United States v. Dodge, 14 Johns. 95, held that an action of debt by the United States on a bond for the payment of duties to the collector would lie in the state court. Sections 9 and 11 of the judiciary act purport to confer concurrent jurisdiction on the state courts of suits at common law where the United States is plaintiff.

Teall v. Felton, 1 N. Y. 537, 40 Am. Dec. 352, sustained an action of trover against a postmaster for detaining a newspaper, notwithstanding the contention that if any action could be maintained against him the jurisdiction of the Federal court would be exclusive. It was argued by defendant that the case was one of a class of which the state courts did not take cognizance when the Federal Constitution was adopted, since the postoffice department was entirely the creation of the national statute. The court replied, however, that the plaintiff was not seeking redress under the postoffice laws, but was simply seeking to recover in an appropriate common-law tribunal, competent to afford the remedy, and in a form of action more ancient than the Federal Constitution or the acts of Congress.

Moyer v. McCullough, 1 Ind. 330, held that suit would lie in the state court by a party having the equitable title to public land to obtain the legal title from one to whom the patent was issued by a mistake, notwithstanding that the question depended on the acts of Congress.

Chesapeake & O. R. Co. v. American Exch. Bank, 92 Va. 495, 44 L. R. A. 449, 23 S. E. 935, holds that the section of the United States Revised Statutes forbidding railroad companies to keep cattle confined in cars for more than twenty-eight consecutive hours without unloading them may be made the basis of an action by a shipper in the state court for negligence.

United States v. Graff, 4 Hun. 634, upheld the jurisdiction of the state court over an action by the United States for duties unpaid on imported goods upon the ground that the primary object of the action was, not simply to execute the laws of the United States, but to collect a debt.

Ammidown v. Freeland, 101 Mass. 303, 3 Am. Rep. 359, holds that the state court has jurisdiction of the action given to sellers of goods

1001; *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.* 109 U. S. 578, 27 L. ed. 1038, 3 Sup. Ct. Rep. 379, 617; *The Doris Eckhoff*, 30 Fed. Rep. 140; *Miller v. O'Brien*, 35 Fed. Rep. 779; *Craig v. Continental Ins. Co.* 141 U. S. 638, 35 L. ed. 886, 12 Sup. Ct. Rep. 97; *The Rosa*, 53 Fed. Rep. 132; *The Garden City*, 26 Fed. Rep. 760.

If the court was unable to extend to the defendants the benefits conferred by the act of 1884, it had no jurisdiction of the cause.

Butler v. Boston & S. S. Co. 130 U. S. 555, 32 L. ed. 1023, 9 Sup. Ct. Rep. 612.

Messrs. Fred. Taylor Pusey and Wendell P. Bowman, for appellee:

The 4th section of the act of 1851 provides that a transfer of the interest of the owners to a trustee, to be appointed by the court, shall be deemed a sufficient compliance with the requirements of the act; but the Supreme

Court of the United States has held that the giving of a stipulation for the value of the vessel as the court may think proper, or the paying of the money into court, is sufficient compliance with the requirements of the law.

Providence & N. Y. S. S. Co. v. Hill Mfg. Co. 109 U. S. 578, 27 L. ed. 1038, 3 Sup. Ct. Rep. 379, 617; *Norwich Co. v. Wright*, 13 Wall. 104, 20 L. ed. 585.

The defendants made no offer whatever to give a stipulation, or to pay the value into court, or to convey the vessel to a trustee, so that it is at once evident that they are not entitled to the benefits of the law in this proceeding on this account, irrespective of the question as to whether they could receive its benefits at all in the state courts.

The state court has no jurisdiction at all to administer the benefits of the limited liability laws, and they can only be adminis-

by United States Stat. 1864, chap. 173, § 97, to recover from the buyer duties imposed on the goods subsequently to the contract.

Actions by or against national banks.

The question as to the concurrent jurisdiction of the state courts over causes arising out of the Federal laws has been frequently raised in actions brought by, or against, national banks. As such banks are the creatures of the Federal laws, and must look to them for the definition of their powers and the source of their authority, actions or proceedings by or against them, of whatever nature, are generally regarded as arising under the laws of Congress, and there is express authority for the position, at least so far as concerns actions by such a bank, in *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204. The correctness of the position with reference to actions against the bank where plaintiff's pleadings admit its existence and authority has been challenged by *Cooke v. State Nat. Bank*, 52 N. Y. 96, and *Ulster County Sav. Inst. v. Fourth Nat. Bank*, 59 How. Pr. 482; but *Cadle v. Tracy*, 11 Blatchf. 101, Fed. Cas. No. 2,279, expressly holds, on the authority of *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204, *supra*, that actions against such banks are necessarily cases arising under the laws of the United States; and the other cases involving the question of concurrent jurisdiction of the state courts over such actions have so treated them.

Mandamus will lie in a state court to compel the officers of a national bank to exhibit to a county assessor a list of names and residences of shareholders with the number of their shares, as required by U. S. Rev. Stat. § 5210. *Paul v. McGraw*, 3 Wash. 296, 28 Pac. 532; *Paul v. Furth*, 3 Wash. 296, 28 Pac. 532, and *Paul v. Chapin*, 3 Wash. 433, 28 Pac. 760.

The state courts have jurisdiction of a suit to compel the directors of a national bank to declare a dividend. *Hiscock v. Lacy*, 9 Misc. 578, 30 N. Y. Supp. 860.

Brinkerhoff v. Dostwick, 88 N. Y. 52, and *Nelson v. Burrows*, 9 Abb. N. C. 280, hold that a state court has jurisdiction of an action by the stockholders of a national bank against its directors to recover damages sustained through the latter's negligence.

Assumpsit will lie in a state court against a national bank. *Dow v. Irasburgh Nat. Bank*, 50 Vt. 112, 28 Am. Rep. 493.

It is true that when these actions were decided the Federal statutes expressly gave, or attempted to give, certain state courts concurrent 48 L. R. A.

jurisdiction with the Federal courts; but such jurisdiction, conformably to *Houston v. Moore*, 5 Wheat. 1, 5 L. ed. 19, appears to have been traced to the inherent powers of the state courts, rather than to the acts of Congress; and there are a number of cases that uphold the jurisdiction of the state courts over actions by or against national banks, even upon the assumption that provisions of the Federal statutes purporting to confer concurrent jurisdiction do not apply.

Thus, *First Nat. Bank v. Hubbard*, 49 Vt. 3, 24 Am. Rep. 97, expressly recognizes the doctrine that civil cases arising under the Constitution and laws of the United States may be tried and determined in the state courts, unless exclusive jurisdiction of them has been vested in the Federal courts, and holds that the state courts would have jurisdiction of suits brought by national banks, even if § 57 of the act of 1864, purporting to confer concurrent jurisdiction on them, only applied to actions against, and not to actions by, national banks.

So, also, *Casey v. Adams*, 102 U. S. 66, 26 L. ed. 52, after holding that the provisions of the Federal statutes purporting to confer concurrent jurisdiction upon certain state courts did not apply to local actions, upheld the jurisdiction of a state court, not within those provisions, over such an action.

And *Fresno Nat. Bank v. San Joaquin County Super. Ct.* 83 Cal. 491, 24 Pac. 157; *Adams v. Daunis*, 20 La. Ann. 315; *Cooke v. State Nat. Bank*, 52 N. Y. 96; *Robinson v. National Bank*, 81 N. Y. 385, 37 Am. Rep. 508; and *Holmes v. National Bank*, 18 N. C. 31, 44 Am. Rep. 538,—upheld the jurisdiction of state courts not within those provisions of the Federal statutes, after holding that the provisions were merely permissive, and not exclusive.

First Nat. Bank v. Morgan, 132 U. S. 141, 33 L. ed. 282, 10 Sup. Ct. Rep. 37, upheld the jurisdiction of a state court not within such provisions, upon the ground that they merely created a personal privilege that could be waived.

It will be observed that each one of these various constructions of the provisions of the Federal statutes with reference to concurrent jurisdiction left the concurrent jurisdiction of the state court without the express sanction of Congress, so that in those cases also the jurisdiction must have been traced to the inherent powers of the state courts.

Crocker v. Marine Nat. Bank, 101 Mass. 241, 3 Am. Rep. 336, while holding that § 57 of the act of 1864 prevents a national bank from being sued in a state court out of the city and county

tered in the district court of the United States of the proper district, or in the circuit court on appeal.

Norwich Co. v. Wright, 13 Wall. 104, 20 L. ed. 585; *The Benefactor v. Mount*, 103 U. S. 239, sub nom. *New York & W. S. S. Co. v. Mount*, 26 L. ed. 351; *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.* 109 U. S. 578, 27 L. ed. 1038, 3 Sup. Ct. Rep. 379, 617; *Re Morrison*, 147 U. S. 14, sub nom. *Morrison v. United States Dist. Ct.* 37 L. ed. 60, 13 Sup. Ct. Rep. 246; *Quinlan v. Pew*, 5 U. S. App. 382, 56 Fed. Rep. 111, 5 C. C. A. 438; *The Tolchester*, 42 Fed. Rep. 180; *The Mary Lord*, 31 Fed. Rep. 416; *Elwell v. Geibel*, 33 Fed. Rep. 71; *Benedict, Admiralty*, 3d ed. p. 320, ¶ 561.

Mitchell, J., delivered the opinion of the court:

The substantial question in this case is the

in which it is located, recognizes the general doctrine that civil cases arising under the Constitution and laws of the United States may be tried and determined in the state courts, unless the national Constitution and laws have vested jurisdiction of them in the Federal tribunals.

Actions by or against assignee in bankruptcy.

The question has also been frequently raised in actions brought by, or against, assignees in bankruptcy in the state courts.

Ward v. Jenkins, 10 Met. 591, upheld the jurisdiction of the state court over an action by such an assignee under the Federal bankrupt law of 1841, upon a contract made by the defendants with the bankrupt. The court held, in effect, that the jurisdiction of the state court in cases arising under the provisions of a Federal statute rested, not upon the ground of the judicial authority conferred as such by a law of the United States, but upon the ordinary powers of the state court acting. Indeed, in the particular case upon legal rights which had been created or materially affected by the legislation of Congress.

The court further points out that under the Federal Constitution the laws of Congress are the supreme laws of the state,—as much so as statutes enacted by her own legislature.

Stevens v. Mechanics' Sav. Bank, 101 Mass. 109, 3 Am. Rep. 325; *Hastings v. Fowler*, 2 Ind. 216; *Cogdell v. Exum*, 69 N. C. 464, 12 Am. Rep. 637; *Barnard v. Davis*, 54 Ala. 565; *Hoover v. Robinson*, 3 Neb. 437; *Peck v. Jenness*, 10 N. H. 516, 43 Am. Dec. 573; *Harrod v. Burgess*, 5 Rob. (La.) 449; *Russell v. Owen*, 61 Mo. 185, and *Johnson v. Bishop*, Woolw. 324, Fed. Cas. No. 7,373,—are to the same effect.

Voorhies v. Frisbie, 25 Mich. 476, 12 Am. Rep. 291, as before shown, denied the jurisdiction of a state court over an action by an assignee in bankruptcy, under § 35 of the bankruptcy act of 1867, to set aside a transfer by the bankrupt as a preference in violation of the act. This decision rests, in part at least, upon the ground that the jurisdiction of the Federal courts was necessarily exclusive, since the right was created by the act. The court attempted to distinguish the case from *Ward v. Jenkins*, 10 Met. 591, upon the ground that in the latter action the right enforced existed at common law.

There is also an intimation in the opinion that the court considered that the right created by § 35 was in the nature of a penalty, and as such beyond the state courts' jurisdiction. 48 L. R. A.

right of the appellants to have their liability for damages to the plaintiff limited to the value of their respective interests in the vessel which is alleged to have caused the injury. The act of Congress of March 3, 1851, § 3 (9 U. S. Stat. at L. 635 [chap. 43], Rev. Stat. 1878, § 4283), provides that "the liability of the owner or owners of any ship or vessel, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively in such ship or vessel, and her freight then pend-

Brigham v. Claflin, 31 Wis. 607, 11 Am. Rep. 623, is to the same effect as *Voorhies v. Frisbie*, 25 Mich. 476, 12 Am. Rep. 291, *supra*, but brings out more prominently the penal character of the action. *Bromley v. Goodrich*, 40 Wis. 181, 22 Am. Rep. 685, reaffirms *Brigham v. Claflin*, and *Sheldon v. Rounds*, 40 Mich. 425, held that the bankruptcy court had exclusive jurisdiction of suits to determine the right of an assignee in bankruptcy to property where the right was disputed under the exemption clause of the bankrupt law of 1867, citing *Voorhies v. Frisbie*, 25 Mich. 476, 12 Am. Rep. 291.

Claflin v. Houseman, 93 U. S. 130, 23 L. ed. 833, however, upheld the concurrent jurisdiction of the state courts over suits under § 35.

Justice Bradley, who wrote the opinion, remarked that if an act of Congress gives a penalty to a party aggrieved without specifying a remedy for its enforcement there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in the state court.

To the same effect as *Claflin v. Houseman*, 93 U. S. 130, 23 L. ed. 833, are: *Eyster v. Gaff*, 91 U. S. 521, 23 L. ed. 403; *Davis v. Friedlander*, 104 U. S. 570, 26 L. ed. 818; *McHenry v. La Société, Française d'Epargne*, 95 U. S. 58, 24 L. ed. 370; *McKenna v. Simpson*, 129 U. S. 506, 32 L. ed. 771, 9 Sup. Ct. Rep. 365; *Re Central Bank*, 6 Nat. Bankr. Reg. 207, Fed. Cas. No. 2,547; *Rison v. Powell*, 28 Ark. 427; *Dambmann v. White*, 48 Cal. 439; *Issett v. Stuart*, 80 Ill. 404, 22 Am. Rep. 194; *Woolbridge v. Rickett*, 33 La. Ann. 234; *Jordan v. Downey*, 40 Md. 401; *Boone v. Hall*, 7 Bush, 66, 3 Am. Rep. 288; *Otis v. Hadley*, 112 Mass. 100; *Lane v. Innes*, 43 Minn. 137, 45 N. W. 4; *McKiernan v. King*, 2 Mont. 72; *Gage v. Dow*, 58 N. H. 420; *Cook v. Whipple*, 55 N. Y. 150, 14 Am. Rep. 202; *Thompson v. Sweet*, 73 N. Y. 622; *Kemmerer v. Tool*, 78 Pa. 147; and *Barton v. Geller*, 3 Lea, 296.

Naturalization proceedings.

As pointed out in a note to *State ex rel. Rushworth v. Judges of Inferior Ct. of Common Pleas (N. J.)* in 30 L. R. A. 763, the courts have not always been in accord as to the true source of the jurisdiction of the state court in naturalization proceedings.

State v. Penney, 10 Ark. 621; *Morgan v. Dudley*, 18 B. Mon. 714, 68 Am. Dec. 735; *Re Ramsden*, 13 How. Pr. 435; and *Ex parte McKenzie*, 51 S. C. 244, 28 S. E. 468,—seem to hold, in conformity to the general doctrine of *Houston v. Moore*, 5 Wheat. 1, 5 L. ed. 19, that the juris-

ing." And the act of June 26, 1884, § 18 (23 U. S. Stat. at L. 57 [chap. 121], 1 Supp. Rev. Stat. ed. 1891, p. 443), makes a substantially similar provision in more condensed phraseology: "That the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole, and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels, and freight pending." By the act of June 19, 1886, § 4 (24 Stat. 79 [chap. 421], 1 Supp. Rev. Stat. ed. 1891, p. 494), the act of 1884 is made to apply to "all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters." In *Butler v. Boston & S. S. Co.* 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612, it was held that this limitation of liability applies to actions for damages for death caused by neg-

ligence. And, on this point, see also *Craig v. Continental Ins. Co.* 141 U. S. 638, 35 L. ed. 886, 12 Sup. Ct. Rep. 97. It was further held in the former case that the limitation of liability was enacted by Congress as part of the maritime law of the United States, and is coextensive in its operation with the whole territorial domain of that law. It applies, therefore, to the case of a disaster happening within the limits of a county of a state, and to a case where the liability itself arises from a law of the state.

These statutory limitations of liability, so construed by the Supreme Court of the United States, would seem to settle the question in this case in favor of appellants. But it is argued for appellee that they cannot prevail against the prohibition in § 21 of article 3 of the Constitution of Pennsylvania against any limitation of the amount to be recovered for injuries resulting in

diction cannot rest alone upon the provisions of the acts of Congress which attempt to confer it, but that the state courts must, independently of such provisions, have power adequate to the performance of the acts required to be done in the process of naturalization.

Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326, however, holds that the doctrine that Congress cannot vest any of the judicial powers of the United States in the courts or judicial officers of the several states applies only to the trial and determination of "cases" in courts of record, and that Congress is still at liberty to authorize the judicial officers of the several states to exercise such power as is ordinarily given to officers not of record, such, for instance, as the power to naturalize aliens, and perform such other duties as may be regarded as incidental to the judicial power, rather than the judicial power itself.

That case, however, did not involve any question as to naturalization, but related to the power of Congress to authorize justices of the peace to issue warrants for deserting seamen.

When jurisdiction of state courts excluded.

There is some difference of opinion as to whether the jurisdiction of the Federal courts is made exclusive, and the state courts ousted of their concurrent jurisdiction, by an act of Congress which without words of exclusion, merely confers jurisdiction upon the Federal courts. It will be observed that in many cases Congress had either expressly granted concurrent jurisdiction to the state court, or had clearly negatived exclusive jurisdiction in the Federal courts, so that this question did not arise.

Hamilton in stating the doctrine says that in every case in which the state courts are not "expressly" excluded by the acts of the national legislature such courts will take cognizance of the causes to which those acts may give birth.

Houston v. Moore, 5 Wheat. 1, 5 L. ed. 19, *supra*, held that the provisions of the Federal militia laws, conferring jurisdiction of the offense in question upon the Federal court martial, did not exclude the concurrent jurisdiction of the state court martial.

As already shown, *Fresno Nat. Bank v. San Joaquin County Super. Ct.* 83 Cal. 491, 24 Pac. 157; *Adams v. Daunis*, 29 La. Ann. 315; *Cooke v. State Nat. Bank*, 52 N. Y. 96; *Robinson v. National Bank*, 81 N. Y. 385, 37 Am. Rep. 508; and *Holmes v. National Bank*, 18 S. C. 31,—hold that the jurisdiction conferred on the Federal and certain state courts by § 5198, U. S.

Rev. Stat., is not exclusive of the jurisdiction of other state courts, while *Crocker v. Marine Nat. Bank*, 101 Mass. 241, 8 Am. Rep. 336, *supra*, and *Cadle v. Tracy*, 11 Blatchf. 101, Fed. Cas. No. 2,279, hold that the jurisdiction so conferred is exclusive.

Pettit v. Noble, 7 Biss. 449, Fed. Cas. No. 11,044, holds that § 629, U. S. Rev. Stat., giving United States courts jurisdiction of all suits by or against any banking association established in the district for which the court is held, under any law providing for banking associations, does not divest the concurrent jurisdiction of the state courts.

Clafin v. Houseman, 93 U. S. 130, 23 L. ed. 833, which approves the general doctrine of *Houston v. Moore*, 5 Wheat. 1, 5 L. ed. 19, intimates a doubt as to the correctness of the decision with reference to the effect of the Federal laws involved in that case on the concurrent jurisdiction.

Ward v. Jenkins, 10 Met. 591, *supra*, held that the various provisions of the Federal bankruptcy act of 1841, conferring jurisdiction upon the United States courts, did not exclude the concurrent jurisdiction of the state courts, and the cases above cited as being to the same effect as that case must have held the same in respect to the act of 1841 or 1867, as the case may have been. The same is true of *Clafin v. Houseman*, 93 U. S. 130, 23 L. ed. 833, and the other cases, above cited, in line with it; and *Wetmore v. McMillan*, 57 Iowa, 344, 10 N. W. 725; *Clark v. Ewing*, 9 Biss. 440, 3 Fed. Rep. 83; *Goodrich v. Willson*, 119 Mass. 429; *Kidder v. Horrobin*, 72 N. Y. 159; *Olcott v. Maclean*, 73 N. Y. 223; *Wente v. Young*, 12 Hun, 220; and *Wheelock v. Lee*, 54 How. Pr. 402,—expressly held that § 4974, U. S. Rev. Stat., providing that legal debts or assets of the bankrupt, if not in excess of \$500, might be recovered in a state court, did not take away the jurisdiction of the state court when the debt exceeded that amount.

Copp v. Louisville & N. R. Co. 43 La. Ann. 511, 12 L. R. A. 725, 9 So. 441, denied the jurisdiction of the state court over an action under the interstate commerce act for the recovery of damages for unlawful discrimination, upon the ground that the statute which created the right provided for a remedy before the interstate commerce commission or the district or circuit court of the United States, and that such remedies were exclusive under the rule that where a particular remedy is provided by law such remedy must be sought to the exclusion of all others.

death, and that, in any view, they cannot be administered by a Pennsylvania court in a common-law action.

As to the first objection, it is clear that neither statute nor Constitution of Pennsylvania can be set up against a right given by Congress in its control of the maritime law of the country. That control is paramount, and, when it has been exercised in a particular way, all state authority must conform to it.

The second objection—that the limitation cannot be administered by a state court in a common-law action—must depend primarily on the language of the acts of Congress, and the nature of the right which they confer.

Battin v. Kear, 2 Phila. 301, and *Dudley v. Mayhew*, 3 N. Y. 9, which were decided before the jurisdiction of the Federal courts over cases arising under the patent right laws was expressly made exclusive, held that § 17 of the act of Congress of July 4, 1836, providing that all cases of that class should be originally cognizable by the circuit courts of the United States, excluded the jurisdiction of the state courts. These decisions rest upon the ground that the rights of the patentee spring wholly from the Federal statutes, and therefore that the remedy provided by the statutes is exclusive.

Missouri River Packet Co. v. Hannibal & St. J. R. Co. 79 Mo. 478, holds that the 1st section of act of Congress of July 26, 1866, "To Authorize the Construction of Certain Bridges," conferring jurisdiction upon the United States district court of any litigation arising from obstruction to navigation by the bridges authorized by the act, does not divest the common-law jurisdiction of the state courts over the matter.

When question arises incidentally.

If, as above shown, the state courts may take concurrent jurisdiction when a cause of action arises out of an act of Congress, *a fortiori*, they may, if they have adequate power and machinery to deal with them, take cognizance of questions incidentally arising under such an act, as in the principal case.

Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97, *supra*, which goes as far as any case to uphold the exclusive jurisdiction of the Federal courts over matters within the judicial power confided to the United States by the Constitution, recognizes the fact that such questions will arise incidentally in the state courts in the exercise of their ordinary jurisdiction, and makes it the basis of an argument for the appellate jurisdiction of the United States Supreme Court over judgments of the state courts. So, also, *Rodney v. Illinois C. R. Co.* 19 Ill. 42, while questioning the right of state tribunals to take direct cognizance of cases arising under Federal statutes, holds they can enforce such law when they come incidentally in question.

It may happen, that the state court does not have the necessary methods or machinery to enforce a right under a Federal statute, even when it arises incidentally. In that event, as shown by the opinions in the principal case, and in *Chisholm v. Northern Transp. Co.* 61 Barb. 363, the state court should dismiss the action.

The power of Congress to exclude from evidence in the state courts instruments not bearing required revenue stamps is discussed in a note to *Knox v. Rossi*, — L. R. A. —.

Miscellaneous.

This note is not intended to cover the question 48 L. R. A.

If such right is contingent on something to be done by the vessel owner or others, then we must look into the pleadings or the evidence of the acts of the parties. But if, on the other hand, the right is absolute, then, clearly, it cannot be defeated by the plaintiff's choice of the tribunal; and if the state court is unable, through defect of its jurisdiction over parties or subject-matter, or through its methods of procedure, to protect the right, then the court must dismiss the case for want of appropriate powers to determine it in accordance with the paramount law on the subject.

This brings us to the consideration of the acts of Congress. The limitation of liability

tion as to what cases fall within the categories of cases of which Congress has declared the jurisdiction of the Federal courts shall be exclusive. Many of the cases which turn upon that question assume that the state courts have concurrent jurisdiction, unless the case falls within one of such categories.

There are many cases, for instance, which uphold the jurisdiction of the state courts in actions in which a defense going to the validity of a patent has been interposed, after holding that such defense does not bring the action within U. S. Rev. Stat. § 711, declaring that the Federal court shall have exclusive jurisdiction of all cases arising under the patent right laws. The following are cases of that kind: *Pratt v. Paris Gaslight & Coke Co.* 168 U. S. 255, 42 L. ed. 458, 18 Sup. Ct. Rep. 62; *Dunbar v. Marden*, 13 N. H. 811; *Rich v. Atwater*, 16 Conn. 409; *Sherman v. Champlain Transp. Co.* 31 Vt. 162; *Clough v. Patrick*, 37 Vt. 421; *Burrall v. Jewett*, 2 Paige, 134; *Middlebrook v. Broadbent*, 47 N. Y. 443, 7 Am. Rep. 457; *Continental Store Service Co. v. Clark*, 100 N. Y. 365, 3 N. E. 335; *Head v. Stevens*, 19 Wend. 411; *Harmon v. Bird*, 22 Wend. 113; *Cross v. Huntly*, 13 Wend. 385; *Saxton v. Dodge*, 57 Barb. 84; *Geiger v. Cook*, 3 Watts & S. 266; *Stemmer's Appeal*, 58 Pa. 155, 98 Am. Dec. 248; *McClure v. Jeffrey*, 8 Ind. 79; *Nye v. Raymond*, 16 Ill. 153; *Page v. Dickerson*, 28 Wis. 604, 9 Am. Rep. 532; *Rice v. Garnhart*, 34 Wis. 453, 17 Am. Rep. 448; *Billings v. Ames*, 32 Mo. 265.

III. Criminal and penal laws.

Criminal laws.

Notwithstanding that the judiciary act passed by the first Congress after the adoption of the Constitution expressly gave the Federal courts exclusive jurisdiction of all crimes and offenses cognizable under the authority of the United States, and that since that time there has been a general statutory reservation of exclusive jurisdiction to the Federal courts in such cases, the question as to the concurrent jurisdiction of the state courts has arisen in a number of cases, because Congress, by purporting to confer concurrent jurisdiction upon the state courts over certain crimes or offenses, has as to them withdrawn the restriction previously imposed.

It would seem that the question of the concurrent jurisdiction of the state courts over this class of cases must be determined by the same criterion that governs in civil cases—namely, the inherent power of the state courts, unaided by the acts of Congress except so far as they may remove restrictions previously imposed upon such jurisdiction by Congress. The answer, however, is likely to be different in view of the general rule that the courts of one sov-

under both the acts of 1851 and 1894 is general and absolute. By the former the liability "shall in no case exceed," and by the latter "shall be limited to" the value of the individual owner's interest in the vessel. The former provision is contained in § 3 of the act of 1851, and by § 4 it is provided that whenever the loss is by several owners of goods, etc., and the whole value of the vessel and freight is not sufficient, they shall receive compensation in proportion to their respective losses, and the owner of the vessel may take appropriate proceedings in any court for the purpose of apportioning the sum for which he is liable among the parties entitled thereto. It then continues that it

shall be sufficient compliance by the owner with the requirements of the act if he shall transfer his interest in the vessel and freight to a trustee for the parties entitled, to be appointed by any court of competent jurisdiction, and thereupon all claims and proceedings against the owner shall cease. There is nothing in this section which in any way changes the positive character of the limitation. The provisions are manifestly in furtherance, not in restriction, of the vessel owner's right, and are directory only, in the sense that they point out a method by which his right may be enforced, but are not exclusive of other methods which may be found effective for the same purpose. And such

eighty will not execute the criminal or penal laws of another, whereas there is no such rule in respect to purely civil actions.

Justice Story, in *Martin v. Hunter, 1 Wheat. 337, 4 L. ed. 105*, says that no part of the criminal jurisdiction of the United States can, consistently with the Constitution, be delegated to state tribunals.

If by this he means, cannot be delegated by Congress, he is in accord with the later decisions, but most of the latter have determined the question of the state court's jurisdiction by reference to the criterion mentioned.

Houston v. Moore, 5 Wheat. 1, 5 L. ed. 19, is not authority for the position that Congress may effectively confer concurrent jurisdiction upon state courts over offenses against the Federal laws. It merely held that the Federal militia laws which covered the offense in question in that case did not confer exclusive jurisdiction upon the Federal courts, as was done by the judiciary act with reference to other offenses. This fact, under the doctrine established by the case with reference to concurrent jurisdiction, left the way open for the state court to take jurisdiction if it could find authority to do so independently of any act of Congress, and in that particular case authority was found in a state statute.

The existence of such statute differentiates the case from most of the other criminal cases involving the question of concurrent jurisdiction, since in such cases it was necessary to determine the inherent jurisdiction of the state courts by reference to the general principles of law.

State v. Wells, 2 Hill, L. 687, held that the state court had jurisdiction of a prosecution for opening a letter contrary to the act of Congress regulating the postoffice department.

The court quotes the provision of the Constitution making the laws of Congress the supreme law of the land, and says that an offense against the laws of the United States is an offense against the laws of the state, and the state has a right to punish it upon the principle of the common law that she has the right to punish all violations of her law. This decision was, however, expressly overruled by *State v. McBride, Rice, L. 400*, holding that the state court had no jurisdiction of an offense of stealing a letter from the mail in violation of the act of Congress, and is opposed to the current of authority.

Com. v. Feely, 1 Va. Cas. 321, denies the jurisdiction of the state court over a defendant indicted for stealing mail.

In these cases the judiciary act opposed no obstacle to concurrent jurisdiction, since the statute creating the offenses purported to confer such jurisdiction.

Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326, as before stated, 48 L. R. A.

holds that the judicial power which Congress cannot vest in the state courts does not include the power to take affidavits, or to arrest and commit for trial offenders against the United States, and accordingly holds that § 4508 of the Revised Statutes is not unconstitutional because it authorizes Justices of the peace to issue warrants to apprehend deserting seamen, and to deliver them up to the master of their vessel.

A similar decision, based on the same principle, had been previously made in *Es parte Gist, 26 Ala. 150*.

Cases in which the defendants are proceeded against under the Federal statutes are to be distinguished from those like *Fox v. Ohio, 5 How. 410, 12 L. ed. 213*; *State v. Pike, 15 N. H. 83*; *Moore v. Illinois, 14 How. 18, 14 L. ed. 306*; *Com. v. Fuller, 8 Met. 313, 41 Am. Dec. 509*; and *Jett v. Com. 18 Gratt. 930*,—in which there was a state statute covering the same offense as the Federal statute.

Penal laws.

Haney v. Sharp, 1 Dana, 442, denied the jurisdiction of the state court over an action for a penalty under the act of Congress relating to the census. The court says that no state tribunal has inherent jurisdiction over, nor can it take jurisdiction of, a penal case arising under an act of Congress, unless some law of the commonwealth has given it the right to do so, and the general government has by an act of Congress also consented. In this case neither of such requisites existed.

United States v. Lathrop, 17 Johns. 4, denied the jurisdiction of the state court over an action of debt by the United States to recover a penalty for selling spirituous liquor in violation of an act of Congress of August 2, 1813, which expressly provides that suit may be prosecuted before any court of the state having jurisdiction in like cases. The court says that a pecuniary penalty for violation of an act of Congress is as much a punishment for an offense against the laws as if a corporal punishment had been inflicted, and that as regards crimes and offenses the government of the United States stands in the same relation to the state government as any foreign government.

Justice Bradley, in *Ciaffin v. Houseman, 93 U. S. 130, 23 L. ed. 833, supra*, says that if an act of Congress gives a penalty to a party aggrieved without specifying a remedy for its enforcement there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in state. He refers to *United States v. Lathrop, 17 Johns. 4*, and remarks that the state courts have in certain instances declined to exercise the jurisdiction conferred upon them, but that that fact does not militate against the existence of such jurisdiction. He also criticises

we understand to be the construction settled by the Supreme Court of the United States.

In the case of *The Scotland*, 105 U. S. 24, *sub nom.* *National Steam Nav. Co. v. Dyer*, 26 L. ed. 1001, it was said by Bradley, J.: "The primary enactment in § 4283, Rev. Stat., is that the liability of the owner for any loss or damage . . . shall in no case exceed the amount or value of his interest in the vessel and her freight then pending. Two modes for carrying out this law are then prescribed,—one in § 4284, and the oth-

er in § 4285." These sections are the revision and re-enactment of § 4 of the act of 1851 just discussed. The same opinion then proceeds to show that these modes are in aid, and not in restriction, of the owner's right to limit his liability, and are not therefore exclusive, but the defense may be made in any form that the nature of the case and the procedure of the court will permit. And to the same effect are *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.* 109 U. S. 578, 594, 27 L. ed. 1038, 1044, 3 Sup. Ct. Rep. 379, 617,

the tendency to regard the laws of the United States as emanating from a foreign power, saying that it is founded on an erroneous view of the nature and relation of the state and Federal governments. It is to be observed, however, that *Ciaffin v. Houseman*, if regarded as an action for a penalty, was for the benefit of an assignee in bankruptcy, and not for the benefit of the government. Moreover, Justice Gray, in *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224, says, *arguendo*, the courts of the state cannot be compelled to take jurisdiction of a suit to recover a penalty for a violation of a law of the United States, and that the only ground ever suggested for maintaining such suits in a state court is that the laws of the United States are in effect the laws of each state. After remarking that the statement of Justice Bradley in *Ciaffin v. Houseman*, 93 U. S. 130, 23 L. ed. 833, on this point was *obiter*, he says that Justice Bradley, the year before, when sitting in circuit (*Ex parte Bridges*), said it would be manifest incongruity for one sovereign to punish a person for an offense against the laws of another.

Jackson v. Rose, 2 Va. Cas. 34; *Davison v. Champlin*, 7 Conn. 244; and *Ely v. Peck*, 7 Conn. 230,—are to the same effect as *United States v. Lathrop*, 17 Johns. 4, *supra*.

On the other hand, *United States v. Smith*, 4 N. J. L. 33; *Buckwalter v. United States*, 11 Serg. & R. 193; *Hartley v. United States*, 3 Hayw. (Tenn.) 45; and *Stearns v. United States*, 2 Paine, 300, Fed. Cas. No. 13,341,—uphold the jurisdiction of state courts over suits by the United States to recover penalties under acts of Congress which purport to confer jurisdiction upon the state courts. These decisions rest on the ground that the laws of Congress are the supreme laws of the land, and the last-mentioned case alludes to the fact, that the proceeding was not a criminal prosecution, but a civil action to recover a penalty for breach of the statute.

That case also disapproved of *United States v. Lathrop*, 17 Johns. 4, and dissented from the view that the Federal and state governments are to be considered as entirely foreign to each other, and that the case falls under the rule that the courts of one sovereignty will not take cognizance of, and enforce, the Penal Code of another.

In addition to the distinction suggested in *Stearns v. United States*, 2 Paine, 300, Fed. Cas. No. 13,341, with reference to the form of proceeding for the enforcement of a penalty, there seems to be a further distinction, depending upon the question whether the injury is solely to public, or directly affects private rights. Actions against national banks to recover the penalty for exacting usury are of the latter kind, and it has been generally held that state courts have jurisdiction of them, the exclusive jurisdiction of the Federal courts having been negatived by the provisions of the acts of Congress purporting to confer concurrent jurisdiction upon the state courts.

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To that effect are *Kinser v. Farmers' Nat. Bank*, 58 Iowa, 728, 13 N. W. 59; *Henderson Nat. Bank v. Alves*, 91 Ky. 142, 15 N. W. 132; *National Bank v. Johnson*, 11 Ky. L. Rep. 904; *Bank v. Snyder (Pa.)* 2 Leg. Rec. Rep. 356; *Ordway v. Central Nat. Bank*, 47 Md. 217, 28 Am. Rep. 455; *First Nat. Bank v. Overman*, 22 Neb. 110, 34 N. W. 107; *Morgan v. First Nat. Bank*, 93 N. C. 352; *Schuyler Nat. Bank v. Bollong*, 37 Neb. 620, 56 N. W. 209; *Hade v. McVay*, 31 Ohio St. 231; *Lebanon Nat. Bank v. Karmany*, 98 Pa. 65; *First Nat. Bank v. Gruber*, 91 Pa. 377; *Bletz v. Columbia Nat. Bank*, 87 Pa. 87, 30 Am. Rep. 343; *Lynch v. Merchants' Nat. Bank*, 22 W. Va. 554, 46 Am. Rep. 520.

The opinion in *Bletz v. Columbia Nat. Bank*, 87 Pa. 87, 30 Am. Rep. 343, cites, and relies on, *Ciaffin v. Houseman*, 93 U. S. 130, 23 L. ed. 833, and says that whatever doubts have been expressed by some state courts as to penalties to be sued for by the United States, or someone in its behalf, in order to vindicate the Federal law, they do not extend to a case involving a private right sued for by the citizen for himself.

The jurisdiction of the state courts, even over such actions, has been denied in *Missouri River Teleg. Co. v. First Nat. Bank*, 74 Ill. 217, which says that the state court cannot enforce the criminal or penal laws of another sovereignty. In answer to the argument based on the fact that the state courts entertain jurisdiction in cases where national banks are parties either plaintiff or defendant, the court said that the jurisdiction in such cases resulted from the power conferred by the state Constitution and laws, and not from the acts of Congress.

Newell v. National Bank, 12 Bush, 57, was an action by a national bank on a note. The defendant pleaded usury, and sought to set off the forfeiture declared by the acts of Congress in such cases. The court held that the penalties arising under the laws of the United States could not be enforced in state courts.

National Bank v. Eyre, 52 Iowa, 114, 2 N. W. 995; *Peoples v. First Nat. Bank*, 15 Ky. L. Rep. 748; and *First Nat. Bank v. Childs*, 130 Mass. 519, 39 Am. Rep. 474,—on the contrary, hold that such forfeiture is available as a defense in a state court. It will be observed that § 5198, U. S. Rev. Stat., which prescribes the penalty for usury, provides for its recovery in an action of debt; so that actions for this penalty are civil in form, and the benefit accrues to the individual.

Whatever may be the rule when the action is for the vindication of a private right, or when the proceeding is not criminal, it is undoubtedly true, in the absence of state legislation, that the state courts cannot find in their own inherent powers, and cannot acquire through acts of Congress, the requisite authority to enable them to entertain a proceeding, criminal in its nature and designed for the vindication of a purely public right, to enforce a criminal or penal statute of the Federal government.

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and *Craig v. Continental Ins. Co.* 141 U. S. 638, 35 L. ed. 886, 12 Sup. Ct. Rep. 97. The very point of the admissibility of this defense in an action in a state court was decided in the case of *The Rosa*, 53 Fed. Rep. 132, where a petition by the vessel owner for establishment of limited liability, and for prohibition of further proceedings by a plaintiff in a state court, was dismissed by the district court of the United States on the ground that the defense could be adequately made in the state court. It is true that this conclusion has been dissented from in *Quinlan v. Peir*, 5 U. S. App. 382, 56 Fed. Rep. 111, 121, 5 C. C. A. 438, but apparently on the ground that the vessel owner's privilege, not only to have the value of the vessel appraised and his liability limited to that, but also to have all parties compelled to come into the admiralty court with their claims, was absolute under the statute, and could not be refused, in view of the want of power of the state court to enforce the latter branch of the remedy. But even this case does not sustain the contention that the vessel owner may not make his defense in the state court if he so chooses. We are of

opinion that appellant's right to make this defense is clear, and we see no difficulty in enforcing it in this action. They should have been permitted to show the value of the tug, and their respective proportions of ownership in it. The most convenient practice then would be, after appropriate instructions to the jury, to direct them, if they found for the plaintiff, to find specially, in addition, the value of the tug, and the proportionate ownership of the several defendants. With these facts specifically found, the verdict could be molded by the court into proper form with less danger of mistake than if the whole were left in a lump to the jury.

The questions of defendant's negligence, and Loughin's own contributory negligence, could not, under the evidence, have been taken from the jury.

A number of questions are raised by the assignments of error in regard to irregularities in the swearing of the jury, and in the verdict and judgment; but, as all of these will be easily avoided at the next trial, it is not necessary to discuss them.

Judgment reversed, and venire de novo awarded.

INDIANA SUPREME COURT.

UNION TRUST COMPANY of St. Louis
et al.

v.

RICHMOND CITY RAILWAY COMPANY
et al.

ROYAL BRICK COMPANY *et al.*, Interveners, *Appts.*

(.....Ind.....)

1. One not a party, but having an interest in the subject-matter of a pending action, that may be adversely affected by the suit, will be permitted by the court, upon a proper showing, under Burns's Rev. Stat. 1894, § 273, to come into the case for the protection of whatever right or interest he may have in the subject-matter.
2. A provision in an ordinance authorizing a street railway to be laid, that the space between the tracks shall be paved in the manner specified "when and as the street may be" thus paved, must be understood to mean that the paving between the tracks shall be at the expense of the company.
3. The construction which the parties themselves place upon a contract will be adopted by the court, when its terms are uncertain.
4. A mortgagee of a street-railway

NOTE.—As to superiority of lien of local assessment over prior lien, see also *Seattle v. Hill* (Wash.) 35 L. R. A. 372, and *note*; and *Dressman v. Farmers' & T. Nat. Bank* (Ky.) 36 L. R. A. 121.

As to liability of street railway to paving assessment, see *Shreveport v. Prescott* (La.) 46 L. R. A. 103, and *note*.

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company, though not bound by a compromise contract between the mortgagor and the city, with respect to liens on the property for paving, cannot accept the benefit of such contract for the relief of the property from a lien existing under the company's charter ordinance without being subjected to the burden of a lien which the contract provided for.

5. A street railway is within the reason of the rule of a court of equity which subjects proceeds of mortgaged railway property in the hands of a receiver to the payment of current debts made in the ordinary course of business, if there has been any diversion of the current receipts to increase the value of the security.
6. A preference of a claim for paving the track of a street railway out of the proceeds of the property on foreclosure cannot be allowed on account of the purchase by the company of cars and other equipment after the paving was begun, materially increasing the value of the mortgaged property, unless such equipment was paid for out of the current earnings of the company.
7. A lien upon a street railway for a paving assessment to which the company is subject under its charter is superior to the lien of a mortgage upon the property.
8. A judgment on demurrer to an intervening petition, which makes a final disposition of the case so far as concerns the petitioners, may be appealed from.

(December 12, 1899.)

A PPEAL by interveners from a judgment of the Circuit Court for Wayne County dismissing a petition by creditors for intervention in a proceeding to foreclose a mortgage on defendant's property, in which

interveners sought to obtain payment for material furnished for improvements which defendant was required to make. *Reversed.*

The facts are stated in the opinion.

Messrs. H. C. Fox, William L. Taylor, and A. C. Lindemuth for appellants.

Messrs. Seddon & Blair and John L. Rupe, for appellees:

The appellants' petitions give them no standing in court. They are not intervening petitions as recognized by the statutes, nor are they cross-complaints.

One who attempts to intervene in an action pending between other parties, without bringing himself within the provisions of the statute, is a mere interloper.

Des Moines Ins. Co. v. Lent, 75 Iowa, 522, 39 N. W. 826.

Treating the intervening petitions as cross-complaints, they must be tested by the rule of pleadings applicable to such complaints.

A pleading cannot serve the double purpose of an answer and a cross-complaint. It must be the one thing or the other.

Thompson v. Toohey, 71 Ind. 296; *Washburn v. Roberts*, 72 Ind. 213; *Conger v. Miller*, 104 Ind. 592, 4 N. E. 300.

Even as against the Richmond City Railway Company there can be no lien on the property of the company, unless the compromise ordinance is shown to be binding upon the company; for no lien can arise under the franchise ordinance alone.

The mere passage of the compromise ordinance did not make a contract.

Admitting that the compromise ordinance did become a valid and binding contract between the city and the company, a lien could be fixed by the city on the property of the company, only in exactly the same way that it could be fixed on the property of the abutting owners.

Before any assessment could have become a lien upon any property, or before anyone could have been affected by the proceedings, notice must have been given.

McEnaney v. Sullivan, 125 Ind. 407, 25 N. E. 540.

The general allegation that such proceedings were taken as required by law, even if the statement was not explained by setting out in the petition exactly what was done, is a mere allegation of law, and not a statement of any fact.

Oldfield v. New York & H. R. Co. 14 N. Y. 310.

If the city and the company ever intended to construe the franchise ordinance at all, or to give it any such construction, it was not in their power to give to it, after the mortgage was executed, any construction prejudicial to the rights of the bondholders, or in any manner to affect the rights of the bondholders without their consent.

Jones, Corporate Bonds, § 416.

A pleading stating a cause of action must proceed upon a single definite theory; it will be construed, and its theory determined, from its general scope and allegations; and the pleader will be held and conclusively 48 L. R. A.

bound by the theory upon which he proceeds in all stages of the cause.

Platter v. Seymour, 86 Ind. 323; *Citizens' Street R. Co. v. Willoby*, 134 Ind. 563, 33 N. E. 627; *Chicago, St. L. & P. R. Co. v. Bills*, 104 Ind. 13, 3 N. E. 611; *Toledo, St. L. & K. C. R. Co. v. Levy*, 127 Ind. 168, 26 N. E. 773; *Jackson v. Landers*, 134 Ind. 529, 34 N. E. 323.

The doctrine that a mortgage can be defeated by, or made inferior to, subsequent obligations incurred by the mortgagor, has never received judicial sanction except in a peculiar and limited class of cases.

Turner v. Indianapolis, B. & W. R. Co. 8 Biss. 315, Fed. Cas. No. 14,258; *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Miltenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117, 1 Sup. Ct. Rep. 140; *Wood v. Guarantee Trust & S. D. Co.* 128 U. S. 416, 32 L. ed. 472, 9 Sup. Ct. Rep. 131.

There is a "broad distinction" between property to which the doctrine has been applied and the property which is the subject of this action.

A railroad is for the use of the universal public in the transportation of all persons, baggage, and other freight; a street railway is dedicated to the more limited use of the local public, for the more transient transportation of persons only, and within the limits of the city.

Louisville & P. R. Co. v. Louisville City R. Co. 2 Duv. 178.

A street railroad or "tramway," as it is sometimes called, whether propelled by mule or electric power, is a matter of purely local concern.

In no sense are these enterprises any more public institutions than are waterworks companies, gas companies, electric-light companies, or telephone exchanges.

The rule in *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339, is not to be applied in case of a waterworks company, and the principles upon which the rule rests make it inapplicable in case of a street-railway company, or other merely local enterprise of that class.

Wood v. Guarantee Trust & S. D. Co. 128 U. S. 416, 32 L. ed. 472, 9 Sup. Ct. Rep. 131; *Jones, Corporate Bonds*, § 606; *Litzenberger v. Jarvis-Conklin Trust Co.* 8 Utah, 15, 23 Pac. 871.

There was no diversion of the current earnings, either to the payment of interest or the permanent improvement of the property. In fact but little interest was ever paid on the bonds.

One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot.

Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co. 137 U. S. 171, 34 L. ed. 625, 11 Sup. Ct. Rep. 61; *Thomas v. Western Car Co.* 149 U. S. 95, 37 L. ed. 663, 13 Sup. Ct. Rep. 824; *Addison v. Lewis*, 75 Va. 701; *Fi-*

delity Ins. Trust & S. D. Co. v. Shenandoah Valley R. Co. 86 Va. 1, 9 S. C. 759; *Metropolitan Trust Co. v. Tonawanda Valley & C. R. Co.* 103 N. Y. 245, 8 N. E. 488; Jones, *Corporate Bonds*, §§ 589, 613; 20 Am. & Eng. Enc. Law, pp. 426, 437.

On petition for rehearing.

No theory adopted by counsel in argument upon appeal can affect a party's right to the judgment of the court upon the pleading as it appears in the record, as to its theory and legal effect.

Western U. Teleg. Co. v. Reed, 96 Ind. 198; *Citizens' Street R. Co. v. Willoby*, 134 Ind. 563, 33 N. E. 627; *New Pittsburgh Coal & Coke Co. v. Peterson*, 136 Ind. 398, 35 N. E. 7; *Balue v. Taylor*, 136 Ind. 368, 36 N. E. 269; *Eransville & R. R. Co. v. Barnes*, 137 Ind. 306, 36 N. E. 1092; *Copeland v. Summers*, 138 Ind. 219, 35 N. E. 514, 37 N. E. 971; *Terre Haute & I. R. Co. v. McCorkle*, 140 Ind. 613, 40 N. E. 62; *Carmel Natural Gas & Improv. Co. v. Small*, 150 Ind. 427, 47 N. E. 11, 50 N. E. 470; *Chicago, St. L. & P. R. Co. v. Bills*, 104 Ind. 13, 3 N. E. 611; *Racer v. State*, 131 Ind. 393, 31 N. E. 81; *Western U. Teleg. Co. v. Young*, 93 Ind. 118; *Etna Powder Co. v. Hildebrand*, 137 Ind. 462, 37 N. E. 136.

A complaint cannot be made elastic so as to take form with the varying views of counsel.

Mesall v. Tully, 91 Ind. 99.

The facts presented do not entitle the appellants to relief by way of priority of payment, as against the mortgagee.

Provisional Municipality v. Northrup, 30 U. S. App. 702, 66 Fed. Rep. 689, 14 C. C. A. 59; *Chicago v. Sheldon*, 9 Wall. 50, 19 L. ed. 594; *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 296, 33 L. ed. 905, 10 Sup. Ct. Rep. 546; *Houston City Street R. Co. v. Storrie* (Tex. Civ. App.) 44 S. W. 695.

The assessment is claimed for a repaving and reconstruction of the street.

A charter obligation to pave the street and maintain or keep it in repair creates no obligation to repave or reconstruct.

Western Paving & Supply Co. v. Citizens' Street R. Co. 128 Ind. 525, 10 L. R. A. 770, 26 N. E. 189, 28 N. E. 88; *Chicago v. Sheldon*, 9 Wall. 50, 19 L. ed. 594; *State ex rel. Kansas v. Corrigan Consol. Street R. Co.* 85 Mo. 263, 55 Am. Rep. 361; *Farrar v. St. Louis*, 80 Mo. 379; *Farmers' Loan & T. Co. v. Ansonia*, 61 Conn. 76, 23 Atl. 705; Elliott, *Roads & Streets*, p. 594; *District of Columbia v. Washington & G. R. Co.* 1 Mackey, 351; *Norristown v. Norristown Pass. R. Co.* 148 Pa. 87, 23 Atl. 1060.

Hadley, Ch. J., delivered the opinion of the court:

The Richmond City Railway Company had operated a railroad over the streets of the city of Richmond for many years with animal power, and in March, 1889, the city council passed an ordinance granting the company a new franchise for the period of fifty years, and authorizing the company to operate its street railroads by means of

cable, electric, or animal power, "or either or any of them," upon the conditions recited in the ordinance. The company accepted said ordinance as amended April 22, 1889, reorganized thereunder, and in January, 1890, to secure its 200 \$1,000 bonds, executed to the now appellees its mortgage or all its property and "all rents, profits, tolls, issues, and income derived or arising therefrom." In 1892 it was deemed necessary and expedient by the common council of the city to pave with vitrified brick three squares of Main street, and, having adopted a declaratory resolution and ordinance therefor, gave notice to the Richmond City Railway Company to pave between its tracks on said squares "when and as the street was improved." The company failing to comply with the notice, the city paved between the tracks when and as the street was paved, and upon completion of the work charged against the company the actual cost thereof, namely \$3,011.30, and demanded payment. The company failed and refused to pay the demand. Thereafter, in April, 1893, the city, desiring to pave with brick twelve additional squares of Main street, entered into what is termed a "compromise settlement" with the street-car company of all disputes and liabilities of the company to pave between its tracks, and in the settlement agreement it was specifically stipulated, as declared by ordinance and acceptance thereof in writing, that the city should remit its claim of \$3,011.30 for the pavement already constructed, and that the company should thereafter pay for all such improvements between its tracks, if the cost thereof should be assessed against its property under the provisions of the Barrett law: the same to become a lien, and be enforced in the same manner as such assessments are enforced against abutting property owners. After the agreement, in the summer of the same year, twelve squares of Main street were, by process of law, paved with brick. The work was performed and materials furnished by the Standard Paving Company under a contract it had with the city for that purpose. The actual and reasonable cost of paving between the company's tracks, for the twelve additional squares, was \$13,177.90, which was assessed against its right of way and property for payment in twenty successive semiannual payments, in pursuance of the compromise agreement. It was stipulated in the contract between the city and the Standard Paving Company that the city should be liable, on account of said improvement, only for the cost of so much of the same as bordered on public grounds and for the crossings of streets and alleys, as provided by the ordinance and laws of this state. The railway company refused to pay any part of the sum so assessed against it for pavement between its tracks. The Standard Paving Company purchased the brick used in the improvement of said twelve additional squares from the Royal Brick Company and the Canton Brick Company, appellants herein, and as part payment there-

for the Standard Company duly assigned in writing to said appellants all its interest in the claim against the street-railroad company for paving between its tracks for the said twelve squares. Whatever rights and equities the Standard Paving Company acquired against the railroad company or its property by reason of said improvements were held by the Royal and Canton Brick Companies at the time of filing their petition of intervention. The company having made default in the payment of its obligations secured by its said mortgage, the mortgagees—being the appellees in this case—brought their action in the Wayne circuit court for the foreclosure of their mortgage and the appointment of a receiver, to which action the Richmond City Railway Company, the city of Richmond, and the Standard Paving Company, among many others, were made parties defendant. It was alleged in the complaint that the Standard Paving Company was claiming to hold a lien against the mortgaged property paramount to the mortgage lien of the plaintiffs, which was unfounded; and the paving company was made defendant, and required to assert its lien, if it had any. The default in payment of the street-car company was alleged. The company voluntarily appeared, and filed answer; and a receiver was appointed, qualified, and took full possession of the mortgaged property upon the same day the complaint was filed. Pending the formation of issues between the various parties, the appellant Royal and Canton Brick Companies, without objection from appellees, obtained leave of court to file their intervening petition and become parties to the action of foreclosure. The petition set forth with much detail the facts stated above, and particularly the franchise ordinance, the acceptance and reorganization thereunder, the adoption of electricity as a motive power, the paving of Main street with brick, notice to the railway company to pave between its tracks when and as the street was improved, its failure and refusal to do so, the doing of the work by the city, the assessment of the actual and reasonable cost thereof to the railway company, its refusal and failure to pay the same, the compromise agreement between the city and company, the performance of the conditions by the city and the nonperformance by the company; that the Standard Paving Company, as contractor with the city, did the work and furnished the materials in the paving of the twelve squares of Main street; that the Standard Company purchased of these interveners all the brick used in paving said twelve squares, and in part payment therefor duly assigned to them in writing—which assignment is filed therewith—all rights and equities held by it against the street-car company; that the actual and reasonable cost of paving between the tracks of the railway for the distance of the twelve squares was \$13,177.90, which is due and unpaid; that under its contract with the Standard Paving Company the city is not liable for any part of said sum of \$13,177.90; that, after the execution of the plaintiff's mortgage, the railway company purchased and added to the mortgaged property in machinery, equipments, and track extensions, property and improvements of the value of \$65,000. Prayer: That in any judgment or decree that may be entered here-in the claim of these petitioners may be held a just lien upon the mortgaged property of the Richmond City Railway Company, and that, upon sale thereof upon decree of this court, the claim of these petitioners be ordered first paid, after payment of costs, out of the proceeds of such sale, and for all further proper relief. The city of Richmond, appellant, also filed an intervening petition, for the use of the Royal Brick Company *et al.* The plaintiffs filed a demurrer to the petition of the Royal Brick Company *et al.*: First, for insufficiency of facts; and, second, for defect of parties, in this,—that the Standard Paving Company was not made a party defendant. The plaintiff's demurrer was sustained, and the interveners refusing to plead further, and electing to stand by their petition, the court rendered judgment upon the demurrer against them, from which they appeal.

As shown by the briefs, the intervening petitions of all the other appellants have been fully settled out of court, and "the intervening petitions of the Royal Brick Company *et al.* and of the city of Richmond are based upon the same right, seek to enforce the same claim, and are substantially set forth in the same words." We will therefore consider only the questions arising upon the brick company's petition. It is first claimed that the appellants have no standing in court; that they came in neither by complaint, cross-complaint, nor answer; and that there is no such pleading known to our Code as an "intervening petition." While the Code does not, in terms, recognize an intervenor as a party litigant, yet this court has many times recognized in a party the attributes of an intervenor in equity. *Barner v. Bayless*, 134 Ind. 600, 603, 33 N. E. 907, and 34 N. E. 502, and cases cited; *State v. Union Nat. Bank*, 145 Ind. 544, 44 N. E. 585. It is the spirit of our Code to settle in a single action the rights and equities of all persons interested in the subject-matter, and to simplify the rules of practice and pleading as far as the same may be done with due regard to the just determination of the controversy. To accomplish this end, therefore, one not a party, and having an interest in the subject-matter of a pending action that may be adversely affected by the suit, will be permitted by the court, upon a proper showing, under § 273, 1 Burns's Rev. Stat. 1894, to come into the case for the protection of whatever right or interest he may have in the subject-matter. *Voorhees v. Indianapolis Car & Mfg. Co.* 140 Ind. 220, 39 N. E. 738; *Zumbro v. Parnin*, 141 Ind. 430, 40 N. E. 1085. And his pleading, as in this case, is neither a cross-complaint nor an answer, and hence not subject to the objections urged. It seeks neither to set up a cross action against

the plaintiffs, nor to bar their right of recovery. The petitioners are interested in the subject-matter of the suit. Without intervention, the property may be sold, and pass forever beyond their reach. It is now in the custody of the law. The plaintiffs seek its sale and application to the payment of their debt. The common debtor and subject-matter are before the court, and the only relief sought is that, if the sale of the property is ordered, the equities of the interveners in the funds arising therefrom may be enforced against the plaintiffs. There can be no doubt of the remedy thus afforded a stranger to the suit to enter, by leave of court, for the timely protection of his interests; and a petition of intervention need not be as formal as a complaint, and is sufficient in form if it contains a succinct and definite statement or recital of the facts upon which the equities claimed are predicated. *Empire Distilling Co. v. McNulta*, 46 U. S. App. 578, 77 Fed. Rep. 703, 23 C. C. A. 415. Appellees have suggested no specific infirmity in the facts alleged, and we are unable to discover any. The objection that the city of Richmond was not a party to the petition is unavailing under the demurrer as presented, and it is not urged that the Standard Paving Company, the petitioners' assignor, was a necessary party.

But it is earnestly urged that the ordinance conferring upon the Richmond City Railway Company the right to occupy the streets of the city of Richmond, exhibited with the petition, imposed no duty upon the railway company to pave between its tracks, and hence no lien, either preferential or specific, was created in the interveners' assignor for the construction of such pavement. With this contention we are unable to agree. In considering the question, it must be borne in mind that the following propositions of law have been by this court declared settled in this jurisdiction, viz.: (a) That a charter granted by a city, and accepted by a railway company, constitutes a contract between the city and company; (b) that such a charter must be strictly construed against the company; (c) that such company has no doubtful rights under such charter; (d) that where there are doubts they must be construed against the grantee and in favor of the city. *Western Paving & Supply Co. v. Citizens' Street R. Co.* 128 Ind. 530, 10 L. R. A. 770, 26 N. E. 188, 28 N. E. 88; *State ex rel. Keith v. Michigan*, 138 Ind. 455, 468, 37 N. E. 1041; *Indianapolis v. Consumers' Gas Trust Co.* 140 Ind. 107, 116, 27 L. R. A. 514, 39 N. E. 433.

The first section of the franchise ordinance provides that permission and authority are hereby granted and fully vested in the Richmond City Railway Company, its successors and assigns, to lay, construct, operate, and maintain a single or double track street railroad, with all the necessary and convenient tracks, etc., in and upon all the streets and alleys of said city, subject to the conditions hereinafter mentioned, to wit:

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Sec. 2. The motive power of said street railroad shall be cable, electric, or animal.

Sec. 3. The tracks of said railroad shall be so laid as to conform to the established grade of the streets, and in such manner as to be no unnecessary impediment to the ordinary use of the streets and the passage of wagons or other vehicles along and across the tracks.

Sec. 5. If the railroad is operated by electricity, the streets, wherever disturbed, obstructed, or damaged by reason of the construction, repair, or existence of said railroad, shall be by said company properly restored to the same condition as they were prior to such disturbance, and so maintained for one year thereafter.

Sec. 6. The sidewalks, curbs, or gutters disturbed or injured in the erection of poles or wires shall be by said company promptly restored and maintained for one year.

Sec. 7. All tracks shall be laid in the middle of the street.

Sec. 8. The center and cross wires shall at no point be at less elevation than 18 feet above the rails.

Sec. 9. The curb poles shall not exceed 22 feet in height.

Sec. 10. The poles shall not be nearer together than 125 feet, with possible variations to avoid interference with shade trees and ingress and egress of property owners.

Sec. 11. The poles shall be straight, smooth, and painted.

"Sec. 12. (As amended April 22, 1889). In case electric power is used, the rail may be T rail, and the street shall be graveled, paved, or macadamized up flush with top of rail upon the outside thereof when and as the street may be graveled, paved, or macadamized upon which the same are laid, and the street between the rails shall be graveled, paved, or macadamized when and as the street may be graveled, paved, or macadamized upon which the same is laid, upon a level with the top of the rail, and as near to the rail as the same can be done, leaving sufficient space only for the flange of the wheel, and so maintained; and, in case animal power is adopted as the motive power, a flat rail shall be substituted on or before September 1, 1889, on Main street, from Fourth street to Twenty-First street, and on North Eighth street from Main to North E street, and as far east on North E street as Tenth street. Said street railway shall have the right to extend its tracks in Glen Miller Park as now laid, as the said street railway and the committee on parks of said city may hereafter agree, subject to the approval of council."

"Sec. 17. Said Richmond City Railway Company hereby agrees to save said city harmless from any damage, loss, or liability occasioned by the construction, maintenance, or operation of said electric or other street railroad."

It is manifest from the foregoing conditions that it was the intention of the city, in granting authority to occupy its streets for private gain, to relieve the public, so far as

possible, from inconvenience in the use of the streets, and from increased burden in their repair and maintenance. This is made clear by § 3, which prescribes how the tracks shall be laid, and by §§ 5 and 6, which provide that, wherever the streets, sidewalks, curbs, or gutters may be disturbed or damaged by the construction of the railroad, the company shall promptly restore the same to as good a condition as before the disturbance. And what warrant have we for saying that things affixed to a grant as conditions to its enjoyment are not conditions at all, but covenants of the grantor? Furthermore, how may we single out from a class of statements, phrased in the same tense, and alike impersonal as to the party of performance, and say some are covenants of the grantor and some conditions imposed upon the grantee? Yet this is what we are urged by the appellee to do. It is not claimed by appellees that the franchise ordinance imposed upon the city the duty of electing the kind of motive power to be used, as stated by § 2; nor of laying the company's track to conform to the established grade of the streets, as described in § 3; nor of erecting and painting its poles, as directed by §§ 10 and 11; nor of stretching its wires not less than 18 feet above the track, as required by § 8. But they do insist that it imposed upon the city the duty of paving between the company's tracks when and as the street is improved, as required by § 12; the insistence of appellees being that § 12 should be construed as merely declaratory of the mode of construction between the tracks that the city should thereafter observe when and as the street was improved upon which the track was laid. If it was the intention that the city should pave between the tracks, what reason was there for a specific covenant to do the work when and as the street was improved? Was it at all likely that the city would choose to do it at any other time? And, in the use of electricity, what concern should the railway company feel about the pavement between its tracks, whether graveled, macadamized, or bricked, or whether it was paved at all? And no reason is apparent, and none is suggested, why the city would voluntarily assume an obligation to pave in a particular manner, and at a particular time, in a contract that would conclude it for fifty years. Besides, the reading of the charter ordinance as a whole, and a consideration of the granting section, with the peculiar and uniform "shall be" in the enumerated conditions, upon which the grant is stated to depend, in the light of the rules of construction above announced, leads to the firm conviction that the adoption of the construction invited by appellees would be to subject ourselves to the irresistible construction that all the things enumerated as conditions of the grant are really covenants of the grantor. And this is not to be thought of. It must be said that they are all one or the other, and to doubt is to construe them against the company. It is also a familiar principle that, when the terms of a written contract are un-

certain, the courts will adopt that construction which the parties themselves place upon it. *Vinton v. Baldwin*, 95 Ind. 433; *Louisville, N. A. & C. R. Co. v. Reynolds*, 118 Ind. 170, 20 N. E. 711; *Pate v. French*, 122 Ind. 10, 23 N. E. 673; *Ingle v. Norrington*, 126 Ind. 174, 25 N. E. 900; *Vincennes v. Citizens' Gaslight Co.* 132 Ind. 114, 16 L. R. A. 483, 31 N. E. 573.

Much space is given to the discussion of the effect of the compromise ordinance of 1893, described in the early part of this opinion, upon the charter ordinance of 1889; but we fail to perceive its importance to the questions involved in this appeal. It does not repeal the charter ordinance of 1889, which supports and limits appellees' mortgage, either in terms or by implication. In fact, it is in aid of the charter by expressly declaring in its prefatory clause that it is "by way of a full settlement and compromise of said dispute;" that is, a full and final settlement and understanding of the extent of the company's liability under its charter of 1889. It was a definition of the franchise ordinance, not a repeal. It was nothing more nor less than an agreed construction of a disputed provision, and one which the court would be bound to adopt as between the parties. But, being subsequent to the execution of the mortgage to appellees, and without their approval, it was, as to them, nugatory. The mortgagees continue to hold the property as they received it from the mortgagor; and they received it in all respects as it was held by the mortgagor at the time the mortgage was delivered. The mortgagor had, therefore, no power to charge the mortgaged property by an unwarranted construction of its charter, nor impose any burden upon the security that did not exist at the time of the mortgage. Hence appellants must find support for their claim under the charter ordinance of 1889, or they have nothing to rest it upon. On the other hand, the compromise ordinance of 1893, being a contract between the city and the mortgagor with respect to the latter's rights and liabilities under its charter, the appellees, as mortgagees, must accept their mortgagor's contract as a whole, or reject it altogether. They cannot have the benefits without the burdens; that is to say, they cannot accept their mortgagor's unauthorized contract to relieve themselves from appellants' preferential claim under the charter ordinance of 1889, and repudiate it to avoid the specific lien fixed upon the mortgaged property by the same instrument. The new contract provides: "Said Richmond City Railway Company hereby agrees to pay all the cost of paving between the rails of its tracks on the residue of said Main street from the west line of Fourth street to the west line of Sixth street, and from the east line of Ninth street to the east line of Twenty-Third street: provided, said improvement is made under the provisions of the Barrett law;" and the estimated cost shall be assessed against the property of said company, "and, when adopted by the common council of said

city, shall be and constitute a valid lien upon all the real estate, right of way, tracks, rolling stock, and machinery of said company." It is specifically alleged in the intervening petition, and admitted by appellees' demurrer to be true, that the city performed all the conditions of said contract on its part, improved twelve of the squares of Main street, as provided for in the contract, and also paved between the company's tracks pursuant to said agreement, at the actual and reasonable cost of \$13,177.90, which amount was assessed against the company's property, payable in twenty semiannual payments, etc., in conformity to the provisions of the Barrett law, and that the company wholly failed and refused to pay the same. Accepting the new contract as a whole, the paramount lien and debt of \$13,177.90 is admitted by appellees. Rejecting it as a whole, we must return to the ordinance of 1889, and dispose of this case as if the act of 1893 had not been ordained. The point made by appellees that the theory of appellants' petition is that their lien is specific under the ordinance of 1893, and not preferential under the charter act of 1889, and that they must be confined to their theory, cannot be accepted. If it is proper in any case—which we greatly doubt—for a court to arbitrarily declare a party's theory from his initial pleading, where the facts pleaded supply more than one, we are relieved of the task in this instance by the course of appellants' argument. Both ordinances are set forth in the petition at length; but the argument in this court, and which is entirely consistent with the pleading, goes to the effect and theory that the ordinance of 1893, designated by appellants as "supplemental" to the ordinance of 1889, should be accepted (1) as establishing a doubt in the charter as to the company's liability to pave between its tracks, and (2) as settling the doubt against the company by convention of the parties.

The most important question remains, namely, Does the petition exhibit such a claim as a court of equity will decree preferential payment from the proceeds of the mortgaged property? It is said in *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339, by Waite, Ch. J., that "every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts, before he has any claim upon the income." "The income out of which the mortgage is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. . . . While, ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way." It is alleged in the petition that, after the execution of the mortgage,

and after the commencement of the improvement of Main street, the company purchased and added to its property, machinery, dynamos, motors, street cars, and electrical apparatus to the value of \$50,000, and extended their tracks to the value of \$15,000. This material increase in the value of the mortgaged property is also admitted by the demurrer. And it is further said, with respect to such acts, in *Fosdick v. Schall*, 99 U. S. 254, 25 L. ed. 339: "Under such circumstances it is easy to see that there may sometimes be a propriety in paying back to the income from the proceeds of the sale what is thus again diverted from the current debt fund in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership. No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must, to a greater or less extent, influence the chancellor when he comes to act. The power rests upon the fact that in the administration of the affairs of the company the mortgage creditors have got possession of that which, in equity, belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained." The rule is restated by the same eminent jurist in *Burnham v. Bowen*, 111 U. S. 776, 783, 28 L. ed. 596, 599, 4 Sup. Ct. Rep. 675, 679, as follows: "That, if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use." There has been no departure in any of the cases cited. It has been adhered to and reaffirmed in them all. The rule has been applied only to railroad companies, and it is earnestly insisted that a street railway is not within the reason of the rule. It is said to operate in the administration of railroads on account of the public character of such institutions, and upon the assumption that they are of public concern. And that a suspension of operation will work an actual detriment to the public. We cannot see how the effect of suspension will be different. Both are transportation companies, both common carriers; and, if suspension in the operation of the one will be an injury to the general public, the suspension of the other will be an injury to the local public, and the difference is one of degree, and not of kind. The doctrine rests upon the principle of mutual benefit to the public, the mortgage and general creditors. If the value of the security is maintained, the system must be kept a going concern; and whatever is essential to this end in labor, repairs, or equipment must be protected by the highest degree of confidence to avoid the mischiefs of suspension. But there can be no restitution where there has been no diversion; that is to say, where there has been no taking of the earnings needed for the pay-

ment of current obligations, and applied in the betterment of the mortgaged property, there is nothing to be restored. And he who invokes the rule must show affirmatively that the mortgage creditors have got that which, in equity, belongs to the petitioner. If the mortgagor increases the value of the mortgaged property from sources other than the earnings, the fact supplies no equity in the general creditor. In this case it is not averred in the petition that the purchase of the electrical equipment, cars, etc., was made from the current earnings of the company, and for the absence of such averment the petition must be held insufficient to bring the claim within the rule just considered. *Burnham v. Bowen*, 111 U. S. 776, 28 L. ed. 596, 4 Sup. Ct. Rep. 675.

Back of the question is another principle. Every right the railway company has in the city of Richmond rests upon the franchise ordinance. It has no power to run a car, collect a fare, or encumber its road in any way, except subject to this ordinance. The obligation to pave between its tracks is of the essence of its being, and can no more be laid aside than its duty to pay its debts. It is written in its charter, and inseparable from it; and when the mortgagees accepted their security they were bound to take the property as they found it, and bound to know that the rights they acquired in the property were subject to the burdens already imposed upon it. The right the appellants seek to enforce is more than a general claim for money, for it is a right blended with the right of the mortgagor to occupy and use the streets, and one which the mortgagees were required to take notice of and estimate in the acceptance of their mortgage. The liability does not rest upon a claim against the mortgagor, but upon the duty which arises out of the occupancy of the streets. In *Midland R. Co. v. Fisher*, 125 Ind. 19, 8 L. R. A. 604, 24 N. E. 756, the owner of land conveyed, in 1873, to a railroad, a right of way. It was incorporated in the deed, as a consideration, that the company should construct a board fence on each side of the railroad as soon as completed. The road was completed in 1876. In 1875 the company mortgaged all its property, and in 1883 the mortgage was foreclosed, and property sold thereunder. The purchaser entered into possession, and began the operation of the road. No fence had been constructed, and in 1886 the owner of the land brought suit against the purchaser, and in disposing of the case the court says: "The appellant is in the possession of the right of way as the grantee of the original contractor, and it must take the benefit it enjoys subject to the burden annexed to it by the contract which gave existence to that benefit. It cannot enjoy the benefit and escape the burden, for the burden and the benefit are so interlaced as to be inseparable. The 48 L. R. A.

right to the benefit is so blended with the burden that equity and justice forbid a severance. One who takes a privilege in land to which a burden is annexed has no right to assert a claim to the privilege and deny responsibility for the burden. A party who acquires such a privilege acquires it subject to the conditions and burdens bound up with it, and must, if he asserts a right to the privilege, bear the burden which the contract creating the privilege brought into existence. In *Louisville, N. A. & C. R. Co. v. Power*, 119 Ind. 209, 21 N. E. 751, we said of a railroad company: 'Holding the land under the deed, as it did, it was bound to perform its contract. To permit it to retain the land and repudiate the deed would be against equity and good conscience.' In this instance the covenant written in the deed was an essential part of it, and the agreement to construct the fence was part of the consideration for the land. The case is near akin to that of a suit to enforce a vendor's lien, for here the deed upon its face exhibited the contract, and the facts open to observation showed that the covenant had not been kept. The facts open to observation did more than put the appellant upon inquiry; but, had they done no more than put it upon inquiry, it could not justly claim the rights of a purchaser without notice. It must be held that the covenant in the deed through which the appellant claims, and the facts open to observation, imparted notice of the covenant, and notice, also, of its nonperformance." As before said, the right does not rest against the person, but it is affixed to the thing, and the mortgagees or their grantees may not have the thing without the obligation to discharge the right, for the right runs and abides with the property wherever it goes. We think, therefore, that the petition of intervention exhibits sufficient facts to show that the charter of the mortgagor company required it to pave between its tracks when and as the street was improved, as a condition to its enjoyment, and that the condition was carried into appellees' mortgage, and that the claim of the petitioners, arising thereunder, is paramount to the lien of the mortgage.

Finally, it is objected that a judgment on demurrer to an intervening petition is not such a final judgment as may be appealed from. The judgment appealed from makes a final disposition of the case so far as concerned the petitioners, and was sufficient to warrant the appeal. *Voorhees v. Indianapolis Car & Mfg. Co.* 140 Ind. 220, 39 N. E. 738.

The judgment is reversed, with instructions to overrule the demurrer of appellees to the intervening petitions of the Royal Brick Company *et al.*, and of the city of Richmond, and for further proceedings in accordance with this opinion.

Rehearing denied.

KENTUCKY COURT OF APPEALS.

HENDERSON TRUST COMPANY, Admr.,
etc., of Mary H. Berner, Deceased, Appt.,
v.

John H. STUART.

(.....Ky.....)

1. The failure to apply for an extension of a vacancy permit for premises that are still vacant at the expiration of the time for which such a permit has been granted with an agreement by the insurer to extend the time on application therefor constitutes negligence on the part of an executor or administrator with the will annexed, who is in possession of the premises and of the policy of insurance thereon, which will make him liable in damages in case the property is destroyed by fire and the insurance cannot be collected because of the failure to procure the extension of the vacancy permit.
2. The negligence of an executor in failing to apply for an extension of a vacancy permit for insured premises which continue vacant, which had been granted with an agreement to extend it on application, is held to be a question of law for the court.

(March 29, 1900.)

A PPEAL by defendant from a judgment of the Circuit Court for Henderson County in favor of plaintiff in an action brought to hold defendant liable for the value of a house destroyed after defendant had negligently permitted the insurance to lapse.
Affirmed.

The facts are stated in the opinion.

Messrs. Yeaman & Yeaman, for appellant:

The failure to insure property, or keep it insured, is not such negligence as, in case of loss, will render the administrator or any trustee liable for its value.

Underhill, Trusts, 4th ed. pp. 253, 255, and note.

Mr. Montgomery Merritt for appellee.

Burnam, J., delivered the opinion of the court:

The first error relied on by appellant for a reversal of the judgment rendered against it in the trial court is that the court erred in overruling its general demurrer to the petition of appellee.

The petition sets forth, in substance, that Mrs. Stuart sold a house and lot to Mary H. Berner, and took notes for the purchase money, retaining a lien for their payment, and that under the contract of sale, as further security for the purchase money, Mrs. Berner insured the house against loss by fire in the sum of \$2,000, and had the policy made payable to Mrs. Stuart as her interest

might appear; that shortly after the sale, Mrs. Berner died, and that appellant, the Henderson Trust Company, qualified as her administrator with the will annexed, and also as guardian of Mary Wilke, the devisee of the house and lot under the will of Mrs. Berner, and that it took possession of the property and also of the policy of insurance under an agreement with appellee that it would look after both; that the house became vacant in violation of the terms of said policy, and, to prevent the avoidance of the policy, the appellant procured from the insurance company on the 1st day of April, 1890, a "vacancy permit" for thirty days, and it is alleged that the insurance company agreed that if the property was still vacant at the expiration of the thirty days the permit would be extended for an additional thirty days upon application; that the house was still vacant at the expiration of the "vacancy permit," but that the appellant neglected to ask for or to procure an extension thereof, and that in fourteen days after the expiration of the thirty days allowed, the house was burned and became a total loss; that the appellant trust company sued the insurance company, making appellee a party defendant, and that recovery was defeated on the ground that "the policy had become void by reason of the aforesaid vacancy." And it is insisted that appellant was negligent in permitting the house to remain vacant, and in failing to ask for an extension of the "vacancy permit," and that it is liable for the damages accruing by reason of such negligence.

It is insisted for appellant that the allegations of the petition are insufficient to support a cause of action, because there is no allegation therein that the insurance company was under any obligation to carry the insurance while the property was vacant, or to have granted a request for an additional "vacancy permit" if it had been made; that, under the averments of the petition, the insurance company was under no legal obligation to have extended the "vacancy permit," even if it had been applied for, and that a recovery should not be permitted upon a mere speculation or surmise as to what it might have done gratuitously if application had actually been made to it.

It is the duty of an executor or trustee to preserve the estate in his hands, and to protect it from loss; and he has ordinarily the power to do whatever may be necessary for that purpose. While he is not the guarantor of the safety of the property, he is held to such care in the management of the estate as a competent person would ordinarily exercise under the same circumstances in reference to his own affairs (see *Messmore v.*

NOTE.—For condition in policy as to vacancy or nonoccupancy, see *McQueeney v. Phoenix Ins. Co.* (Ark.) 5 L. R. A. 744; *Halpin v. Insurance Co. of N. A.* (N. Y.) 8 L. R. A. 79, and note; *Continental Ins. Co. v. Kyle* (Ind.) 9 L. R. A. 81, and note; *Limburg v. German F. Ins. Co.* 48 L. R. A.

(Iowa) 23 L. R. A. 99; *Moody v. Amazon Ins. Co.* (Ohio) 26 L. R. A. 313; *Agricultural Ins. Co. v. Hamilton* (Md.) 30 L. R. A. 633; and *Home Ins. Co. v. Mendenhall* (Ill.) 36 L. R. A. 374.

Stone, 6 Ky. L. Rep. 596; 11 Am. & Eng. Enc. Law, 2d ed. p. 944); and the Henderson Trust Company owed the same duty to protect the property and preserve it from injury and destruction that a careful person would ordinarily have exercised under the same circumstances if the property had belonged to him. There is no statute in this state which requires an executor to insure real estate in his hands against loss by fire, and the failure to take out such insurance is not necessarily such negligence as in case of loss will render the executor or trustee liable for its value, but is a question to be determined from the facts of each particular case; and the cost of the insurance, the value of the property, its liability to destruction by fire, and whether or not the executor had money in his hands that could have been used for that purpose, are the cardinal elements to be considered. But in this case no money was needed. The insurance had already been paid, and all that was necessary on the part of the defendant to keep the policy alive was that it should have made application to the insurance company for the extension of the "vacancy permit," and it seems to us that the failure of the appellant to make such application was such negligence in the care of the property as to make it liable for the injury resulting therefrom. In the answer filed by the Henderson Trust Company there is no denial of the averments of the petition that the "vacancy permit" would have been extended upon application, and that no application or effort was made to get same done; and the president of the company frankly admits in his testimony that the failure to make application for the extension of

the "vacancy permit" was due to an oversight of the clerk in the company's office who had charge of these matters. The demurrer was therefore properly overruled.

Negligence or the absence of care is always a question of fact for the jury when there is a reasonable doubt as to the facts or inferences to be drawn from them, but when the facts are either admitted or established by undisputed testimony, it is the duty of the court to declare the law applicable to them. See Field, Neg. § 519; *Ashland Coal & I. R. Co. v. Wallace*, 101 Ky. 637, 42 S. W. 744, 43 S. W. 207.

In this case we have these facts admitted in the pleadings: That appellant, as executor, took charge of the policy of insurance and property, and it became vacant in violation of the provision of the policy; that a vacancy permit was granted for thirty days, and the insurance company agreed that it would be extended upon application at expiration if desired, and that this application was not made on account of the oversight and negligence of the appellant company; and that the property was destroyed and the loss of the insurance was directly attributable to such negligence. Under these circumstances; we think it was the duty of the court to declare, as a matter of law, that appellant had not exercised such care in the management of this property as a competent person would ordinarily have exercised under the same circumstances with reference to his own property. This is in substance the effect of the instruction given in this case, and upon the whole facts we are of the opinion that appellant has not been prejudiced.

The judgment is affirmed.

MAINE SUPREME JUDICIAL COURT.

Charles F. JOHNSON, Assignee, etc., of Edward Ware,

v.

John H. EVELETH.

(.....Me.....)

1. A log-driving company's possession of logs in a river while driving them, not as agents of the person to whom they have been sold and are being sent, but by virtue of the charter of the company, although all owners of logs driven by it are made members of the company by force of the statute, does not constitute the possession of the person to whom they are being taken, so as to preclude the stoppage of the logs *in transitu* by the seller.
2. Logs in a river being driven by an incorporated log company, though it is not a common carrier but has a duty under its charter of driving the logs and the possession of them so far as the logs are susceptible of

possession, are subject to the right of stoppage *in transitu* in favor of a person who had sold them and had delivered them in the river for the purpose of their being driven to the purchaser's booms and mill.

3. A contract for the delivery of logs "over the dam" at the outlet of a lake into a river, whence they are to be driven by a log-driving company down the river to the booms and mill of a purchaser, does not make the dam the final destination or place of delivery of the logs, so as to terminate the right of stoppage *in transitu* while they are being driven down the river.
4. Constructive possession of a mass of logs being driven down a river to the booms and mill of a purchaser does not result in his favor, so as to terminate the right of stoppage *in transitu*, by the fact that a few of the logs have actually floated down to his mill and been received by him.

(December 7, 1899.)

NOTE.—On the subject of stoppage *in transitu*, see *Farrell v. Richmond & D. R. Co.* (N. C.) 3 L. R. A. 648, and *note*; *Fenkhausen v. Fellows* (Nev.) 4 L. R. A. 732; *Kingman v. Denison* (Mich.) 11 L. R. A. 847, and *note*; and *Jeffris v. Fitchburg R. Co.* (Wis.) 83 L. R. A. 851. 48 L. R. A.

REPORT by the Supreme Judicial Court for Kennebec County for the opinion of the full bench, of a suit to recover the value of certain logs which had been sold by defendant to Ware and stopped *in transitu*. *Judgment for defendant.*

The facts are stated in the opinion.

Mr. Charles F. Johnson, for plaintiff:

If Mr. Ware knew, or had reasonable grounds for believing, that he was insolvent when these logs were purchased, that would not afford a legal reason for a rescission by the defendant of the contract of sale.

Burrill v. Stevens, 73 Me. 395, 40 Am. Rep. 366.

If the logs were stopped by the defendant by virtue of his right of stoppage *in transitu*, there was no rescission of the contract of sale.

Newhall v. Vargas, 13 Me. 93, 29 Am. Dec. 489; *Vargas v. Newhall*, 15 Me. 314, 33 Am. Dec. 617.

If defendant rescinded the contract because of fraud practised by Mr. Ware, he cannot avail himself of this second ground of defense.

The right of stoppage *in transitu* could not be exercised in this case, because the place of delivery specified in the contract of sale had been reached and the transit was at an end when the logs were turned over the dam at the east outlet of Moosehead lake. and they were then in the constructive, if not actual, possession of Mr. Ware.

Muskegon Booming Co. v. Underhill, 43 Mich. 629, 5 N. W. 1073.

A company charged with the duty of driving logs is not a common carrier.

Mann v. White River Log & Booming Co. 48 Mich. 38, 41 Am. Rep. 141, 8 N. W. 550.

The original direction given to these logs by the defendant had been fully complied with when they had been towed across Moosehead lake to the dam at the east outlet, and turned over the dam.

Brook Iron Co. v. O'Brien, 125 Mass. 446; *Mohr v. Boston & A. R. Co.* 106 Mass. 70; *Dixon v. Baldwin*, 5 East, 175; *Guilford v. Smith*, 30 Vt. 49; *Rowley v. Bigelow*, 12 Pick. 307, 23 Am. Dec. 607; 23 Am. & Eng. Enc. Law, p. 913; *Aguirre v. Parmelee*, 22 Conn. 473; *Sawyer v. Joslin*, 20 Vt. 172, 49 Am. Dec. 768.

Some of these logs had reached Mr. Ware's boom at Winslow before his assignment, and a delivery of part of an entire parcel or cargo, with an intention on the part of the vendor to take the whole, terminates the *transitu*, and the vendor cannot stop the remainder.

2 Kent, Com. 9th ed. p. 746; *Boynton v. Feazie*, 24 Me. 286; *Kohl v. Lindley*, 39 Ill. 195, 89 Am. Dec. 294; *Jewett v. Warren*, 12 Mass. 300, 7 Am. Dec. 74.

Mr. Harvey D. Eaton for defendant.

Savage, J., delivered the opinion of the court:

This case comes up on report. We think the evidence shows the following facts: On March 22, 1898, one Edward Ware entered into a contract of bargain and sale with the defendant for the purchase of about 1,000,000 feet of logs, numbering 7,663 sticks, then lying in Spencer pond, above Moosehead lake. It was agreed that the logs should be delivered by the defendant "over the dam" at 45 L. R. A.

the east outlet of Moosehead lake into Kennebec waters. From that point they were to be driven down the Kennebec river by the Kennebec Log-Driving Company. Ware had booms in Fairfield and Winslow, and a mill at the latter place. The logs were bought by Ware for the purpose of being manufactured into lumber at his mill in Winslow. On May 25, 1898, Ware assigned to the plaintiff for the benefit of his creditors, under the provisions of the insolvent law (Laws 1897, chap. 325, § 16). He was, and for a long time had been, hopelessly insolvent. In the meantime the defendant had caused a large portion of the logs to be delivered "over the dam" at the east outlet, and they were being driven down the Kennebec river towards Ware's booms and mill. Some scattering logs had already reached Ware's mill, and had been sawed. They had drifted down the river, without the necessity of being driven. But the drive proper did not reach Fairfield or Winslow until the last of August, 1898. When the drive reached Shawmut, above the Fairfield boom, August 22d, the defendant took from the river all the logs he had sold to Ware which then remained in the drive, numbering 6,815 sticks, and surveying 808,032 feet. And it is for this taking and alleged conversion that the plaintiff has brought this action of trover. Ware agreed to give four notes for the price of the logs, maturing at different times. At the time of his assignment he had given one note to the defendant, which was subsequently protested for non-payment, and then tendered back by the defendant to the plaintiff. The other three notes he never gave.

The defendant asserts several grounds of defense, only one of which do we think it necessary to consider. He says he took the logs from the river in the exercise of the right of stoppage *in transitu*. He claims that the log-driving company was a carrier. He says he sold the logs on credit, and that while they were in transit to their ultimate destination in Winslow, and were in the possession of the log-driving company as a carrier, the purchaser became insolvent. And this fact, he says, gave him the right to resume the possession of the logs at any time before they came into the actual possession of Ware, or came to their destination in Winslow.

In reply the plaintiff says: (1) That the log-driving company was not a carrier, or middleman, in such a sense as gave it possession or control of the logs; that the river was the real carrier; that the company provided no means of conveyance or motive power, but simply facilitated the floating of logs down the river by breaking jams and otherwise, and hence that, after the logs passed out of the possession of the defendant by being turned "over the dam," they must have been, constructively at least, in the possession of Ware, while floating upon the river; and, furthermore, that in any event the log-driving company was really only an association of log owners, of whom Ware was one, and that a delivery of the logs to the

company was, in effect, a delivery into the possession of Ware. (2) That by the terms of the contract between Ware and the defendant the "destination" of the logs was "over the dam" at the east outlet, and that when they were so delivered the *transitus* was at an end. And (3) that the facts that some of the logs had floated down the river to Ware's mill, and had been received and sawed by him, constituted a constructive delivery of the whole mass into his possession.

These contentions make it necessary for us to consider the character and duties and method of operation of the Kennebec Log-Driving Company. Its charter and by-laws are made a part of the case. By the charter (Laws 1885, chap. 402), certain persons named, their associates and successors, are constituted "a body politic and corporate," and may sue and be sued, etc. They have power to adopt all necessary regulations and by-laws. "They shall drive to such place of destination on the Kennebec river as may be designated by the owners, or by the directors of said company, and may secure and form into rafts, under rigging, all logs and other timber belonging to said company, or any member thereof, that may be in the East Branch and Kennebec river, for that purpose, below the outlet of Moosehead lake at the dam." "They may remove obstructions, and erect booms, piers, and dams." Section 1. "Any person, persons, or corporations, or their agents, owning logs or other timber to be driven on said rivers at the date of the annual meeting in each year, shall be members of the Kennebec Log-Driving Company, and shall so continue for two years at least from that date." Section 3. Members owning logs to be driven are required to file a correct statement of all such logs or timber, giving the number of feet, with the marks, and the place from which logs are to be driven, and their destination. The expenses of driving, and for damages and losses, are to be assessed upon the owners of the logs driven, and the payment of assessments is secured by a lien upon the logs. Section 4. The company may collect logs or timber remaining in booms or in any place exposed to loss, and deposit the same in suitable places, and properly secure it from loss, and to pay for this service an assessment may be made. Sections 10, 11, 12, 13. "The private property of each member of said company shall be holden to pay all debts contracted by the company after he became a member thereof, and before his withdrawal from the same, in default of company property whereon execution may be satisfied." Section 16.

By these extracts from its charter it appears that the Kennebec Log-Driving Company is a corporation. It is more than a mere association of log owners. To be sure, all owners of logs to be driven are, by force of the statute, members, but all combined are only one corporate body. The corporation and its members are different persons. Hence it follows that a possession by the corporation is not a possession by a member, unless the corporation has been made an agent for that purpose. In this case the cor-

poration does not appear to have been the agent of Ware for any purpose. It was simply performing its corporate duty in receiving and driving the logs. It did that under its charter, and not as agent. In this respect this case is unlike *Muskegon Booming Co. v. Underhill*, 43 Mich. 629, 5 N. W. 1073, cited by the plaintiff. There the logs in question had failed to get into the booming company's main drive, and had been left in the rear. The vendees engaged the booming company to send back and get the logs, which they did. The vendees having become insolvent before the logs reached their mill, the vendor, Underhill, sought to exercise the right of stoppage *in transitu*. The court denied this right, but rested its decision on the ground that the vendor, by his contract or acquiescence, "virtually offered possession to [vendees] . . . and that they [the vendees] accepted the offer, and virtually took possession by having the logs taken into custody, at their expense and on their account as owners, by the booming company." Our conclusion is, therefore, that the possession by the log-driving company was not possession by Ware.

The next question in this connection is, May the right of stoppage *in transitu* attach to logs being driven as these were? We have no doubt that it may. It may be conceded that the log-driving company is not a common carrier, although in some respects its duties are analogous to those of common carriers (see *Mann v. White River Log & Booming Co.* 46 Mich. 38, 41 Am. Rep. 141, 8 N. W. 550, where the distinction is pointed out); but that is not decisive. When a vendor sends goods sold to the place of destination by private conveyance, the right of stoppage *in transitu* exists the same as if they are sent by common carrier. The vital question is, Are they in transit between the vendor and the vendee? The right of stoppage *in transitu* is merely an extension of the lien for the price which the vendor has after contract of sale and before delivery of goods sold on credit. The term itself implies that the goods are in transit, and that they have not come into the possession of the vendee. It permits the vendor to resume possession before the goods sold have come into the vendee's possession, if the latter has become insolvent. Whether they are in the possession of a carrier, strictly so called, while in transit, or whether they are in possession of a "middleman," is immaterial. 2 Kent, Com. 702. In this case the logs were certainly in transit between the dam at the east outlet and Ware's mill. They were moving down the river. They were kept moving by the agency of the log-driving company. The company broke the jams, cleared the eddies and the banks of logs, took them wherever they became stranded, and drove in the rear. The company having assumed the duty of driving the logs, no one else had the right to interfere with the driving. So far as a mass of logs in a river is susceptible of possession, to that extent the log-driving company was in possession of these logs for the purpose of transporting them. And we

think that was sufficient. It certainly accords with the equitable principles out of which the right of stoppage *in transitu* has grown. *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489. The character of the possession of the log-driving company is only important as it shows that the logs had not come into the possession of the vendee, and were still in transit.

But the plaintiff next contends that, so far as this case is concerned, the *transitus* ended when the logs were turned "over the dam" at the east outlet, because, he says, that was the ultimate destination of the logs, within the meaning of the contract of purchase; that the defendant's agreement was to deliver the logs there; and that, when the logs were so delivered, the *transitus* contemplated by the contract was at an end; and that in any further transit the right of stoppage *in transitu* would not exist. This might be true if by any fair construction of the contract, read in the light of surrounding conditions and circumstances, we could understand that the dam was really the contemplated final destination of the logs, or that the logs were to be delivered at the "dam," and there remain subject to further acts or directions of Ware. *Becker v. Hallgarten*, 86 N. Y. 167. But we cannot interpret the contract so narrowly. We must view the situation as the parties did. We cannot shut our eyes to the fact that these logs, at the time of the contract, were above the dam, and above a portion of Moosehead lake; that they were brought to be manufactured in Ware's mill in Winlow; that they must float or be driven down the river all the distance between those points; that it was expected that they would be driven by the log-driving company; that there was no place of deposit at the "dam" for keeping the logs, but that the transit in the lake above the dam and in the river below was actually continuous, the dam being simply the point where the defendant ceased to drive and the company began. In view of these circumstances, should "over the dam" be regarded as the "destination" of the logs? We think not.

The question here is not whether the turning of the logs "over the dam" was a delivery,—such a delivery as would have vested title in the vendee, in case delivery was necessary. It is not a question of title. We assume that Ware had the title to the logs. The defendant bases his right of stoppage *in transitu* upon that fact in part. The exercise of that particular right presupposes that the title of the goods is in the vendee; and, further, the title remains in the vendee even after the exercise of the right. The title is not changed. *Hurd v. Bickford*, 85 Me. 217, 27 Atl. 107. The question here is whether, by the delivery at the dam, the logs came into the possession of the vendee, and so far only as the delivery at the dam throws light upon this question is it material. The distinction, in a word, is that property sold may have been delivered so as to affect title, and yet not have come into the possession of the vendee so as to bar the right of stoppage *in*

transitu. An illustration of this is found in the common class of contracts where the vendor agrees to deliver to a carrier designated by vendee for shipment to vendee's place of business. A delivery to a carrier under such circumstances vests title in the vendee, and places the goods subject to his risk, but the vendor does not lose his right of stoppage *in transitu* while the goods are in transit to the vendee. *Grout v. Hill*, 4 Gray, 361; *Rowley v. Bigelow*, 12 Pick. 307, 23 Am. Dec. 607; *Gibson v. Carruthers*, 8 Mees. & W. 321. In a case where goods were delivered to the purchasing agent of the vendee to be transmitted to the vendee's factory in another state, it was held that the right of stoppage *in transitu* was not barred. The court said that the delivery of the goods was to the agent, not as owner, nor as agent of the owners to dispose of them in any other way than to transmit them to the vendee's place of business, and that to take away the right of stoppage *in transitu* there must be an absolute delivery to the agent for the use of the vendee, and it must have been a full and final delivery, as contradistinguished from a delivery to a person acting as a carrier or forwarding agent to the principal. *Aguirre v. Parmelee*, 22 Conn. 473. To terminate the *transitus* by delivery to a middleman, it must be a delivery not to transport, but to keep. *Guilford v. Smith*, 30 Vt. 49. See our own case of *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489. It was held in *Mohr v. Boston & A. R. Co.* 106 Mass. 67, that the *transitus* is not at an end until the goods have reached the place contemplated by the contract between the buyer and seller as the place of their destination.

As bearing upon the "destination" of the logs, the plaintiff, in argument, suggests that under the charter of the log-driving company the owner of the logs was required to file with the company a statement of their destination, which was not done, and also that the company does not itself take logs from the river, but the owners separate them from the general drive, and boom them, or take them out, at such points as they please. To these suggestions, it is a sufficient answer to say that it is clear that the intended destination of these logs was at Ware's mill, and that, whatever the rights of Ware to stop the logs, or take them out of the river, may have been, he did not exercise them. He did not take possession of the logs while they were in transit.

Finally, the plaintiff contends, inasmuch as some small portion of the logs had floated down to Ware's mill, and had been received by him before his assignment, that this put him in constructive possession of the whole mass, and terminated the *transitus*. We are unable to come to that conclusion. The surveyor's bill shows that there were 7,663 sticks in the lot of logs purchased. The defendant, when he took possession, found 6,815 sticks in the drive. It appears that some had gone below Ware's mill to Hallowell, and undoubtedly some sticks had been left behind upon the banks or in the eddies of the river. But assuming that the whole

of the remaining 848 sticks had, during the season, floated down to or by Ware's mill, still we do not think that that fact constituted a constructive possession in Ware, or the plaintiff, of the logs which had not come down. It is not like the case where a vendee has taken some portion out of the whole mass, which was then susceptible of possession, and in which case he has thus obtained constructive possession of the whole. Such facts are important sometimes when it is necessary to decide whether a legal delivery has been made. But here, as we have said, it is not a question of technical delivery, but

one of actual possession. Here Ware took only such scattering, floating logs as came to him. The remainder were not in his possession. They were still in the possession of the log-driving company. They were still being driven. They were still in actual transit. And we think the vendor had the right to stop them before that transit was ended. Such a conclusion gives effect to the spirit and purpose of the law. *Buckley v. Furniss*, 17 Wend. 504; *Mohr v. Boston & A. R. Co.* 106 Mass. 67.

Plaintiff nonsuit.

MARYLAND COURT OF APPEALS.

Otho L. SUMMERS *et al.*, Appts.,
v.

Henry H. BEELER *et al.*

(.....Md.....)

1. A restriction as to the building line, inserted in a deed, cannot inure to the benefit of a prior grantee of another lot on the same street, which is conveyed subject to the same restriction, when the grantor did not impose any servitude upon the land he retained, and the restrictions were not part of a general plan or scheme for the benefit of all the purchasers.
2. A general plan or scheme for the benefit of all the purchasers of lots sold on the same street, as shown by a recorded plat, does not appear from the fact that most of the lots are sold subject to the same restriction as to building line, where no restrictions are shown by the plat, and none are imposed on some of the lots that are first sold, while purchasers of some of the other lots have violated the restrictions upon them, and such violations have not been resisted by other purchasers.

(December 9, 1899.)

A PPEAL by plaintiffs from a decree of the Circuit Court for Washington County in favor of defendants in a proceeding to enjoin defendants from erecting a building in violation of the restrictions contained in their title deeds. *Affirmed.*

The facts are stated in the opinion.

Messrs. Daniel W. Doub and Frank B. Bomberger, for appellants:

The condition in the deed of Mrs. Beeler, and of all the lots from 6 to 13 inclusive, is an encumbrance upon the title.

Halle v. Newbold, 69 Md. 265, 14 Atl. 662; *Kramer v. Carter*, 136 Mass. 504; *Re Higgins' Contract*, 51 L. J. Ch. N. S. 772; *Columbia College v. Lynch*, 70 N. Y. 449, 26 Am. Rep. 615; *Peck v. Conway*, 119 Mass. 546; *Hamlen v. Werner*, 144 Mass. 397, 11 N. E. 684.

NOTE.—For condition in deed as to building restrictions, see also *Atty. Gen. v. Algonquin Club (Mass.)* 11 L. R. A. 500; *Hutchinson v. Ulrich (Ill.)* 21 L. R. A. 391; and *Chicago v. Ward (Ill.)* 38 L. R. A. 849.

For ordinance establishing building line, see *St. Louis v. Hill (Mo.)* 21 L. R. A. 226. 48 L. R. A.

The restrictions in the deed of Mrs. Beeler and the other eight lots create easements or servitudes in favor of the other lots.

Sanborn v. Rice, 129 Mass. 396.

The plaintiff may enforce the condition in the deed of the adjoining lot belonging to Mrs. Beeler.

Clark v. Martin, 49 Pa. 289; *Halle v. Newbold*, 69 Md. 265, 14 Atl. 662; *Columbia College v. Lynch*, 70 N. Y. 449, 26 Am. Rep. 615.

The mere fact that the original deed of the Summer's lot is prior in date to that of the original deed of the Beeler lot does not deprive Mrs. Summers of the right to enforce the condition in the deed of Mrs. Beeler.

Tallmadge v. East River Bank, 26 N. Y. 105; *Whitney v. Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715; *Parker v. Nightingale*, 6 Allen, 341, 83 Am. Dec. 632; *Linsee v. Mixer*, 101 Mass. 512; *Tulk v. Mozhay*, 1 Phill. Ch. 774; *Thruston v. Mink*, 32 Md. 487; *Newbold v. Peabody Heights Co.* 70 Md. 493, 3 L. R. A. 579, 17 Atl. 372; *Clark v. Martin*, 49 Pa. 289; *DeGray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388; *Nottingham Patent Brick & Tile Co. v. Butler*, L. R. 15 Q. B. Div. 261, L. R. 16 Q. B. Div. 778.

In New York relief seems to be granted on the theory that the covenant creates an easement over the land of the covenantor for the benefit of all the other lots subject to the same covenant.

Columbia College v. Lynch, 70 N. Y. 440, 26 Am. Rep. 615; *Beals v. Case*, 138 Mass. 140.

The purpose intended to be accomplished by the restrictions inserted in the deeds of the estate now owned and occupied by the defendant was for the benefit and advantage of other owners of land situated on the same street or court.

Parker v. Nightingale, 6 Allen, 341, 83 Am. Dec. 632; *Mulligan v. Jordan*, 50 N. J. Eq. 363, 24 Atl. 543.

The building of a bay-window by Mrs. Beeler, the defendant, is a violation of the restrictions in her deed.

Peck v. Conway, 119 Mass. 546; *Bagnall v. Davies*, 140 Mass. 76, 2 N. E. 786; *Hamlen*

v. *Werner*, 144 Mass. 397, 11 N. E. 684; *Clark v. Martin*, 49 Pa. 289; *Sanborn v. Rice*, 129 Mass. 396.

Mr. A. C. Strite for appellees.

Pearce, J., delivered the opinion of the court:

This is a bill in equity filed by the appellants to restrain the appellees from erecting upon their own premises, adjoining those of the appellants, a bay window, in violation, as the appellants claim, of restrictions contained in conveyances for their respective premises from a common vendor, to whom their titles are traced through mesne conveyances. A preliminary injunction was granted, and was dissolved upon hearing, and thereupon this appeal was taken.

Rev. C. L. Keedy being the owner of a tract of land in Hagerstown, on the east side

of Mulberry street, laid out the tract into twenty-eight lots, fourteen of which fronted on Mulberry street, and fourteen extended back eastward, fronting on King street, as shown in the accompanying plat, which was recorded among the land records of Washington county, but without anything thereon, or in the description of the lots which accompanied the plat, to indicate any restrictions upon the use of the lots, or any of them. In the subsequent sale and conveyance of these lots fronting on Mulberry street, certain restrictions as to the building line to be observed were inserted in some of the deeds, while in others there were no restrictions whatever. Lots 1, 2, 14, 3, and 5 were the first sold, and in the order named, without any restriction as to their use. These conveyances were all made between June 28, 1888, and November 23, 1888. Lot 5 was conveyed to C. P. Mason and W. M. Keedy, and the first house built upon any of the lots was erected here in the spring of 1889, standing back 8 feet from the east line of Mulberry street. On No. 1, a church has been built, with a covered vestibule extending beyond the 8-foot line. On No. 2, three dwellings have been built, each with a two-story bay window extending beyond the 8-foot line. On lots 7, 10, and 14, houses have been built, each with a one-story front porch extending beyond the line. On lot 8 a house was erected in 1889, the front wall of which is on the 8-foot line, with an inclosed porch, making it a one-story bay window, extending beyond the line. All the other houses on the Mulberry street lots have steps extending beyond the 8-foot line. All these lots, except 1, 2, 14, 3, and 5, were sold and conveyed with substantially the same restriction as to building; that is, "that no building or other improvement shall be located, built, or constructed upon said lot closer to the west marginal line thereof than a line running parallel thereto, and bounding the west wall of the house owned by C. P. Mason and Wm. M. Keedy upon lot No. 5." No. 11 is owned by Mrs. Summers, one of the appellants; and No. 10, by Mrs. Beeler, one of the appellees, who is now building a house thereon, with a bay window extending 3 feet beyond the line of the Mason and Keedy house on No. 5, to which she is limited by the original conveyance of her lot No. 10, and the appellants are seeking to restrain the erection of this bay window. Lot 11 was originally conveyed to the Danzer Lumber Company by deed dated January 2, 1890, containing the restriction above mentioned; and the title thereto has passed to Mrs. Summers by mesne conveyances, each of which refers to the restriction in the original deed. Lot 10 was originally conveyed to Norman B. Scott by deed dated December 16, 1890, with the same restriction; and the title thereto has in like manner passed by mesne conveyances to Mrs. Beeler, each conveyance referring to the original restriction.

In *Halle v. Newbold*, 69 Md. 270, 14 Atl. 663, this court, reviewing the cases of *Thurston v. Minke*, 32 Md. 487; *Whitney v. Union*

EAST BALTIMORE STREET.		
KING STREET.	15	14 No restriction. Porch extending beyond line.
	16	13 Restriction.
	17	12 Restriction.
	18	11 Restriction. Pliffs' Lot.
	19	10 Restriction to west wall of house on 5.
	20	9 Restriction.
	21	8 Restriction. 2nd house built. Bay window.
	22	7 Restriction to line of house already built.
	23	6 Restriction.
	24	5 No restriction. 5th house built.
	25	4 Restriction to building line of 3 and 5.
	26	3 No restriction.
	27	2 No restriction.
	28	1 No restriction.
ANTIETAM STREET.		

SOUTH MULBERRY STREET.

R. Co. 11 Gray, 359, 71 Am. Dec. 715, and *Clark v. Martin*, 49 Pa. 289, says: "These cases very conclusively settle the law that a grantor may impose a restriction in the nature of a servitude or easement upon the land that he sells or leases, for the benefit of the land he still retains; and if that servitude is imposed upon the heirs and assigns of the grantee, and in favor of the heirs and assigns of the grantor, it may be enforced by the assignee of the grantor against the assignee (with notice) of the grantee." The court observed that in each of the cases reviewed the grantor imposed the servitude upon the land he sold, in favor of the land he retained, while in the case then before the court the grantors imposed the condition upon the land they retained, in favor of the land they sold; but the court said "the principle is the same in both cases." But the case now before us does not fall within either class of cases mentioned. Mr. Keedy sold and conveyed the plaintiff's lot No. 11 January 2, 1890. He had then sold and conveyed eight lots (Nos. 1, 2, 14, 3, 5, 9, 8, and 6), the first five without restriction, and the last three with the restriction mentioned, and he imposed upon the grantee of lot 11 the same restriction; but he imposed no servitude upon the land he retained, which embraced lot 10, in favor of the land he then sold, lot No. 11. He sold and conveyed the defendant's lot No. 10 December 16, 1890, and he imposed the same restriction upon that lot which he had imposed upon lot 11. But this restriction cannot inure to his benefit, as respects lot 11, upon the principle stated in 69 Md., and 14 Atl., because he had sold lot 11 nearly a year before; nor can it inure to the benefit of the plaintiff, upon that principle, as owner of lot 11, because there is no privity either of contract or estate between the plaintiff and the defendant. In *Mulligan v. Jordan*, 50 N. J. Eq. 363, 24 Atl. 543, it was held that a purchaser of a lot, whose deed contains a covenant against the erection of any building within a certain distance of the curb line, cannot maintain an action against a subsequent purchaser of an adjacent lot from her grantor, for violation of a like covenant, when there was no such covenant between the two purchasers, and their grantor, although he required similar covenants from all purchasers, did not covenant with the first that he would exact them from subsequent purchasers. The chancery court of New Jersey is a court of high repute, and has dealt with numerous questions of this character; and the facts of the case cited above are so closely analogous to the facts of this case that we cannot do better than adopt the following language from that opinion: "The complainant's deed is prior to that of the defendant. There is no covenant to the complainant from Mr. Roberts, the grantor, that he holds the remainder of the property subject to the same restrictions, or that he will exact similar covenants from the purchasers of the remaining property; nor is the complainant the express assign of defendant's covenant with Mr. Roberts; nor is there any

covenant between the plaintiff and the defendant. The right of an owner of a lot to enforce a covenant (to which he is not a party or an assign) restrictive of the use of other lands is dependent on the covenant having been made for the benefit of this lot. Obviously, while a subsequent purchaser might, by the operation of this rule, acquire a right of action against a prior purchaser, the prior purchaser would acquire no rights from a covenant entered into by a subsequent purchaser, unless there exists some condition which will entitle him to the benefit of such covenant."

The condition above mentioned has its illustration in another class of cases in which grantees from a common grantor, whose deeds contain restrictive covenants, conditions, or reservations, have been allowed to enforce them *inter sese*; that is, cases where, "although the covenant or agreement in the deed, regarded as a contract merely, is binding only on the original parties, yet, in order to carry out the plain intent of the parties, it will be construed as creating a right or interest in the nature of an incorporeal hereditament or an easement appurtenant to the remaining land belonging to the grantor at the time of the grant; . . . and the right and burden thus created will respectively pass to, and be binding on, all subsequent grantees of the respective lots of land." *Whitney v. Union R. Co.* 11 Gray, 365, 71 Am. Dec. 715, quoted and approved in 69 Md. 270, 14 Atl. 663. But, as is well expressed in *Mulligan v. Jordan*, 50 N. J. Eq. 363, 24 Atl. 543, "the right of grantees from a common grantor to enforce, *inter sese*, covenants entered into by each with said grantor, is confined to cases where there has been proof of a general plan or scheme for the improvement of the property, and its consequent benefit, and the covenant has been entered into as part of a general plan to be exacted from all purchasers, and to be for the benefit of each purchaser, and the party has bought with reference to such general plan or scheme, and the covenant has entered into the consideration of his purchase." In that case the court proceeded to say: "The only fact which appears . . . is that the same covenant is incorporated in the deeds of the complainant and defendant, and that Mr. Roberts has inserted the same covenant in each deed he made conveying any portion of the property. This has been held not to be sufficient evidence of the covenant having been entered into for the benefit of other lands conveyed by the same grantor,"—citing in support of this position *Jewell v. Lee*, 14 Allen, 145; *Sharp v. Ropes*, 110 Mass. 381; *Keates v. Lyon*, L. R. 4 Ch. 218; and *Renals v. Cowlishaw*, L. R. 11 Ch. Div. 866. In the present case the facts are not nearly so strong as in *Mulligan v. Jordan*, because here Mr. Keedy conveyed five of the fourteen lots sold without any restrictions whatever.

In *Nottingham Patent Brick & Tile Co. v. Butler*, L. R. 15 Q. B. Div. 268, Justice Wills says: "The principle which appears to me to be deducible from the cases is that where

the same vendor, selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold, without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him, and understood by the buyers, to be for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them, *inter se*, for their own benefit." That case was a sale of a parcel of land in 1865, in thirteen lots, to different purchasers, with covenant by each restricting the use of the land as a brickyard. Defendant subsequently bought lot 11, but his deed contained no restriction. In 1882 plaintiff contracted to purchase lot 11, and paid a deposit, but, on discovering the restrictive covenant, claimed to rescind the contract, and sued for the deposit; and it was held that, if the contract were executed, he would be bound by the restrictive covenants; that the owner of the other twelve lots could enforce them against him and each other, and that he was entitled to rescind and recover the deposit. On appeal Lord Esher, M. R., said Justice Willis was perfectly correct, and that "the question whether it is intended each of the purchasers shall be liable, in respect of those restrictive covenants, to each of the other purchasers, is a question of fact, to be determined by the intention of the vendor and of the purchasers, and that question must be determined upon the same rules of evidence as every other question of intention." In that case the property was put up at auction in 1865 in thirteen lots, and one of the publicly announced conditions of sale was that no lot should be used as a brickyard. At that time lots 1 and 2 were sold; in February, 1866, there was a second auction, at which lots 6, 7, and 8 were sold; and in October, 1867, there was a third auction, at which lots 9 and 10 were sold; and the evidence showed that all these were sold on the same terms. Lots 3, 4, and 5 were sold, respectively, in 1865, 1866, and 1867, at private sale; but there was no direct evidence as to the terms on which they were sold, the deeds for these not being produced. Lot 11 was sold at private sale September 4, 1866, and the deed contained the restrictions mentioned at the auction. Lot 13 was sold at private sale in June, 1866, with the same restrictions. These restrictions, among other things, required that all buildings erected should be of a uniform stone color, with slate roofs, and should cost not less than £400 each; and the proof was that every house built conformed to these conditions. Upon this state of proof, the court could reach no other logical or rational conclusion

than that the vendor intended, and the purchasers understood, that the covenants should inure to the benefit of every purchaser, and that they entered into the consideration of every purchaser. But, in the case before us, though Mr. Keedy took the pains to record, before sale, a plat of the land, and a description of the lots, he nowhere mentioned any restrictions or conditions as to their use. There was no auction sale at which such restrictions or conditions were made known to the public, nor was such announcement made in any other manner. Not only so, but the five lots first sold were sold without any restrictions; and the purchasers of all the other eleven lots on Mulberry street (which were sold with restrictions), except Mrs. Summers, have treated these restrictions as not made for the common benefit of all these purchasers, both by their own violation of these restrictions, and by their failure to resist similar violations by the other purchasers. We think, therefore, the conduct both of the vendor and of the purchasers forbids the conclusions that their intent and understanding were that these restrictions were part of a general plan or scheme for the benefit of all the purchasers.

The cases chiefly relied on by the appellant do not sustain his contention in this case. Thus, in *Tallmadge v. East River Bank*, 28 N. Y. 105, a plat was filed and recorded, showing that every house to be built was to be set back 8 feet from the street. In *Columbia College v. Lynch*, 70 N. Y. 449, 26 Am. Rep. 615, an agreement showing restrictions as to all the lots was recorded, and the defendant's purchase was made with express reference and subject to this agreement. It was strenuously contended that the case of *Clark v. Martin*, 49 Pa. 289, repudiated the necessity of a general plan in cases like the present, and having been approved by this court in 32 Md., and in 69 Md. and 14 Atl., sustained the appellants' contention. But we do not so understand that case. The language used by the court, and relied on here by the appellants, is as follows: "It was objected at the argument that this remedy applies only as a means of compelling an observance of the terms involved in a general plan of lots, and this element actually exists in about half of the cases just cited, yet they are not decided on that consideration. It is not because a plan is deranged that the court interferes, but because rights are invaded, or about to be; and this fact may exist in a plan of two lots, as well as in one of two hundred. The plan often furnishes the proof of the terms on which sales were made, but the fact of the alleged terms is as effective when proved by a single deed as when proved by a plan." It is manifest from this language that the Pennsylvania court is in full accord with the English chancery court in holding that the question is one of fact to be determined by the intention of the vendor and of the purchasers, and that it is to be determined upon the same rules of evidence as other questions of intention. In the Pennsylvania case there were but two lots under consideration,

and the intention of the parties was as clearly shown by the one deed imposing restrictions upon one lot for the benefit of the other, retained by the vendor, as it could have been by a plan describing the two lots, and detailing the conditions to be imposed on one for the benefit of the other. The case of *Sharp v. Ropes*, 110 Mass. 381, is more closely analogous to the present case than any to which we have been referred. Heath laid out a parcel of land in eleven lots, five of which fronted on the north side of Gordon street, and one on the south side of the same street. A plat was recorded, showing the area and description of each lot, but making no reference to any restrictions upon their use. Three of the five lots on the north side of the street were conveyed by Heath, subject to the condition that no house should be built thereon within 20 feet of Gordon street. The other two lots on the north side and the one lot on the south side were conveyed without any restriction. The plaintiff's deed was prior in point of time to defendant's deed, and both were subject to the restriction mentioned. Defendant began the erection of a house within 20 feet of the street, and plaintiff applied for an injunction, which was refused, the court saying: "There is nothing from which the court can infer that the restriction contained in the deed from Heath to the defendant was intended for the benefit of the estate now owned by the plaintiff. No such purpose can be gathered from the plan. . . . Neither of the deeds under which these parties respectively claim purports to give to the grantee any such right against any other grantee. . . . The burden of proof is upon the plaintiff, if she insists upon giving to that condition any wider application, and this burden we do not find that she has sustained." A very elaborate and able review of all the leading American and English cases on this subject will be found in *De Gray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388, fully sustaining the conclusions of the learned judge of the circuit court.

For the reasons stated, the decree of the Circuit Court is affirmed with costs to the appellee in both courts.

David B. ELLICOTT *et al.*, Appts.,
v.

Thomas P. ELLICOTT *et al.*

(.....Md.....)

1. A will giving a grandnephew an estate "for the purpose of securing to him a liberal education," requiring him to finish a collegiate course at one of two specified universities, and providing that the property shall pass from him if, "through his own disinclination or incapacity or the indifference of his parent or guardians, he should

NOTE.—For inability to perform condition on which gift by will is made, see also *Bullard v. Shirley* (Mass.) 12 L. R. A. 110.
48 L. R. A.

fail to carry out these intentions," with a further provision that until he is twenty-five years of age the property shall be held by a trustee, who shall "deliver over the property and estate into his hands and possession" when he is twenty-five years old if the directions of the will have been carried out; expressing also a special desire that the grandnephew shall not sell a certain place until he shall attain the age of twenty-five years,—vests in him an equitable estate at the death of the testatrix, subject to be divested by the nonperformance of the condition imposed, which is a condition subsequent, and not precedent.

2. The death of a person while in college, thereby making it impossible to perform a condition subsequent imposed by will on an estate which was given him subject to be divested if he should fail to carry out the intentions of the will "through his own disinclination or incapacity or the indifference of his parent or guardians," will not divest the estate so as to prevent its descent to his heirs at law and next of kin, since the performance, becoming impossible by the act of God, is dispensed with.

(January 9, 1900.)

A PPEAL by plaintiffs from a decree of the A Circuit Court of Baltimore City construing the will of Elizabeth E. Pike, deceased, adversely to plaintiffs' contention that, a life estate having terminated, a trust thereby created had ceased, and the property should be declared vested in the residuary legatees. *Affirmed.*

The facts are stated in the opinion.

Messrs. Bernard Carter, John Fremtiss Poe, S. Johnson Poe, and Edgar Allan Poe, for appellants:

In construing wills, courts always endeavor to ascertain what the intention of the testator is, and, when this intention is discovered, are guided and controlled by it.

The vesting is suspended where the suspension of enjoyment is for reasons personal to the legatee, and not for the convenience of the fund.

Bigelow, Wills, Student Series, p. 255.

An interest is vested, as distinguished from contingent, either when enjoyment of it is presently conferred, or when, if the enjoyment of it is postponed, the time of enjoyment will certainly come to pass. If the right of enjoyment is made to depend upon some event or condition which may or may not happen or be performed, the gift is contingent.

Bigelow, Wills, Student Series, p. 244.

The law favors the early vesting of estates, but the intention of the testator governs, and in ascertaining his intention the whole will must be regarded, and not particular expressions in it only; and if it appears that the condition annexed to the gift was for reasons personal to the legatee and related to the substance of the gift, so that it is to be presumed that without the condition the testator would not have made the gift, and especially where the event upon the happening of which the gift depends is uncertain, and does not relate to the arriving at a given age, then the gift is contingent, and the con-

dition on which it depends is a condition precedent.

Scott v. West, 63 Wis. 566, 24 N. W. 161, 25 N. W. 18; *Loder v. Hatfield*, 71 N. Y. 98; 29 Am. & Eng. Enc. Law, p. 456; *Cropley v. Cooper*, 19 Wall. 176, 22 L. ed. 113; *Tayloe v. Mosher*, 29 Md. 452.

Construing the 5th clause and the 11th clause together, it is made apparent that the testatrix intended to give the legatee only so much of the income as was necessary to secure him the liberal education in the mode prescribed by the time designated, that is to say, by his finishing his collegiate course at Harvard or Yale by the time of his arrival at the age of twenty-five years.

Pulsford v. Hunter, 3 Bro. Ch. 416; *Leake v. Robinson*, 1 Mer. 363.

If, for any of the reasons stated in the 5th clause, he did not graduate before reaching twenty-five years of age, the "money" appropriated for such purpose and not then expended was to pass away from him to the residuary legatees.

To give it to him before that event happened would palpably be to defeat the intent of the testatrix, which clearly was to make no absolute gift of the *corpus*, unless that event did happen.

Loder v. Hatfield, 71 N. Y. 98; *Tayloe v. Mosher*, 29 Md. 453.

The condition upon which alone his right of enjoyment was to depend was the fact of his graduating before reaching the age of twenty-five years.

Bigelow, Wills, p. 244.

Equity cannot relieve from the consequence of a failure to perform a condition precedent.

4 Kent, Com. 125; *Davis v. Angel*, 31 Beav. 223, Affirmed on Appeal, 4 DeG. F. & J. 524.

The contingency was annexed to the substance of the gift, and hence it is plain that the testatrix never meant to make absolute the gift to him unless the event, *viz.*, his graduation, happened.

Tayloe v. Mosher, 29 Md. 452; *Bigelow*, Wills, Student Series, p. 257.

Messrs. William A. Fisher and Arthur Steuart, for appellees:

A condition will not be raised by implication from a mere declaration in the deed that the grant is made for a special and particular purpose, without being coupled with words appropriate to make such condition.

Kilpatrick v. Baltimore, 81 Md. 193, 27 L. R. A. 643, 31 Atl. 805; 3 Kent, Com. 130; *Bigelow v. Barr*, 4 Ohio, 358; *Packard v. Ames*, 16 Gray, 327.

A grant declared to be for a special purpose, without other words, cannot be held to be on a condition.

Kilpatrick v. Baltimore, 81 Md. 193, 27 L. R. A. 643, 31 Atl. 805.

The question whether a condition is antecedent or subsequent depends upon the order of time within which the performance is to occur.

Creswell v. Lawson, 7 Gill & J. 240.

And "if the thing to be done does not necessarily precede the vesting of the estate in 48 L. R. A.

the grantee, but may accompany or follow it, and may as well be done after as before the vesting of the estate, the condition is subsequent."

Re Stickney, 85 Md. 102, 35 L. R. A. 693, 36 Atl. 654; *Hammond v. Hammond*, 55 Md. 582; *Finlay v. King*, 3 Pet. 375, 7 L. ed. 701.

A strict construction is applied to conditions subsequent, adversely to the raising of a forfeiture, and the forfeiture must have occurred literally within the terms creating the condition.

2 Jarman, Wills, 6th ed. p. 853; 1 Roper, Legacies, 619; 2 Wms. Exrs. 1273; *Hervey-Bathurst v. Stanley*, L. R. 4 Ch. Div. 272.

Since James Pike Ellicott faithfully pursued the directions of the testatrix until his untimely death, the condition was performed.

Merrill v. Emery, 10 Pick. 511; 2 Jarman, Wills, 849, 852; *Sutcliffe v. Richardson*, L. R. 13 Eq. 606; *Hammond v. Hammond*, 55 Md. 575.

If a gift is made "for maintenance and education," or "for education," it is an absolute one; and if the donee dies his personal representatives are entitled to receive it.

Webb v. Kelly, 9 Sim. 469; *Bayne v. Crowther*, 20 Beav. 400; *Gough v. Bult*, 16 Sim. 45; *Brown v. Concord*, 33 N. H. 285.

Boyd, J., delivered the opinion of the court:

By this appeal we are called upon to determine what estate, if any, was vested in James Pike Ellicott under the last will and testament of Mrs. Elizabeth E. Pike. He was the grandnephew of the testatrix, and in his fifteenth year at the time of her death, which occurred in 1891, a few months after her will was executed. He died intestate, in March, 1898, having been twenty-one years of age the December preceding his death. The will is divided into fourteen paragraphs, and the testatrix stated in it that it was written by herself. She first named the executor and trustee, then made a number of devises and bequests, and, after giving \$10,000 to each of the four children of her brother William M. Ellicott, in addition to an interest in another fund, made them her residuary devisees and legatees. The paragraphs directly involved in this proceeding are the fifth, tenth, and eleventh, and are as follows:

"(5) I leave the rest of my Baltimore property to my grandnephew James Pike Ellicott for the purpose of securing to him a liberal education. He shall remain at some good preparatory school in the state of Massachusetts until he is fitted to enter either Harvard or Yale University, where he shall remain until he has finished the collegiate course. If, however, through his own disinclination or incapacity, or the indifference of his parent or guardians, he should fail to carry out these intentions, then the money which has been left to him for this purpose shall pass away from him entirely into the body of my estate."

"(10) I give and bequeath to my grand-

nephew James Pike Ellicott, in fee simple, all my real estate situated in the town of Robbinston, Maine, and also all furniture, plate, horses, carriages, boats, harness, by which I mean everything of every description that I own in the town of Robbinston, and not hereafter specially disposed of by me.

"(11) Provided, however, that all the estate and property devised and bequeathed by me to James Pike Ellicott shall be held by my trustee until the said James Pike Ellicott shall have attained the age of twenty-five years, in trust, to rent, manage, and take charge of the real estate, keep it in repair, pay taxes and expenses incidental thereto, also to keep the personal estate invested in good securities, and collect and receive all rents, increase, and interest accruing on said estate, and devote the net income arising therefrom to the special object mentioned above, viz., the education of James Pike Ellicott; it being my desire that he may be thoroughly prepared to enter into any profession for which he has inclination or capacity. All surplus income arising from the property given for his use by this my will, not required in the earlier years of his minority for his education and maintenance, to be carefully invested and accumulated for the later period of his minority, when his collegiate expenses will be increased. In case the above directions have been carried out, upon my said nephew James Pike Ellicott attaining the age of twenty-five years, I desire my trustees to deliver over the property and estate into his hands and possession. But I specially desire my said grandnephew not to sell the Robbinston place till he shall attain the age of twenty-five years, as it is my earnest wish to keep the property as long as possible in the family, and have it go with the name."

James Pike Ellicott graduated at a preparatory school in Massachusetts, and in the fall of 1896 entered the freshman class at Harvard. He was in the sophomore class when he died, but was still under some conditions, either as to his entrance into college or imposed afterwards. The testimony is not altogether clear about that, but it is not material. The question is whether, under this will, he had such a vested estate as descended to his heirs, or whether the property referred to passed to the residuary devisees and legatees named in the will. The court below decreed that the part of the estate of Mrs. Pike thus left young Ellicott became, at her death, vested in him, and at his death descended to his heirs at law, and directed the trustee to at once relinquish control over the same, the period during which he as trustee was directed to hold it having been terminated by the death of young Ellicott. From that decree this appeal was taken.

It may be conceded that the desire of the testatrix, most conspicuously made known in her will, was that this grandnephew, who was named after her deceased husband, should receive such an education and be so prepared for the battle of life that he would reflect credit upon him whose name he bore, 48 L. R. A.

although it does not follow that she was not in part influenced by her affection and regard for him. The testimony shows that she always took a very special interest in him, paid nearly, if not all, his expenses after he went to Adams Academy, and gave means from time to time for his benefit. He, at least, does not seem to have been in either of the classes of which she says: "I have not thought it necessary to divide my property among those who have received a larger amount from others than I can give to any. Still less have I cared to remember any who have shamefully and despitely used me." Her idea undoubtedly was that the best way to provide for him was to have him properly educated; but that was not all, for, after he received the education contemplated by her, he was to have the *corpus* of the estate. If she had only been interested in his education, and had intended that the property set apart for him should be used for that purpose alone, then she could, and probably would, have directed that the *corpus*, on his arrival at the age of twenty-five years, should be otherwise disposed of.

But let us examine the will itself to ascertain the legal effect of the terms used therein, always keeping in mind the intention of the testatrix, so far as indicated by the will and such circumstances as we can properly consider. In paragraph 5 the language is, "I leave the rest of my Baltimore property to my grandnephew James Pike Ellicott, for the purpose of securing to him a liberal education;" in paragraph 10, "I give and bequeath" to him "in fee simple all my real estate situated in the town of Robbinston, Maine, also all furniture," etc.; and in the part that created the trust she said, "Provided, however, that all the estate and property devised and bequeathed by me to James Pike Ellicott" shall be held by the trustee until said Ellicott shall have attained the age of twenty-five years, "in trust," etc. The language thus used by the testatrix in making provision for him was not only sufficient to vest an equitable estate in him immediately upon her death, but, unless qualified by some other parts of the will, is absolutely conclusive of her intention to do so. The form of the gift "shows that a present, and not a future, estate was intended." *Re Stickney*, 85 Md. 103, 35 L. R. A. 693, 36 Atl. 654. She did not even "leave" or "give and bequeath" the property to the trustee for the use of her nephew, but, on the contrary, she not only devised and bequeathed it to the latter, but, in creating the trust and describing what the trustee should hold, she said, "all the estate and property devised and bequeathed by me to James Pike Ellicott." When the trustee was ready to enter upon the discharge of his duties, in order to ascertain what he was to hold, he was compelled to see what was thus devised and bequeathed to James. The gift of the Baltimore property, "for the purpose of securing to him a liberal education," did not, of itself, create a condition; for, as was said in *Kilpatrick v. Baltimore*, 81 Md. 193, 27 L. R. A. 645, 31 Atl. 806, "a condition will not be

raised, by implication, from a mere declaration in the deed that the grant is made for a special and particular purpose, without being coupled with words appropriate to make such a condition," and the same principle applies to a devise or bequest. What, then, is there to be found elsewhere in the will to overcome the language used by the testatrix which so strongly indicates her intention to vest the property in her grand-nephew? The trust created by paragraph 11 was simply that the trustee should rent, manage, and take charge of the real estate, keep it in repair, pay taxes and expenses incidental thereto, also to keep the personal estate properly invested, and collect the interest, "and devote the net income arising therefrom to the special object mentioned above, viz., the education of James Pike Ellicott." The testatrix also provided for the investment and accumulation of any surplus income not required in the earlier years of his minority "for his education and maintenance," so it could be used when his collegiate expenses would be increased. There is therefore nothing in that to cast any doubt on her intention, so clearly previously expressed, as to his taking the estate. When she made her will, and indeed when she died, he was not yet fifteen years of age, and it was therefore eminently proper that the estate should be left under the control of a trustee until James reached his majority; and as she intended that the income should be used for his education and maintenance, and fixed twenty-five years of age as the time within which he was to complete his collegiate course, it was far better to at once name a trustee, instead of giving his guardian control, especially as his father was her executor and trustee.

The only other provision in the trust which reflects upon the question we are to determine, besides what is in paragraph 5, of which we will speak presently, is "In case the above directions have been carried out, upon my said nephew James Pike Ellicott attaining the age of twenty-five years I desire my trustee to deliver over the property and estate into his hands and possession." The direction "to deliver over the property and estate into his hands and possession," in so far as it reflects upon the question whether the estate was intended by the testatrix to be vested in her nephew, indicates that it was. She did not direct him, under those circumstances, to convey property to her nephew, the title to which up to that time was not vested in him, but simply to deliver over and give the possession of "the property and estate;" which imports that she considered it already vested in him, but that he, up to that time, was to be kept out of the possession of the *corpus*. Nor did she make any provision for the trustee conveying it to any other person or persons if her directions had not been carried out. She therefore could not have supposed that the property was vested in the trustee, excepting such legal title as was in him by intendment of law, as would enable him to discharge his duties as such trustee. She

certainly did not intend that, from the time of her death until the period when her grand-nephew would reach the age of twenty-five years, if he lived that long, the beneficial interest in the estate should be in the residuary devisees; for there is nothing in the will to suggest that, and as she devised nothing to the trustee, and the legal title was only in him by intendment of law, she must have intended that the equitable interest should be somewhere, and the only possible place indicated by her will where it should be, if not in the trustee, was in James Pike Ellicott, so long as he had not forfeited his right to it.

The provision, "in case the above directions have been carried out," undoubtedly refers to the directions contained in paragraph 5. They are that James shall remain in a good preparatory school in Massachusetts until he was fitted to enter either Harvard or Yale, "where he shall remain until he has finished the collegiate course. If, however, through his own disinclination or incapacity, or the indifference of his parent or guardian, he shall fail to carry out these intentions, then the money which has been left to him for this purpose shall pass away from him entirely, into the body of my estate." The latter part of the clause just quoted adds strength to the appellees' contention that the title to the equitable estate in this property vested in James at the death of the testatrix. It is that "the money which has been left to him for this purpose shall pass away from him entirely;" thus not only speaking of the money "which had been left to him," but when she said it "shall pass away from him" it seems to us that the necessary inference is that it was, in her opinion, in him, and hence could "pass away from him" upon his failure to carry out her intentions as therein expressed. At the argument the meaning of the word "money" in the connection in which it is used was discussed; the appellants contending that its usual and ordinary meaning should be given it, and that its use showed that the intention of the testatrix was not to give him any estate in the *corpus* unless and until he graduated, but only to give him in the meantime so much of the income as was necessary to enable him to become entitled to the *corpus* by the time he should arrive at the age of twenty-five years, by his graduation at or before that time. They say he took an equitable interest in the income, subject to the condition precedent that he should finish his collegiate course at Harvard or Yale by the time he arrived at the age of twenty-five years, and, if he graduated prior to that time, the equitable estate in the income, subject to such condition precedent, was to become a vested estate in the *corpus*, of which, upon his arrival at the age, he was to receive the actual possession, freed from the trust. Although the will furnishes some ground for the contrary contention, it may be conceded that the word "money," thus used by the testatrix, is equivalent to "income," and only meant that. In paragraph 3, in making certain provisions for her sis-

ter Rebecca, the testatrix apparently used the word in its ordinary sense, and she may have intended to do so in this paragraph. But we cannot admit that it at all follows that this use by her of the term "money" shows any intention on her part that he should not have a vested equitable interest in the estate. Until he was twenty-five he was only to have the possession and use of the income,—the money. That is all that owners of equitable estates in properties held by trustees usually have. There are, of course, cases in which they may have the enjoyment and use of the *corpus*; but if the legal title of real and personal property is held by a trustee for the beneficial use of another, who gets the income, the latter ordinarily has an equitable vested interest, which is liable for his debts, and, if not limited to life or some definite period, it will descend to his heirs at law or next of kin. Generally, if the interest from the investment of a fund or the profits of an estate be given by will, the devisee will take the fund or estate absolutely, although that does not obtain when the will shows a different intent (*Cooke v. Husbands*, 11 Md. 506); and we cannot see how this direction as to the money passing away from him can be any evidence of the intention of the testatrix not to give him a vested equitable estate, subject to be defeated by the nonperformance of the condition. "It makes no difference, as to the vesting, whether the legal estate be devised to trustees, who are required to convey according to the directions of the will, or whether the interest is provided to take effect without the intervention of trustees, nor that the trust provides for the accumulation of income until the period of payment or distribution arrives." *Taylor v. Mosher*, 29 Md. 451. In this same paragraph, as we have seen, the testatrix had used language which imports an intention to make an absolute gift, as she afterwards did in the tenth paragraph as to the Maine property; and when she provided, in paragraph 11, that a trustee should hold the property in trust, to use the net income for the education and maintenance of her nephew, it would be placing a very narrow construction on the whole will to hold that she only intended to give him an equitable interest in the income until he graduated, and then such interest was to become a vested estate in the *corpus*.

The only causes of his failure to carry out these instructions, which should work the result mentioned, assigned by the testatrix, are "his own disinclination or incapacity, or the indifference of his parent or guardian." The one relied on by the appellants is his "incapacity," and they contend that his death, which prevented him from graduating, whatever he might have done if his life had been spared, is included in that term. But while it is true that the word "incapacity" may sometimes apply to physical as well as mental conditions, was it used by the testatrix in that broad sense? It was used in connection with the education of this young man,—with reference to his power to complete the collegiate course provided at Har-

vard or Yale. It was not a question whether he would have the necessary funds, for those she was providing, nor the inclination to study, as that was included by another term, but it evidently applied to his mental powers. If, while he was at the preparatory school, his teacher had said of him that he did not have the "capacity" to graduate at Harvard, would that have been understood to have referred to any other than his mental capacity? If when he entered Harvard it had been said, "He will fail to graduate by reason of his incapacity," would it have been thought to refer to his death before graduating? Of course, his death would cause him to be incapable of graduating; but that is not the term that would be used if it was meant that he would not graduate because he would die before doing so. If the testatrix had meant that "if for any reason whatever" he did not graduate he should forfeit the estate, it would have been easy to say so, and it is only reasonable to suppose that if she had intended that, if his death prevented his graduation, it should be forfeited, she would not only have said so in terms that would have admitted of no doubt, but she would probably have directed where it should in that event go. She did so in other instances, and she was evidently a woman of considerable intelligence, and with very decided convictions as to how her estate should go.

The concluding clause of paragraph 11, "But I specially desire my said grandnephew not to sell the Robbinston place till he shall attain the age of twenty-five years, as it is my earnest wish to keep the property as long as possible in the family, and have it go with the name," is relied on by the appellees. When that is taken in connection with the tenth paragraph, in which she gave him that property in fee simple, it certainly does afford some evidence of her intention that the property should be vested in him before he was twenty-five years of age; but if the appellants' theory was correct, that she intended him to have a vested equitable estate as soon as he graduated, although he was not twenty-five, it is possible that she might have for that reason placed that provision in the will; and therefore, in considering the question, we have not attached as much importance to it as might otherwise have been done.

Taking the whole will into consideration, our conclusion is that the testatrix intended to vest an equitable estate in the properties mentioned in her grandnephew at the time of her death, subject to be divested by the nonperformance of the condition imposed by her, which was a condition subsequent, and not precedent. In that conclusion we are supported by the settled rules of construction of wills and the presumptions of law. It undoubtedly favors the early vesting of estates, as has often been said by this and other courts, but nowhere more emphatically than in *Taylor v. Mosher*, 29 Md. 450. The same words may be used to create a condition precedent as a condition subsequent, "but courts are averse to construing condi-

tions to be precedent when they might defeat the vesting of estates under a will." *Pennington v. Pennington*, 70 Md. 442, 3 L. R. A. 822, 17 Atl. 333. "It is equally well settled that if the thing to be done does not necessarily precede the vesting of the estate in the grantee, but may accompany or follow it, and may as well be done after as before the vesting of the estate, the condition is subsequent." *Re Stickney*, 85 Md. 102, 35 L. R. A. 696, 36 Atl. 656. Indeed, "in doubtful cases, the disposition of the courts is to construe language as creating a trust or covenant, rather than a condition." *Kilpatrick's Case*, 81 Md. 193, 27 L. R. A. 645, 31 Atl. 806; 6 Am. & Eng. Enc. Law, 2d ed. p. 502. Then the presumption is that the testatrix used the words of gift we have referred to in their usual sense, unless the contrary clearly appears, which is not the case.

Having determined that this was a condition subsequent, the estate was not divested by the death of James, who was engaged in fulfilling the condition when stricken down. The performance becoming impossible by the act of God, it is dispensed with, and the estate vested absolutely. 6 Am. & Eng. Enc. Law, 2d ed. p. 506; *Hammond v. Hammond*, 55 Md. 575. In that case the testator left the use of \$2,500 to his brother, "for that he, the said C. L. H., shall look after and take care of our beloved brother R. while he shall live, and bury him at his death." Rezin died before the testator, and it was held that the condition annexed to the bequest was a condition subsequent, and, its performance being made impossible by the act of God, the legatee took unconditionally. In *Merrill v. Emery*, 10 Pick. 511, the testator left a legacy to his widow, upon condition that she should educate and bring up his granddaughter until she arrived at the age of eighteen years or married. The widow died shortly after the testator, and it was held to be a condition subsequent, and that the nonperformance was excused by the death of the widow. In *Burnham v. Burnham*, 79 Wis. 557, 48 N. W. 661, the testator had by his will made certain bequests to each of his children, including Daniel, who was an inebriate and spendthrift, and afterwards added a codicil by which he declared that his son Daniel should not have any part or interest in his estate unless, within five years after the testator's decease, he reformed, and became a sober and respectable citizen, of good moral character. He directed that, "in the event that he shall at that time have become a sober man and have a good moral character," in the opinion of the executors, "I give, devise, and bequeath to him, and order paid over to him, one half of the property and estate bequeathed to him in my will," and that, if he continued to remain sober, etc., for the further period of five years, the other half should be paid him. He also directed his executors to hold and retain this share of his estate in trust until the expiration of five years after his death, and thereafter, unless his son had reformed, to pay to the children of Daniel certain sums per annum, and, if he did not reform within 48 L. R. A.

ten years, then to pay the fund to Daniel's children. In less than a year after the testator's death Daniel died. It was held that the estate vested in Daniel, subject to the conditions subsequent, and was not divested by his death, but became absolute, and descended to his widow and children, as provided by the statute in cases of intestate estates. Many other cases might be cited illustrating the tendency of the courts to hold conditions to be subsequent, rather than precedent, and to declare estates to be vested, but it is unnecessary. The article in 6 Am. & Eng. Enc. Law, on *Conditions*, cites many of them. We are then of the opinion that this estate, having vested in James Pike Ellicott, subject to the condition subsequent, the nonperformance of which is excused by his death, descended to his heirs at law and next of kin, and the decree will be affirmed. But as it was proper, for the protection of the trustee and to settle the rights of the parties, to have the will construed, we will direct that the costs be paid out of the estate.

Decree affirmed, costs to be paid out of the estate.

ECONOMY SAVINGS BANK, Appt.,

v.

Douglas H. GORDON et al.

(.....Md.....)

1. A savings bank is not charged with notice of infirmity in a mortgage an assignment of which it takes as security for a loan, by the fact that its treasurer is cashier of the bank at which the mortgagee, mortgagor, and a corporation of which they are members, and to raise money for which the mortgage is executed, keep their accounts, so that he might have learned the disposition made of the money borrowed.
2. A bona fide purchaser for value and without notice of a mortgage given without any consideration, and which is not accompanied by any negotiable obligation, holds it as a valid encumbrance as against creditors of the mortgagor, since his equities are at least equal to theirs, and in such case the legal title prevails.

(January 10, 1900.)

A PPEAL by defendant from a decree of the Circuit Court of Baltimore City in favor of plaintiffs in a suit brought to set aside a mortgage covering property belonging to Cecil R. Atkinson as having been executed in fraud of his creditors. *Reversed.*

The facts are stated in the opinion.

Messrs. Daniel L. Brinton and John P. Poe, for appellant:

A bona fide holder for value without notice is preferred to creditors.

Smith v. Pattison, 84 Md. 341, 35 Atl. 963; *Totten v. Brady*, 54 Md. 170; *Fuller v. Brewster*, 53 Md. 359; *Cooke v. Cooke*, 43 Md.

NOTE.—As to rights of a bona fide purchaser of a mortgage, see also *Patterson v. Rabb* (S. C.) 19 L. R. A. 831, and *Holmes v. Gardner* (Ohio) 20 L. R. A. 329.

530; *Glenn v. Grover*, 3 Md. Ch. 29; *Ander-son v. Tydings*, 3 Md. Ch. 167; *Swan v. Dent*, 2 Md. Ch. 111, note 9, Brantley's ed.

By bona fide purchasers we mean persons who have either paid or advanced money upon the faith of the grantor's actual title to the property transferred, or who have accepted specific property in payment of a specific debt.

Tyler v. Abergh, 65 Md. 20, 3 Atl. 904; *Sleeper v. Chapman*, 121 Mass. 404; *Phelps v. Morrison*, 24 N. J. Eq. 195; *Spicer v. Robinson*, 73 Ill. 519; *Sydnor v. Roberts*, 13 Tex. 598; *Smart v. Bement*, 4 Abb. App. Dec. 253; *Thompson Nat. Bank v. Corvine*, 89 Fed. Rep. 774; *Smith v. Pattison*, 84 Md. 341, 35 Atl. 963.

The policy of the law which favors the security of titles as conducive to the public good would be subverted if a creditor having no lien upon the property should yet be permitted to avail himself of the priority of his debt to defeat such a bona fide purchaser.

1 Story, Eq. Jur. 13th ed. p. 387.

It is not enough that an overprudent and cautious person, if his attention had been called to the circumstance in question, would have been likely to seek an explanation of it.

Briggs v. Rice, 130 Mass. 50; *Flagg v. Mann*, 2 Sumn. 551, Fed. Cas. No. 4,847; *Buttrick v. Holden*, 13 Met. 355; *Acer v. Westcott*, 46 N. Y. 384, 7 Am. Rep. 355.

A bona fide purchaser for value without notice is protected, and he cannot be adjudged to have notice of anything apparently improbable and which diligent and reasonable inquiry would not disclose.

Seldner v. McCreery, 75 Md. 287, 23 Atl. 641; *Lincoln v. Quinn*, 68 Md. 299, 11 Atl. 848; *Biddinger v. Wiland*, 67 Md. 359, 10 Atl. 202; *Abell v. Brown*, 55 Md. 217.

Where a conveyance has been made with the intent to defraud creditors of the grantor, so that it would be voidable as against the grantee, but this grantee has in turn conveyed to a bona fide purchaser for value, the remedial rights of the creditors to have the original and fraudulent transfer set aside are then cut off, and the purchaser has a complete defense against their claim.

2 Pom. Eq. Jur. § 777; *Birdsall v. Russell*, 29 N. Y. 250; *Johnson v. Hess*, 126 Ind. 298, 9 L. R. A. 471, 25 N. E. 445; *Bigelow, Fr. p. 399*; *Agra Bank v. Barry*, Ir. Rep. 6 Eq. 125.

A bona fide purchaser for value without notice of a secret equitable lien or an unrecorded equitable title is considered as having an equal claim to the consideration of a court of equity, with the holder of the equitable lien or title. His legal title will therefore prevail.

Phelps, Eq. § 241; *Ohio L. Ins. & T. Co. v. Ross*, 2 Md. Ch. 25.

The purchaser, to be charged with notice, must have knowledge of some fact to put him on inquiry as to the existence of some right or title in conflict with that which he is about to purchase.

Baker v. Bliss, 39 N. Y. 74; *Williamson v. Brown*, 15 N. Y. 362; *Birdsall v. Russell*, 29 N. Y. 250; *Willis v. Vallette*, 4 Met. (Ky.) 186; *David v. Birchard*, 53 Wis. 495, 10 N. W. 557.

48 L. R. A.

The creditors of the person against whom the chose in action exists have no concern with any intent of such person to defraud them, though the holder of the chose be equally guilty, after the chose has been assigned for valuable consideration without notice of the fraud.

DeWitt v. Van Sickle, 29 N. J. Eq. 209; *Sleeper v. Chapman*, 121 Mass. 404; *Bigelow v. Smith*, 2 Allen, 264; *Welch v. Priest*, 8 Allen, 165; *Logan v. Brick*, 2 Del. Ch. 206.

An assignee of a mortgage is a purchaser, and is entitled to the protection of the recording acts as much as a purchaser of the equity of redemption.

1 Jones, Mortg. § 475; *Westbrook v. Gleason*, 79 N. Y. 23; *Decker v. Boice*, 83 N. Y. 215; *Union College v. Wheeler*, 59 Barb. 585; *Pierce v. Fauscoe*, 47 Me. 513.

It does not avail to show that the debtor's assignment was fraudulent, unless it be shown that the assignee participated in the fraudulent intent, or took it under such circumstances that he is chargeable with notice of the fraudulent intent on the part of the assignor.

1 Jones, Mortg. § 828; *Tantum v. Green*, 21 N. J. Eq. 364.

A bona fide assignee for value of a mortgage of land may enforce it by foreclosure, although it was originally given as a consideration for a transfer of the land fraudulent as to creditors, and such transfer has been adjudged void.

Smart v. Bement, 4 Abb. App. Dec. 253.

The burden of proof that the assignee took the mortgage with notice, or that he is not a bona fide purchaser, is on the party who sets up the fraud.

Marshall v. Billingsly, 7 Ind. 250; *Farmers' Bank v. Douglass*, 11 Smedes & M. 469; *Langdon v. Keith*, 9 Vt. 299.

Messrs. Taylor & Keech and Foster & Foster, for appellees:

Having proved the mortgage fraudulent, it is void with respect to the rights of Atkinson's creditors, in whose hands it may be found, and no assignee of it can obtain a better title than Steers, the original mortgagee, had.

Inasmuch as Atkinson had creditors at the time the mortgage was given, the only effect of such a voluntary or covinous conveyance could be to hinder them in obtaining the satisfaction of their debts. Consequently, at their suit the mortgage must be held to be void with respect to their rights under the statute of fraudulent and voluntary conveyances.

13 Eliz. chap. 5, Alexander's British Statute, p. 378.

A mortgage has no existence apart from the debt which it is given to secure. It is a mere accessory or incident to the debt; and so far is it inseparably united to the debt (the one being in truth appurtenant to the other) that a separate alienation of either cannot be made, and an assignment of the debt carries in equity the mortgage; and in such a case the mortgagee is held to be a trustee for the assignee of the debt.

Clark v. Levering, 1 Md. Ch. 178; *Wash-*

ington F. Ins. Co. v. Kelly, 32 Md. 421, 3 Am. Rep. 149; *Byles v. Tome*, 39 Md. 461.

This pretended debt, even at best, can only be treated as a mere non-negotiable chose in action; and the assignee of it can in no way obtain any superior title to that of his assignor, and can only take subject to all the equities and defenses to which it is, or might be, subject in the hands of the original pretended creditor.

Harwood v. Jones, 10 Gill & J. 404; *Eversole v. Maull*, 50 Md. 95.

When a mortgage "stands alone," without an instrument evidencing the debt, or is given to secure a non-negotiable instrument, such as a single bill, or where it is given to secure a note which is indorsed over after maturity, then it passes to an assignee like any other chose in action which is not protected by the law merchant, and the assignee takes only such title as his assignor had.

1 Jones, *Mortg.* §§ 341 *et seq.*; *Carpenter v. Logon*, 16 Wall. 271, 21 L. ed. 313; *Judge v. Vogel*, 38 Mich. 569; *Castle v. Castle*, 78 Mich. 298, 44 N. W. 378; *Corbett v. Woodward*, 5 Sawy. 403, Fed. Cas. No. 3,223; *Westfall v. Jones*, 23 Barb. 9; *Schafer v. Reilly*, 50 N. Y. 61; *Union College v. Wheeler*, 61 N. Y. 88; *Crane v. Turner*, 67 N. Y. 437; *Hill v. Hoole*, 116 N. Y. 289.

This rule prevails in Maryland.

Central Bank v. Copeland, 18 Md. 305, 81 Am. Dec. 597; *Timms v. Shannon*, 19 Md. 296, 81 Am. Dec. 632; *Cumberland Coal & I. Co. v. Parish*, 42 Md. 598.

On petition for rehearing.

Unless all the knowledge gained by Schott as a man, during the course of the transaction, was utterly and completely blotted out of his mind on every occasion when he acted as treasurer of the Economy Savings Bank in this matter, then the Economy Bank knew, in the only way it could know,—i. e., through one of its corporate officers,—everything that this court and the lower court knew when they held that there was no consideration for the mortgage from Cecil R. Atkinson to A. J. Steers, and that it was a mere scheme for raising money to stave off the pending insolvency of the concerns in which the Atkinson brothers were interested.

4 *Thomp. Corp.* §§ 5189 *et seq.*; 1 *Morawetz, Priv. Corp.* §§ 540b, 540c; *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *Hoffman Steam Coal Co. v. Cumberland Coal & I. Co.* 16 Md. 456, 77 Am. Dec. 311.

Schmucker, J., delivered the opinion of the court:

On July 30, 1897, Cecil R. Atkinson executed a mortgage upon a warehouse owned by him, on South Howard street, in Baltimore city, to Alonzo J. Steers, which recited that he was indebted to Steers "in the full sum of fifteen thousand dollars, payable February 10th, 1898," and that it was executed to secure the payment of this debt, with interest thereon. The mortgage was in due form, was regularly acknowledged, and had attached to it a proper affidavit as to the bona fides of the consideration therein stated, and it was recorded on the day after its date. No note accompanied the mortgage, but it

contained a covenant to pay the mortgage debt and interest. About the same time Steers, the mortgagee, applied to the American National Bank to lend him \$6,000 offering to assign the mortgage as security for the loan. Schott, the cashier of the bank, explained to him that a national bank could not lend money upon real-estate security, but informed him that the appellant savings bank, of which he (Schott) was treasurer, had some money on hand, and would lend him \$5,000 upon the mortgage, if the security proved to be ample, but the matter must first be referred by the appellant to a committee, who would investigate and report upon the security. Steers assented to the terms suggested by Schott, and a committee from the appellant went upon the mortgaged premises and examined them, and reported favorably upon the loan, provided there were no encumbrances upon the property prior to the mortgage. The matter was then referred by the appellant to its attorney to examine the title, Steers placing the mortgage in its hands for that purpose. The attorney examined the title, and reported favorably upon it, whereupon the appellant, on August 6, 1897, lent the \$5,000 to Steers, and at the same time took from him an assignment of the mortgage as security for the loan. The \$5,000 so loaned was given to Steers in the check of the appellant to his order upon the American National Bank, in which the appellant had on deposit at that time more than the amount of the check. Steers indorsed the check to the Eastern Electric Company, which at once deposited it to its own credit in the bank upon which it was drawn, and the \$5,000 was passed to the credit of the electric company, and charged to the appellant upon the books of the bank. The money was then used by the electric company, to the extent of \$2,000, in the payment of a loan which had been made by one Myerdyck upon a previous unrecorded assignment of the Atkinson mortgage, and the remaining \$3,000 was almost entirely paid to the American National Bank in satisfaction of obligations due to it by the Eastern Electric Company or by George H. Atkinson, a brother of Cecil R. Atkinson, the mortgagor. Steers subsequently assigned his equity in the \$15,000 mortgage to one C. S. Hinchman as collateral security for a loan of \$2,000. It appears from the record that Cecil R. Atkinson, the mortgagor, and his four brothers, William J., George H., Harry, and Richard F., were promoters by profession, and together operated and controlled the Eastern Electric Company and other kindred corporations, all of which proved to be speculative enterprises, and soon became insolvent and passed into the hands of receivers. Steers, who was put upon the stand by the appellees, testified that the consideration for the \$15,000 mortgage from Atkinson to him consisted of \$10,000 of Best Telephone Company bonds and \$5,000 of Best Telephone Company stock, which he had let Atkinson have prior to the execution of the mortgage; but his testimony was so inconsistent and contradictory in its differ-

ent portions that it cannot be accepted as reliable. The whole testimony touching the consideration for the mortgage leads to the conclusion that there was no substantial consideration for it, but that it was executed to provide a means of raising money to assist the Atkinson brothers in staving off the impending insolvency of the Eastern Electric and Best Telephone Companies, and the other enterprises which they were then attempting to keep afloat. On December 29, 1897, nearly five months after the loan of the \$5,000 to Steers by the appellant, and the assignment to the latter of the mortgage, Douglas H. Gordon, one of the appellees, obtained a judgment for \$5,442.30 against the mortgagor, Cecil R. Atkinson, and his brother William J. Atkinson, on a note given by them to him on November 13, 1896, for a loan which he then made to them upon Best Telephone Company bonds and stock as collateral. Gordon testified that at the time he made this loan William J. Atkinson stated that his brother Cecil R. owned the Howard street warehouse, and he (Gordon) suggested that he be given a mortgage on the warehouse as security for the loan about to be made by him. W. J. Atkinson declined to procure the mortgage, saying that it would injure his brother's credit, but stated that Gordon would have the benefit of the property by having its owner, Cecil R. Atkinson, upon the note. Gordon testified that he relied on this statement of William J. Atkinson in making the loan. Harry W. Boureau, the other appellee, obtained a judgment for \$503.80 against William J. Atkinson and Cecil R. Atkinson on September 29, 1897. On December 18, 1897, after Boureau had obtained his judgment, and after Gordon had sued the Atkinsons, but before he had gotten his judgment, the appellees instituted the present case, which is a creditors' suit in equity against the appellant, Cecil R. Atkinson, Steers, and Hinchman. The bill of complaint alleged that the mortgage from Atkinson to Steers, and the successive assignments of it by him to the appellant and Hinchman, were all without consideration, and fraudulent, and prayed to have them declared void. The appellant answered the bill, denying its material allegations, and setting up its title to the mortgage to the extent of the \$5,000 loaned on it, and interest, as a bona fide purchaser for value, without notice of any infirmity in it. Neither Hinchman nor Steers answered, and a decree *pro confesso* was entered against them. The case against the appellant came regularly to a hearing, and the court below at first filed an opinion sustaining the appellant's claim; but upon a rehearing of the case the learned judge changed his views of the case, and filed another opinion, of a contrary tenor, and signed the decree appealed from, denying the appellant's claim to a lien on the property, and directed it to be sold for the benefit of the creditors of the mortgagor. In his second opinion the learned judge held, upon the authority of the *Cumberland Coal & I. Co. Case*, 42 Md. 598, that the appellant, although he found it to be a bona fide purchaser for value of the mortgage, without notice,

was not entitled to a lien for its loan to Steers, and interest, made upon the faith of the mortgage, because the latter, not being accompanied by a negotiable obligation, was a mere chose in action, which the appellant must be treated as having taken subject to all equities that might have been urged against it in the hands of Steers, the mortgagee.

Under the facts of the case, the appellant must be regarded as a bona fide purchaser for value of the mortgage, without notice. It advanced its \$5,000 upon the mortgage in the ordinary course of business, after a careful inquiry into the value of the property, and an investigation of the title upon the public records. It was not concerned in the disposition made by Steers of the borrowed money, not one dollar of which went back into its hands, or was expended for its benefit. It was not put upon inquiry as to the bona fides of the mortgage by the fact that Schott, its treasurer, was also cashier of the American National Bank, where Steers and the Eastern Electric Company and one or more of the Atkinson brothers kept their accounts, and that he might have seen by an examination of the books of the bank what disposition was made of the borrowed money. There was in fact nothing in the use made of the money to suggest any infirmity in the mortgage.

The next question to be determined is, What are the rights of the appellant, as such bona fide purchaser, against the claims of the appellees? As there was no attempt by Steers to assign the mortgage debt to one person, and the mortgage to another, we are not called upon to consider the relative equities of one who claims as assignee of the debt and another who claims as assignee of the mortgage, as the court were in the cases of *Clark v. Leclercq*, 1 Md. Ch. 178, and *Byles v. Tome*, 39 Md. 461, which were in part relied on by the appellees. What we have to consider is the attitude of the appellant, as the bona fide purchaser of both debt and mortgage, towards the creditors of the mortgagor, who were such at the time the mortgage was made. The mortgage was not given to secure an actual indebtedness of \$15,000, as it professes on its face to have been. Its execution was evidently a means adopted by the parties to it to clothe Steers, the mortgagee, with the appearance of a good title to a large debt secured by a valid mortgage, in order to enable him to raise money upon it. It was not fraudulent, in the sense that its execution had been procured by fraud, misrepresentation, or constraint practised on the owner of the land who executed it, as was the case in *Central Bank v. Copeland*, 18 Md. 305, 81 Am. Dec. 597, and *Cumberland Coal & I. Co. v. Parish*, 42 Md. 598, in each of which the defrauded mortgagor was protected in equity against the assignee of the fraudulent mortgage. In the present case the execution of the mortgage was the voluntary and deliberate act of the mortgagor, from which he had no equity to be relieved, even as against the mortgagee. *Snyder v. Snyder*, 51 Md. 77; *Cushwa v. Cushwa*, 5 Md. 44. We have therefore no question be-

fore us of subjecting the rights of the appellant, as assignee of the mortgage, to any equities to which the assignor would have been liable in favor of the mortgagor; for here it is plain that there were no such equities. The present mortgage is to be regarded as fraudulent only in the sense that, having been made to secure a simulated, and not a real, indebtedness, it operated to hinder, delay, or defraud the creditors of the mortgagor, and was therefore obnoxious to the provisions of the statute of 13 Eliz. chap. 5. The real question in the case is thus narrowed down to a comparison of the relative strength of the claims on the mortgaged property of the appellant, as assignee of the specific lien of the mortgage, and the appellees, as subsisting general creditors of the mortgagor, having reduced their debts to judgments after the assignment of the mortgage had been made. If the conveyance under consideration had been a fraudulent deed, instead of a mortgage, the right of the appellant, as a bona fide purchaser, to a lien on the property for the \$5,000 advanced, and interest, could not seriously be questioned. *Cone v. Cross*, 72 Md. 102, 19 Atl. 391; *Hull v. Deering*, 80 Md. 432, 31 Atl. 416; *Hinkle v. Wilson*, 53 Md. 293; *Worthington v. Bullett*, 6 Md. 198. The broader and more general proposition that a bona fide purchaser, without notice, under a deed from a fraudulent grantee, takes a good title, which is not impaired by the fact that judgments were obtained against the fraudulent grantor prior to the conveyance by the fraudulent grantee, is well sustained by authority. 4 Kent, Com. 464; *Sleeper v. Chapman*, 121 Mass. 404; *Phelps v. Morrison*, 24 N. J. Eq. 195; *Totten v. Brady*, 54 Md. 170; *Swan v. Dent*, 2 Md. Ch. 111 (note 9, Brantley's ed.); Wait, Fraud. Conv. § 369. In the case of *Farmers' Bank v. Brooke*, 40 Md. 257, the title of a bona fide purchaser of a mortgage note to the lien of the mortgage securing it was upheld against the suit of the creditors of the mortgagor, although it was admitted that the note and mortgage had been given in prejudice of the rights of his creditors, and would have been void as against them in the hands of the mortgagee. The fact that the mortgage in that case was accompanied by a promissory note distinguishes it from the case at bar, but the circumstance of the negotiability of the mortgage debt was not expressly mentioned or dwelt upon in the court's opinion. See also *Danbury v. Robinson*, 14 N. J. Eq. 218, 219, 82 Am. Dec. 244.

A bona fide mortgagee from a fraudulent grantee has in a number of cases been held to be entitled to protection, to the extent of the debt due him, against the creditors of the fraudulent grantor, upon the ground that a mortgagee is to be treated as a purchaser, to the extent of his interest, within the meaning of the term "purchaser" as used in statutes such as that of 13 Eliz. chap. 5; and this where the mortgage was not accompanied by a negotiable instrument. *Ledyard v. Butler*, 9 Paige, 136, 137, 37 Am. Dec. 379; *Murphy v. Briggs*, 89 N. Y. 451; *Shorten v. Drake*, 38 Ohio St. 76; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41, 14 Am. Rep. 173. 48 L. R. A.

If the mortgage in the present case had been made directly from Cecil R. Atkinson to the appellant, no question could be made by Atkinson's creditors as to the appellant's lien upon the mortgaged property to the extent of the money advanced bona fide upon the faith of the property at the time the mortgage was made. When, therefore, Atkinson clothed Steers with the appearance of a good mortgage title of record to the property, for the purpose of enabling him to raise money upon the mortgage, and the appellant, relying upon this appearance of good title in Steers, after a careful examination of the public records and a failure to find any prior encumbrances upon the property, parted with its money in good faith, it is entitled to the favor of a court of equity in the consideration of the relative equities of the parties to the controversy. This court, in *Seldner v. McCreery*, 75 Md. 296, 23 Atl. 643, said: "Where a title is perfect on its face, and no known circumstances exist to impeach it or put a purchaser on inquiry, one who buys bona fide and for value occupies one of the most highly favored positions in the law." The appellant did not trust to the personal responsibility of the mortgagor, but lent its money upon the faith of the particular property covered by the mortgage, and required an assignment of the mortgage at the time of so doing. On the contrary, the appellees trusted to the mortgagor, or to such other collaterals as he lodged with them; and the appellee Gordon, although he knew when he lent his money that Cecil R. Atkinson owned the Howard street warehouse, did not insist upon having a lien on it for his loan, but deliberately relied, so far as the warehouse was concerned, upon his right as an ordinary creditor of its owner. The equities of the appellant are at least equal to those of the appellees, and, having the legal title to the warehouse, it has the stronger claim thereon under the familiar principle that where equities are equal the legal title must prevail. Pom. Eq. Jur. § 417; Wait, Fraud. Conv. § 370; *Townsend v. Little*, 109 U. S. 512, 27 L. ed. 1015, 3 Sup. Ct. Rep. 357; *Black v. Cord*, 2 Harr. & G. 103; *Basset v. Noworthy*, 2 White & T. Lead. Cas. in Eq. 4th Am. ed. 1. In *Dyson v. Simmons*, 48 Md. 214, it was held, upon the authority of many cases there cited, that if a party makes, or affects to make, a mortgage which proves to be defective by reason of some informality or omission, even on the part of the mortgagee himself, the conscience of the mortgagor is bound, and equity will recognize and enforce the lien of the defective mortgage, and give it precedence over the subsisting creditors of the mortgagor, and also over judgments obtained against him after the date of the mortgage. General creditors have no lien on the property of the debtor, and a judgment is only a general lien, and is for that reason subordinate to the prior specific equitable lien of such a defective mortgage. The case at bar does not come directly within the principle asserted in the last-mentioned case, but it is certainly one in which, by reason of its peculiar facts, the conscience of the mortgagor was especially bound to the appellant;

and we think the same course of reasoning might well be applied, within proper limits, to the appellant's protection.

This court has frequently been called upon to assert and define the rights of the creditors of a grantor, as against a conveyance made by him which, by reason of inadequacy or want of consideration, or even by design, operated to hinder, delay, or defraud them. The court has not hesitated to strike down such conveyances at the suit of the creditor, holding that one cannot make a voluntary conveyance of his property, as against the rights of subsisting creditors, nor can he, as against such creditors, sell it for a consideration that bears no adequate relation to its real value. When, however, in such cases, the rights of parties, even if they were the immediate grantees under the conveyance, who had in good faith parted with value in reliance upon the conveyance, have had to be measured against those of the creditors, it has uniformly been held that, in order to do full justice to all the parties in such cases, a court of equity, in setting aside the deed, will allow it to stand as security for the consideration actually paid, and apply the balance to the payment of the vendor's debts. These propositions were distinctly upheld in the cases already cited of *Cone v. Cross*, *Hull v. Deering*, *Hinkle v. Wilson*, and *Worthington v. Bullitt*. We regard the principle of the last-mentioned cases, in none of which was the position of the party claiming under the conveyance strengthened by any element of negotiability in the subject-matter of the thing assigned to him, as properly applicable to the one at bar. The mortgaged property should be sold, and the proceeds of the sale, after deducting proper expenses, applied first to the payment of the \$5,000 lent by the appellant to Steers, with interest thereon, and then to

the payment of the creditors of Cecil R. Atkinson, the mortgagor, who have come or may come into the case, according to their legal priorities.

We do not mean by this decision to disturb the authority of the *Cumberland Coal & I. Co. Case*, upon which the learned judge below mainly relied in changing his opinion, nor that of the *Copeland Case*. In each of these cases the issue on trial was between the owner of property who had been fraudulently induced to execute a mortgage upon it, and an assignee of the fraudulent mortgage, and they were both cases of flagrant fraud in fact. The rights of the creditors of the grantor were not in issue in either case. In the *Cumberland Coal & I. Co. Case* the court asserted the proposition that the transfer of a mortgage is so far within the rule which applies to choses in action, that when the assignment is made without the concurrence of the mortgagor, as in that case, the assignee takes subject to the same equities and defenses to which the assignor was liable. We do not, however, understand the court, by what was said in that opinion, to intimate that, when the equities in behalf of the creditors of the mortgagor in such a case came to be asserted, their claims would be enforced without regard to the proposition, so frequently upheld by this court in setting aside fraudulent conveyances at the suit of the creditor of the grantor, that, in order to do justice to all parties in such cases, the conveyances would be allowed to stand as security for the consideration actually paid on the faith of it by the party holding the legal title under it.

Decree reversed, and cause remanded for further proceedings in accordance with this opinion.

Rehearing denied.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Henry M. NARRAMORE, *Plff. in Err.*,
v.

CLEVELAND, CINCINNATI, CHICAGO, &
St. LOUIS RAILWAY COMPANY.

(96 Fed. Rep. 298, 37 C. C. A. 499.)

1. The provision of a penalty for violation of a statute enjoining upon railroad companies the duty of blocking switches does not make that remedy exclusive of actions by persons injured by the neglect to do so, unless that intention is to be inferred from the whole purview of the statute.

2. Continuance, without complaint, in service of a railroad company with knowledge that it has not complied with a statute requiring under penalty the blocking of switches, does not constitute an assumption of risk of injury therefrom.

3. Assumption of risk is a term of the contract of employment, expressed or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of his duty shall be at his risk.

4. The courts will not enforce or recognize an agreement, express or implied, on the part of a servant to waive the per-

NOTE.—*Liability of an employer for injuries received by servants owing to the want of blocking at switches.*

I. Want of blocking not negligence per se apart from statute.

II. Statutes requiring frogs, etc., to be blocked.

III. Want of blocking considered as a risk assumed by the servant.

I. Want of blocking not negligence per se apart from statute.

In common-law actions the liability of railroad L. R. A.

way companies for failing to provide blocking in frogs and similar places on their tracks, where there is danger that the feet of employees may be caught while they are engaged in the performance of their duties, has always been treated as primarily an open question of fact, the difference of opinion disclosed by the decisions of courts of review having reference, in the first place, to the question whether a want of blocking is a circumstance which of itself justifies the inference of negligence, and, in the next place, to the proper weight to be

formance of a statutory duty imposed on the master for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution.

5. An employee's contributory negligence is a defense to an action founded on a violation of the statutory duty of a railroad company to block guard rails and frogs.

(July 5, 1899.)

ERROR to the Circuit Court of the United States for the Southern District of Ohio, Western Division, to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Before Taft and Lurton, Circuit Judges, and Thompson, District Judge.

attributed to the evidence relied upon to support or rebut this inference.

A finding that the absence of blocking imported negligence was upheld in *Sherman v. Chicago, M. & St. P. R. Co.* (1885) 34 Minn. 259, 25 N. W. 593.

In *Missouri P. R. Co. v. Baxter* (1894) 42 Neb. 793, 60 N. W. 1044, the court did not doubt that the failure of the company to block its frogs was evidence of negligence, but held that the petition did not state facts sufficient to constitute a cause of action, since there was no allegation that the servant did not know, and was excusably ignorant, of their condition.

Compare also *Rush v. Missouri P. R. Co.* (1887) 38 Kan. 129, 12 Pac. 582. A case which tends to support the same view is *Union P. R. Co. v. James* (1896) 163 U. S. 485, 41 L. ed. 236, 16 Sup. Ct. Rep. 1109, but the actual rulings were on other points (see below); and the case of *Southern P. Co. v. Seley*, referred to below, seems to commit the supreme court to the theory that evidence merely of the want of blocking is not enough to establish culpability.

By most courts, however, it has been considered that the servant, in order to make good his right to recover damages for injuries from this cause, must do more than merely establish the want of blocking. That is to say, he has the burden of proving that frogs, etc., without blocking are not reasonably safe for the purpose for which they are designed (*Spencer v. New York C. & H. R. R. Co.* (1893) 67 Hun, 196, 22 N. Y. Supp. 100; *Chicago, R. I. & P. R. Co. v. Lonergan* (1886) 118 Ill. 41, 7 N. E. 55), and must show that, upon the whole, the use of the block would be prudent, and guard against dangers in one direction without the introduction of perils in another. *McGinnis v. Canada Southern Bridge Co.* (1882) 49 Mich. 466, 13 N. W. 819.

Evidence which is merely to the effect that, where blocks are used, it may be safer for the employees than where they are not used, will not justify the inference of negligence. *Chicago, R. I. & P. R. Co. v. Lonergan* (1886) 118 Ill. 41, 7 N. E. 55; *Huhn v. Missouri P. R. Co.* (1887) 92 Mo. 440, 4 S. W. 937.

A court will not pronounce a railway company negligent, where no proof is given that blocked frogs are a device in general use on other roads. *Spencer v. New York C. & H. R. R. Co.* (1893) 67 Hun, 196, 22 N. Y. Supp. 100.

Where the evidence is that the usage of railway companies in regard to blocking frogs is conflicting, some adopting and some rejecting that precaution. *McNeill v. New York, L. E. & 48 L. R. A.*

Statement by Taft, Circuit Judge:

This writ is brought to review a judgment for the defendant in a suit to recover damages for personal injuries sustained by plaintiff while in defendant's employ as a yard switchman in its railroad yards at Cincinnati, Ohio. While plaintiff was attempting to couple two freight cars, his foot was caught in an unblocked guard rail, and in his effort to extricate the foot his right hand was crushed between the drawheads of the cars, and injured so badly as to require amputation. Plaintiff had been in defendant's employ seven months. About one third of that time he was engaged during the daytime, and two thirds during the night. He had had nine years' experience as a railroad man. A railroad man of experience can see at a glance whether a guard rail or switch is blocked or not. There were a great many

W. R. Co. (1893) 71 Hun, 24, 24 N. Y. Supp. 610.

Nor where the utmost that is established by the plaintiff's evidence is that the device of blocking is still an experiment, and of doubtful practicability. *Chicago, B. & Q. R. Co. v. Smith* (1885) 18 Ill. App. 119; *Chicago, R. I. & P. R. Co. v. Lonergan* (1886) 118 Ill. 41, 7 N. E. 55.

In the latter case the court said: "It must appear, before the defendant can be held liable, that the switch or turn-out, as constructed and used, was not reasonably safe, or that it was not constructed with the usual care and skill. An employer is not required to change his machinery in order to apply or adopt every new invention. . . . The fact that a few of the railroads of the country have adopted this new device, or that the defendant has used it on a part of its road, is not enough to establish its utility, and establish negligence in every other road that adheres to the old system. The old system of constructing switches must be condemned." It was accordingly held error to instruct the jury that the law requires a railroad company to use reasonable and ordinary care and diligence in providing and maintaining reasonably safe structures, tracks, sidetracks, switches, turn-outs, etc., and if it fails to do so, and an injury happens in consequence thereof to an employee in the exercise of due and reasonable care, then the railroad company would be liable. The specific negligence charged in the declaration being the omission to use blocking, such an instruction would be understood by the jury as laying down the rule that the company was absolutely required to use blocks. (*Mulkey, Ch. J., and Shope and Magruder, JJ., dissent.*)

"An employer is not bound to make use of the newest mechanical appliances for the purpose of insuring the safety of his employees, especially if it does not appear that, on the whole, it would be advantageous to them. So, a railway company is not bound to block its frogs, particularly if it does not appear that, in doing so, it would not entail greater dangers than it would avert." *McGinnis v. Canada Southern Bridge Co.* (1882) 49 Mich. 466, 13 N. W. 819.

In *Southern P. Co. v. Seley* (1894) 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530, it was held error to refuse the following instruction: "The jury are instructed that, if they find from the evidence that the railroad companies used both the blocked and the unblocked frog, and that it is questionable which is the safest or most suitable for the business of the roads, then the use of the unblocked frog is not negligence, and the jury are instructed not to im-

guard rails and switches in the yards where plaintiff worked. With the exception of a few, where experimental blocks were used, the defendant did not use blocks in either its guard rails or switches. Plaintiff said he did not know that the guard rail in which his foot was caught was not blocked, and that he had not noticed whether the guard rails and switches of defendant generally were blocked or not. The plaintiff relied on the following statute of Ohio, passed March 23, 1888 (85 Ohio Laws, p. 105): "Every railroad corporation operating a railroad or part of a railroad in this state shall, before the first day of October, in the year one thousand eight hundred and eighty-eight, adjust, fill, or block the frogs, switches, and guard rails on its tracks, with the exception of guard rails on bridges, so as to prevent the feet of its employees from being caught therein. The work shall be done to the satisfaction of

the railroad commissioner. Any railroad corporation failing to comply with the provisions of this act shall be punished by a fine of not less than one hundred dollars, nor more than one thousand dollars." It appeared from the evidence that the defendant company was operating this railroad at the time of the passage of the act, and has operated it ever since. At the close of the evidence the trial court directed the jury to return a verdict for the defendant on the ground that defendant's failure to block its rails and switches was obvious, and the plaintiff must be held, notwithstanding the statute, to have assumed the risk of injury therefrom, and upon such verdict entered judgment for the defendant.

Messrs. Edgar W. Cist and Harlan Cleveland, with Mr. Charles M. Cist, for plaintiff in error:

pute the same as negligence to the defendant, and they should find for the defendant." In the lower court ((1890) 6 Utah, 319, 23 Pac. 751.) It had been held negligence not to have blocking.

A special finding that the frogs of the defendant company were the same as those used by the principal roads in the country was one of those upon which the plaintiff's right to recover was denied in *Lake Shore & M. S. R. Co. v. McCormick* (1881) 74 Ind. 440. To the same effect, see *Richmond & D. R. Co. v. Risdon* (1891) 87 Va. 335, 12 S. E. 786, declaring that to maintain unblocked frogs of a standard pattern is not negligence (dissenting, Lewis, J., whose opinion is noticed below), and *Smith v. St. Louis, K. C. & N. R. Co.* (1878) 69 Mo. 32, 33 Am. Rep. 484, holding a railroad company not liable for injuries caused by a guard rail of a pattern in general use, through a safe one might have been constructed.

[The following cases are a portion of the many that might be cited to the point that general usage is an absolute protection to the master: *Kehler v. Schwenk* (1891) 144 Pa. 348, 13 L. R. A. 374, 22 Atl. 910; *Titus v. Bradford, B. & K. R. Co.* (1890) 136 Pa. 618, 20 Atl. 517; *Corcoran v. Wanamaker* (1898) 185 Pa. 496, 39 Atl. 1108; *Allison Mfg. Co. v. McCormick* (1888) 118 Pa. 519, 12 Atl. 278; *Gulnard v. Knapp-Stout & Co. Company* (1897) 95 Wis. 482, 70 N. W. 671; *Kansas & T. Coal Co. v. Brownlie* (1895) 60 Ark. 582, 31 S. W. 453; *Louisville & N. R. Co. v. Allen* (1885) 78 Ala. 494; *Keenan v. Waters* (1897) 181 Pa. 247, 37 Atl. 342; *Schultz v. Bear Creek Refining Co.* (1897) 180 Pa. 272, 36 Atl. 739; *Bohn v. Chicago, R. I. & P. R. Co.* (1891) 106 Mo. 429, 17 S. W. 580; *Atchison, T. & S. F. R. Co. v. Alsdurf* (1892) 47 Ill. App. 200; *Dooner v. Delaware & H. Canal Co.* (1895) 171 Pa. 581, 33 Atl. 415; *Georgia P. R. Co. v. Propet* (1887) 83 Atl. 518, 3 So. 764; *Grant v. Union P. R. Co.* (1891) 45 Fed. Rep. 217; *Stringham v. Hilton* (1888) 111 N. Y. 188, 1 L. R. A. 483, 18 N. E. 870; *Boess v. Clausen & P. Brewing Co.* (1896) 12 App. Div. 366, 42 N. Y. Supp. 848; *Kaye v. Rob Roy Hosiery Co.* (1889) 51 Hun. 519, 4 N. Y. Supp. 571; *Whitley v. Block* (1894) 95 Ga. 15, 21 S. E. 983; *Dingley v. Star Knitting Co.* (1890) 58 Hun. 605, 12 N. Y. Supp. 31, Affirmed in 134 N. Y. 552, 42 N. E. 35; *Prybilski v. Northwestern Coal R. Co.* (1898) 98 Wis. 413, 74 N. W. 117; *The Lizzie Frank* (1887) 31 Fed. Rep. 477; *Lehigh & W. B. Coal Co. v. Hayes* (1889) 128 Pa. 294, 5 L. R. A. 441, 18 Atl. 387; *Hale v. Cheney* (1893) 159 Mass. 268, 34 N. E. 255; *Rooney v. 48 L. R. A.*

Sewall & D. Cordage Co. (1894) 161 Mass. 153, 36 N. E. 368; *Goodnow v. Walpole Emery Mills* (1888) 146 Mass. 261, 15 N. E. 576; *Donahue v. Washburn & M. Mfg. Co.* (1897) 169 Mass. 574, 48 N. E. 842.]

By other courts very much less weight is ascribed to the fact that the defendant company had complied with the usage of other roads.

In *Huhn v. Missouri P. R. Co.* (1887) 92 Mo. 440, 4 S. W. 937, it was held that the question whether the company was negligent in maintaining a guard rail without blocking could not be resolved merely by showing how many roads used blocks. Such a fact was merely one for the consideration of the jury.

It was also held in *Austin v. Chicago, R. I. & P. R. Co.* (1895) 93 Iowa, 286, 61 N. W. 849, that an instruction was correct which declared that a brakeman who was injured through catching his foot in a space left unfilled between the ties on each side of the bars of a switch was not precluded from recovering by proof that this arrangement was customary.

The following vigorous argument by Lewis, J., in his dissenting opinion in *Richmond & D. R. Co. v. Risdon* (1891) 87 Va. 335, 12 S. E. 786, is worth quoting: "That the 'frogs' were dangerous is not disputed. But it is contended that they were of the standard pattern, and that that fact of itself repels the imputation of negligence. From this view I dissent. If a standard frog, unguarded and situated as this one was, in a place where there are many tracks and where cars are shifted at all hours of the day and night, is not reasonably safe, then the company, in allowing it to remain unguarded, was guilty of negligence, and the jury rightly so found. Nor upon this point are we left to inference. The expert evidence for the plaintiff is conclusive that the dangerous condition of the frogs could easily have been guarded against by the device of 'filling' them with cinders, which simple and inexpensive method renders them safe to those whose duties call them upon the track, and at the same time does not interfere with their ordinary use. The witness Perry, who for a number of years was in the employ of the defendant company as roadmaster, testifies that at terminal points, or in yards where much shifting is done, the frogs ought always to be filled, as a protection to switchmen, and this is so well understood, he says, that the laws of some states expressly require it to be done. And why should they not be filled? Why should the servant be exposed to unnecessary risks that can so easily be guarded against? Is the rule that the master must exercise reasonable or

The failure on the part of a railroad company to comply with this statute is negligence *per se*.

Cincinnati, H. & D. R. Co. v. Van Horne, 37 U. S. App. 262, 69 Fed. Rep. 139, 16 C. C. A. 182; *Lake Erie & W. R. Co. v. Craig*, 37 U. S. App. 654, 73 Fed. Rep. 642, 19 C. C. A. 631.

No claim of contributory negligence was urged at the trial, and if it had been put forward the question would have then been for the jury, not for the court.

Kane v. Northern C. R. Co. 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679.

The distinction between the acquiescence of a careful man in a known danger, which is a matter of contract,—assumption of risk,—and that disregard of personal safety, which is contributory negligence, is well marked.

ordinary care a meaningless phrase—a mere jargon of words? I think not."

For other cases and *dicta* supporting the general proposition that conformity to the usage of other employers is not conclusive in the master's favor, see *Indermaur v. Dames* (1866) L. R. 1 C. P. 274, 35 L. J. C. P. N. S. 184, 12 Jur. N. S. 432, 14 L. T. N. S. 484, 14 Week. Rep. 586, 1 Harr. & R. 243, per Willes, J.; *Walsh v. Whiteley* (1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38, per Lord Esher; *Wabash R. Co. v. McDaniels* (1882) 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932; *Geno v. Fall Mountain Paper Co.* (1895) 68 Vt. 568, 35 Atl. 475; *Sawyer v. J. M. Arnold Shoe Co.* (1897) 90 Me. 369, 38 Atl. 833; *Kansas City, M. & B. R. Co. v. Burton* (1893) 97 Ala. 240, 12 So. 88; *McCormick Harvesting Mach. Co. v. Burandt* (1891) 136 Ill. 170, 26 N. E. 588; *Reichla v. Gruensfelder* (1892) 52 Mo. App. 43; *Hosic v. Chicago, R. I. & P. R. Co.* (1888) 75 Iowa, 683, 37 N. W. 963; *Craver v. Christian* (1887) 86 Minn. 413, 31 N. W. 457; *Molaske v. Ohio Coal Co.* (1893) 86 Wis. 220, 56 N. W. 475; *Chicago & G. W. R. Co. v. Armstrong* (1895) 62 Ill. App. 228; *Martin v. California C. R. Co.* (1892) 94 Cal. 326, 29 Pac. 645.

Where a railway company has been in the habit of blocking its guard rails at some particular place, there is a special ground for charging it with negligence in failing to replace them when forced out by accident; but it has been held that, even conceding there is a duty to see that there is a blocking under such circumstances, it is plain that, upon general principles, the servant cannot recover for an injury caused by the want of the blocking, in the absence of evidence showing that it had been displaced so long that the company might, by the exercise of reasonable care, have discovered its absence. *Haskins v. New York C. & H. R. Co.* (1894) 79 Hun. 159, 29 N. Y. Supp. 274. See note to *Walkowski v. Penokee & G. Consol. Mines* (1898; Mich.) 41 L. R. A. 33.

The failure of a railroad company to block a guard rail in its yard is not ground for recovery by a switchman thrown from a car, whose arm was caught and crushed between the guard rail and the main rail; blocking being intended only to prevent feet from being caught. *Rutledge v. Missouri P. R. Co.* (1892) 110 Mo. 312, 19 S. W. 38.

Witnesses introduced in a personal injury case for the purpose of showing a coal company's negligence in not blocking its railroad switch rails may, to show their experience as 48 L. R. A.

Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612; *New Jersey & N. Y. R. Co. v. Young*, 1 U. S. App. 96, 49 Fed. Rep. 723, 1 C. C. A. 428; *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; *Snow v. Housatonic R. Co.* 8 Allen, 441, 85 Am. Dec. 720; *Gardner v. Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140; *Union P. R. Co. v. O'Brien*, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618.

An examination of the principles on which the doctrine of "assumption of risk" rests will show that it has no application in the case of the violation of a statute.

The principle underlying this doctrine will be found to be that no negligence is properly attributable to the master where the servant, having knowledge of the dangerous business or defective appliances, agrees to continue to work.

railroad men, testify that switches were blocked before and after the accident in certain railroad yards where they worked. Nor is it a valid objection to their testimony that they acquired their experience from work at ordinary railroad yards, and not at switch tracks about coal shafts. *Hamilton v. Rich Hill Coal Min. Co.* (1891) 108 Mo. 864, 18 S. W. 977.

Where both parties in an action for indemnity for an injury caused by an unblocked frog go to trial on the single question whether it was or was not blocked at the time of trial, the defendant cannot take for the first time on appeal the point that the case should have been tried upon the theory that the defendant, if it had once blocked the frog, incurred no liability by reason of its subsequent displacement, unless it had actual or constructive notice of such displacement. *Union P. R. Co. v. James* (1896) 163 U. S. 485, 41 L. ed. 236, 16 Sup. Ct. Rep. 1109.

In the absence of any testimony as to the condition of a frog prior to an accident, the jury are at liberty to infer that it had never been blocked. *Ibid.*

In *International & G. N. R. Co. v. Bell* (1889) 75 Tex. 50, 12 S. W. 321, the court reversed a judgment for a brakeman based on a finding that the company was negligent as regards the manner in which the guard rail was laid with respect to the track rail, but the reversal was merely on the ground that the instructions had imposed too high a degree of diligence on the company, and it is not apparent from the report what precise precautions it was contended that the company should have adopted.

II. Statutes requiring frogs, etc., to be blocked.

In many jurisdictions the obligations of railway companies in regard to blocking have been definitely fixed by statute, the failure to comply with such a statute being, of course, negligence *per se*. *Cincinnati, H. & D. R. Co. v. Van Horne* (1895) 37 U. S. App. 262, 69 Fed. Rep. 139, 16 C. C. A. 182; *Craig v. Lake Erie & W. R. Co.* (1896) 35 Ohio L. J. 15.

That the duty they impose is also personal and nonassignable in such a sense that a railway company cannot relieve itself from responsibility by delegating its performance to an employee, see *Le May v. Canadian P. R. Co.* (1899) 17 Ont. App. Rep. 293.

The statutes requiring blocking to be used are as follows:

Michigan: Laws 1883, No. 174, § 22, 3 How. Stat. § 3397 (a). See also *Ashman v. Flint & P. M. R. Co.* (1892) 90 Mich. 567, 51 N. W. 64.

The duty imposed by this statute is not f

Smith v. Baker [1891] A. C. 352; *Thomas v. Quartermaine*, L. R. 18 Q. B. Div. 685; *O'Maley v. South Boston Gaslight Co.* 158 Mass. 135, 47 L. R. A. 161, 32 N. E. 1119; *New Jersey & N. Y. R. Co. v. Young*, 1 U. S. App. 96, 49 Fed. Rep. 723, 1 C. C. A. 428; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Cooley, Torts*, § 559; *Clarke v. Holmes*, 7 Hurlst. & N. 937; *Baddeley v. Granville*, L. R. 19 Q. B. Div. 423; *Boyd v. Brazil Block Coal Co.* (Ind. App.) 50 N. E. 368; *Durant v. Lexington Coal Min. Co.* 97 Mo. 62, 10 S. W. 484.

The exemption of the master from liability to a servant for an injury resulting from a risk or danger of the employment which the servant knows and appreciates grows out of, and depends upon, the contract of employment.

Bailey, Personal Injuries Relating to Master & Servant, 180; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Tuttle v. Detroit, G. H. & M. R. Co.* 122 U. S. 195, 30 L. ed. 1116, 7 Sup. Ct. Rep. 1166; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 382, 28 L. ed. 789, 5 Sup. Ct. Rep. 184; *Northern P. R. Co. v. Herbert*, 116 U. S. 647, 29 L. ed. 758, 6 Sup. Ct. Rep. 590; *Gardner v. Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140; *Union P. R. Co. v. O'Brien*, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618; *Texas & P. R. Co. v. Archibald*,

170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777.

It is not a valid defense as against an action for negligence *per se*.

No contract is valid whereby an employee of a railroad company undertakes for a stipulated sum, or in consideration of employment, not to hold the company liable for negligently injuring him.

Lake Shore & M. S. R. Co. v. Spangler, 44 Ohio St. 471, 58 Am. Rep. 833, 8 N. E. 467; *Louisville & N. R. Co. v. Orr*, 91 Ala. 548, 8 So. 360; *Hissong v. Richmond & D. R. Co.* 91 Ala. 514, 8 So. 776; *Richmond & D. R. Co. v. Jones*, 92 Ala. 218, 9 So. 276; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 36 U. S. App. 152, 70 Fed. Rep. 201, 17 C. C. A. 62, 30 L. R. A. 193; *Miller v. Chicago, B. & Q. R. Co.* 65 Fed. Rep. 305; *Chicago, B. & Q. R. Co. v. Miller*, 40 U. S. App. 448, 76 Fed. Rep. 440, 22 C. C. A. 264; *Owens v. Baltimore & O. R. Co.* 35 Fed. Rep. 715, 1 L. R. A. 75.

If plaintiff were chargeable with constructive knowledge that the frogs or guard rails generally were not blocked, then he must be equally chargeable with knowledge of the fact that the company was experimenting with blocks preparatory to introducing them generally.

Such conduct of the company amounted

filled by the adoption of a method of blocking which the ordinary use of the road renders ineffectual in two or three days.—In this case by the wheel flange wearing down the blocking so far that it became practically useless. The alternative safe method suggested was to give the blocking a grooved or furrowed surface so as to allow the flanges of the wheels to pass without interference. *Eastman v. Lake Shore & M. S. R. Co.* (1894) 101 Mich. 597, 60 N. W. 809.

Ohio: Rev. Stat. 7th ed. § 9822, 85 Ohio Laws, 105, March 23, 1888.

The word "employee," in this statute means all those who, "by rightful authority of the company, are engaged in the business of walking over these frogs and guard-rails," although employed and paid by another company. *Atkyn v. Wabash R. Co.* (1889) 41 Fed. Rep. 193.

Upon familiar principles, the fine imposed by this statute does not exclude an action for damages. *New York, C. & St. L. R. Co. v. Lambricht* (1891) 5 Ohio C. C. 433.

Rhode Island: Laws 1894, chap. 1282, § 1. Wisconsin: Laws 1889, chap. 123, Sanborn & Berryman Anno. Stat. § 1809 (a); *Curtis v. Chicago & N. W. R. Co.* (1897) 95 Wis. 460, 70 N. W. 665.

Canada: The blocking of frogs on all railways under the control of the Dominion legislature in Canada is prescribed by § 262, railway act 51 Vict. chap. 29.

The proviso in subsection 4 of this section, allowing the filling there mentioned to be left out in the winter months by permission of the railway committee, is not applicable to the filling prescribed in subsection 3. *Washington v. Grand Trunk R. Co.* (1897) 28 Can. S. C. 184, *Reversing* (1897) 24 Ont. App. Rep. 183.

A switch foreman injured while uncoupling cars, by having his foot caught in a frog, is a "person injured" within the meaning of these sections. *Le May v. Canadian P. R. Co.* (1890) 18 Ont. Rep. 314, *Affirmed* 17 Ont. App. Rep. 293.

By the existing Ontario workmen's compensation act 48 L. R. A.

tion for injuries act, 55 Vict. chap. 30 (Ont. Rev. Stat. 1897, chap. 160, § 5, subsec. 3), railway companies are required to block frogs. See also a similar provision in the earlier act of 49 Vict. chap. 28 (Ont. Rev. Stat. 1887, chap. 141, § 4, subsec. 3).

III. Want of blocking considered as a risk assumed by the servant.

In many cases the question whether a want of blocking imports negligence on the master's part may become of no practical importance in view of the fact that the servant brings himself within the operation of the familiar rule that he cannot recover for injuries caused by his continuing to expose himself to dangers of which he had actual or constructive notice. The plaintiff's action was deemed to be barred on this ground in the following cases: *Appel v. Buffalo, N. Y. & P. R. Co.* (1888) 111 N. Y. 530, 19 N. E. 93 (switchman after working for several years in a yard is presumed, as matter of law, to understand the risks created by the want of blocking); *Southern P. Co. v. Seley* (1894) 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530 (dangers arising from the use of unblocked frogs in a certain yard presumed to be accepted by a conductor of freight trains, whose duty frequently brought him into that yard); *Spencer v. New York C. & H. R. Co.* (1893) 67 Hun, 196, 22 N. Y. Supp. 100 (plaintiff had been working near the frog for an hour and a half in broad daylight, and the frog was in plain sight); *Rush v. Missouri P. R. Co.* (1887) 86 Kan. 129, 12 Pac. 582 (switchman who has been working for two months in a yard is affected with notice of the want of blocking between a guard and main rail at a certain place).

To same effect, see *Ames v. Lake Shore & M. S. R. Co.* (1893) 135 Ind. 363, 35 N. E. 117; *St. Louis, I. M. & S. R. Co. v. Davis* (1892) 55 Ark. 462, 18 S. W. 628 (1891) 54 Ark. 389, 15 S. W. 895; *Lake Shore & M. S. R. Co. v. Mc-*

to a notification to him that it intended shortly to block the guard rails.

It was an implied promise, and plaintiff should be presumed to have relied upon it as upon any promise to repair a defect.

Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; *Monsarrat v. Keegan*, 58 U. S. App. 377, sub nom. *Valley R. Co. v. Keegan*, 87 Fed. Rep. 855, 31 C. C. A. 255.

Messrs. Harmon, Colston, Goldsmith, & Headly, for defendant in error:

Knowing the fact that no rails were blocked, plaintiff's ignorance about this particular rail would have been of no consequence.

Missouri P. R. Co. v. Somers, 71 Tex. 700, 9 S. W. 741; *Kohn v. McNulta*, 147 U. S. 238, 37 L. ed. 150, 13 Sup. Ct. Rep. 298.

His duties brought him constantly over and about these frogs and guard rails, so that a man exercising his sight and employing his ordinary senses could not have avoided discovering and knowing the fact that the guard rail was not blocked, and understanding such danger as resulted from that fact.

Appel v. Buffalo, N. Y. & P. R. Co. 111 N. Y. 553, 19 N. E. 93; *Southern P. Co. v. Seley*, 152 U. S. 154, 38 L. ed. 395, 14 Sup. Ct. Rep. 530.

Whatever the negligence of one party, it is not the proximate cause of an injury re-

sulting to the other, if the other, after discovering such negligence, might have avoided its consequence by reasonable prudence on his own part.

Assuming that when plaintiff was hurt defendant was presently violating the statute to plaintiff's knowledge, this would not entitle him to recover on the facts shown here.

Knisley v. Pratt, 148 N. Y. 372, 32 L. R. A. 367, 42 N. E. 986; *O'Maley v. South Boston Gaslight Co.* 158 Mass. 135, 47 L. R. A. 161, 32 N. E. 1119; *E. S. Higgins Carpet Co. v. O'Keefe*, 51 U. S. App. 74, 79 Fed. Rep. 900, 25 C. C. A. 220; *Graves v. Brewer*, 4 App. Div. 327, 38 N. Y. Supp. 566; *Krause v. Morgan*, 53 Ohio St. 26, 40 N. E. 886; *Pittsburgh & W. Coal Co. v. Estievenard*, 53 Ohio St. 43, 40 N. E. 725; *Atkyn v. Wabash R. Co.* 41 Fed. Rep. 193; *Cleveland, C. C. & St. L. R. Co. v. Baker*, 63 U. S. App. 553, 91 Fed. Rep. 224, 33 C. C. A. 468; *Victor Coal Co. v. Muir*, 20 Colo. 320, 26 L. R. A. 435, 38 Pac. 378; *Holum v. Chicago, M. & St. P. R. Co.* 80 Wis. 299, 50 N. W. 99; *Grand v. Michigan C. R. Co.* 83 Mich. 564, 11 L. R. A. 402, 47 N. W. 837; *Taylor v. Carew Mfg. Co.* 143 Mass. 470, 10 N. E. 308; *Wood, Master & Servant*, § 397.

Injuries from unblocked frogs and rails come within the rule of obvious risk.

Southern P. Co. v. Seley, 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530; *Lake Shore & M. S. R. Co. v. McCormick*, 74 Ind. 440;

Cormick (1881) 74 Ind. 440; *Chicago, B. & Q. R. Co. v. Smith* (1885) 18 Ill. App. 119; *McGinnis v. Canada Southern Bridge Co.* (1882) 49 Mich. 466, 13 N. W. 819.

The danger arising from the want of a block between a rail and a guard rail at a switch is so obvious that even an inexperienced brakeman will, as matter of law, be presumed to understand the risk incident to working without it. *Mayes v. Chicago, R. I. & P. R. Co.* (1884) 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680, modifying on rehearing the opinion expressed at the first hearing,—that it was for the jury to say whether the inexperience of the brakeman was a sufficient excuse for his nonappreciation of the danger.

A railway servant is not necessarily debarred from recovery for an injury caused by a want of blocking at a frog, for the reason that, although he did not know that the frog in question was not blocked, he knew that some of the frogs were not blocked. *Sherman v. Chicago, M. & St. P. R. Co.* (1885) 34 Minn. 259, 25 N. W. 593 (instruction to opposite effect, rightly refused). The court said: "If the defendant's habit, custom, or mode of doing business at that yard was to protect the frogs by blocks,—if that was the rule of its conduct,—Sherman had a right to assume, where he had not notice to the contrary, that such mode or custom had been followed in respect to any particular frog. He had a right to assume, in the absence of such notice, that the defendant had acted according to the general rule adopted by it for its business, although he may have known some instances in which it had not done so. The omission at that yard to put in the blocks, not as a general rule, but in isolated instances, would not make out a case like that of the *Hughes Case*, of an unsafe and careless custom or habit of doing business, known, or which by the use of his senses ought to be known, to an employee; in which case the employee, by continuing in the employment without objection on his part, or promise

on the part of the master to change it, is held to assume the risk incident to that mode of doing the business. A single instance, or any number of instances, not amounting to a custom or mode of business, of culpable negligence on the part of the master, will not cast on the employee the risk of subsequent or other similar acts of negligence."

In Quebec the risk of a brakeman's catching his foot in an unblocked frog seems to be regarded as an ordinary risk incidental to his employment. *Bourgeault v. Grand Trunk R. Co.* (1887) Mont. L. R. 5 S. C. 249, holding the plaintiff unable to recover upon an allegation that the frog was out of order.

As it is manifest that a split switch cannot be blocked without destroying its efficiency, the risk arising from the absence of blocking in this case is one of those assumed by a man who enters the service of a railroad company which, to his knowledge, uses such switches. *Grand v. Michigan C. R. Co.* (1890) 83 Mich. 564, 11 L. R. A. 402, 47 N. W. 837.

It should be remembered that, under the Missouri doctrine, a brakeman is not debarred from recovery for injuries received by a want of blocking merely because he knew of such want. It must also be shown that a continuance of his work threatened immediate danger such as no prudent man would encounter. *Huhn v. Missouri P. R. Co.* (1887) 92 Mo. 440, 4 S. W. 937.

As the servant assumes the risk incident to the use of his master's appliances in the condition in which they have always been since he begun work, in so far as he is affected with notice of such condition, a general verdict for the plaintiff cannot stand where it is specially found that there had been a change in the condition of the frogs and switches on defendant's road, and that the plaintiff might have known of such condition if he had taken pains to inquire about it. *Lake Shore & M. S. R. Co. v. McCormick* (1881) 74 Ind. 440.

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Wood v. Locke, 147 Mass. 604, 18 N. E. 578; *Missouri P. R. Co. v. Baxter*, 42 Neb. 793, 60 N. W. 1044; *Rush v. Missouri P. R. Co.* 36 Kan. 129, 12 Pac. 582; *Mayes v. Chicago, R. I. & P. R. Co.* 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680; *Richmond & D. R. Co. v. Risdon*, 87 Va. 335, 12 S. E. 786; *St. Louis, I. M. & S. R. Co. v. Davis*, 54 Ark. 389, 15 S. W. 895; *Wilson v. Winona & St. P. R. Co.* 37 Minn. 326, 33 N. W. 908.

Taft, Circuit Judge, delivered the opinion of the court:

In the absence of the statute, and upon common-law principles, we have no doubt that in this case the plaintiff would be held to have assumed the risk of the absence of blocks in the guard rails and switches of the defendant. His denial of knowledge of the fact that the particular guard rail causing the injury was unblocked is entirely immaterial. Nor is his vague statement that he was so busy as not to notice whether the rails and switches of plaintiff generally were unblocked in a yard where there were hundreds of guard rails and switches, and in which he was constantly at work for seven months, of more significance or weight. His evidence upon this point is not creditable to him. He could only have been ignorant of the admitted policy of the defendant in respect to blocks through the grossest failure of duty on his part in a matter that much concerned his personal safety and the proper operation of the road. In such a case the authorities leave no doubt that the servant assumes the risk of the absence of the blocks, and the employer cannot be charged with actionable negligence towards him. *South-ern P. Co. v. Seley*, 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530; *Appel v. Buffalo, N. Y. & P. R. Co.* 111 N. Y. 550, 19 N. E. 93; *Richmond & D. R. Co. v. Risdon*, 87 Va. 335, 339, 12 S. E. 786; *Wood v. Locke*, 147 Mass. 604, 18 N. E. 578; *Lake Shore & M. S. R. Co. v. McCormick*, 74 Ind. 440; *Wabash R. Co. v. Ray*, 152 Ind. 392, 51 N. E. 920; *Rush v. Missouri P. R. Co.* 36 Kan. 129, 12 Pac. 582; *Mayes v. Chicago, R. I. & P. R. Co.* 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680; *Wilson v. Winona & St. P. R. Co.* 37 Minn. 326, 33 N. W. 908; *Missouri P. R. Co. v. Baxter*, 42 Neb. 793, 60 N. W. 1044; *St. Louis, I. M. & S. R. Co. v. Davis*, 54 Ark. 389, 15 S. W. 895.

The sole question in the case is whether the statute requiring defendant railway, on penalty of a fine, to block its guard rails and frogs, changes the rule of liability of the defendant, and relieves the plaintiff from the effect of the assumption of risk which would otherwise be implied against him. We have already had occasion to consider in a more or less direct way the effect of the statute. *Cincinnati, H. & D. R. Co. v. Van Horne*, 37 U. S. App. 262, 69 Fed. Rep. 139, 16 C. C. A. 182; *Lake Erie & W. R. Co. v. Craig*, 37 U. S. App. 654, 73 Fed. Rep. 642, 19 C. C. A. 631. In these cases we held that the failure on the part of a railway company to comply with the statute was negligence *per se*. A further consideration of the 48 L. R. A.

statute confirms our view. The intention of the legislature of Ohio was to protect the employees of railways from injury from a very frequent source of danger by compelling the railway companies to adopt a well-known safety device. It was passed in pursuance of the police power of the state, and it expressly provided, as one mode of enforcing it, for a criminal prosecution of the delinquent companies. The expression of one mode of enforcing it did not exclude the operation of another, and in many respects more efficacious, means of compelling compliance with its terms, to wit, the right of civil action against a delinquent railway company by one of the class sought to be protected by the statute for injury caused by a failure to comply with its requirements. Unless it is to be inferred from the whole purview of the act that it was the legislative intention that the only remedy for breach of the statutory duty imposed should be the proceeding by fine, it follows that upon proof of a breach of that duty by the railway company, and injury thereby occasioned to the employee, a cause of action is established. *Groves v. Wimborne* [1898] 2 Q. B. 402, 407; *Atkinson v. Newcastle & G. Waterworks Co.* L. R. 2 Exch. Div. 441; *Gorris v. Scott*, L. R. 9 Exch. 125. In this case there can be no doubt that the act was passed to secure protection and a newly defined right to the employee. To confine the remedy to a criminal proceeding in which the fine to be imposed on conviction was not even payable to the injured employee or to one complaining, would make the law not much more than a dead letter. The case of *Groves v. Wimborne* involved the construction of a statute quite like the one at bar, and a right of action was held to be given thereby to the injured servant in addition to the criminal prosecution. The courts of Ohio have given the statute under discussion the same construction. *New York, C. & St. L. R. Co. v. Lambricht*, 5 Ohio C. C. 433, affirmed by the supreme court of Ohio without opinion, 29 Ohio L. J. 359.

Do a knowledge on the part of the employee that the company is violating the statute, and his continuance in the service thereafter without complaint, constitute such an assumption of the risk as to prevent recovery? The answer to this question is to be found in a consideration of the principles upon which the doctrine of the assumption of risk rests. If one employs his servant to mend and strengthen a defective staircase in a church steeple, and in the course of the employment part of the staircase gives way, and the servant is injured or killed, it would hardly be claimed that the master was wanting in care towards the servant in not having the staircase which fell in a safe condition. Why not? Because, even if no express communication is had upon the subject, the servant must know, and the master must intend, that the dangers necessarily incident to the employment are to be at the risk of the servant, who may be presumed to receive greater compensation for the work on ac-

count of the risk. The foregoing is an extreme case, perhaps, but it fairly illustrates the principle of assumption of risk in the relation of master and servant. Assumption of risk is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself; but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly or impliedly to assume. The master is not, therefore, guilty of actionable negligence towards the servant. This is the most reasonable explanation of the doctrine of assumption of risk, and is well supported by the judgments of Lord Justices Bowen and Fry in the case of *Thomas v. Quartermaine*, L. R. 18 Q. B. Div. 685, 695. See also language of Lord Watson in *Smith v. Baker*, [1891] A. C. 325, and *O'Maley v. South Boston Gaslight Co.* 158 Mass. 135, 32 N. E. 1119. It makes logical that most frequent exception to the application of doctrine by which the employee who notifies his master of a defect in the machinery or place of work, and remains in the service on a promise of repair, has a right of action if injury results from the defect while he is waiting for the repair of the defect, and has reasonable ground to expect it. *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; *Snow v. Housatonic R. Co.* 8 Allen, 441, 85 Am. Dec. 720; *Gardner v. Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140. From the notice and the promise is properly implied the agreement by the master that he will assume the risk of injury pending the making of the repair.

If, then, the doctrine of the assumption of risk rests really upon contract, the only question remaining is whether the courts will enforce or recognize as against a servant an agreement, express or implied on his part, to waive the performance of a statutory duty of the master imposed for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute. The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract; and it would entirely defeat this purpose thus to permit the servant "to

contract the master out" of the statute. It would certainly be novel for a court to recognize as valid an agreement between two persons that one should violate a criminal statute; and yet, if the assumption of risk is the term of a contract, then the application of it in the case at bar is to do just that. The cases upon the subject are by no means satisfactory, and, strange as it may seem, but few are in point. There is one English case which entirely supports our conclusion, and several *dicta* by English judges of like tenor. Several American cases on their facts also sustain the principle, though it must be confessed they do not very clearly state the true ground of their conclusion. There is one American case which is directly to the contrary, and possibly one other ought so to be regarded. There are several American cases that are said to be opposed to our view, but an examination of the facts in each will clearly distinguish them from the case at bar.

In the case of *Baddeley v. Granville*, L. R. 19 Q. B. Div. 423, the action was for the wrongful death of a miner, due to his employer's violation of a statute, and the defense of assumption of risk was set up. Section 52 of the coal mines regulation act of 1872 required a bankman to be constantly present while the men were going up or down the shaft, but it was the regular practice of the defendant, as the plaintiff's husband well knew, not to have a bankman in attendance during the night. The plaintiff's husband was killed, in coming out of the mine at night, by an accident arising through the absence of a bankman. It was held that the plaintiff's intestate did not, by continued service after he knew of the violation of the statute, thereby assume the risk of danger therefrom. The court says (page 426): "An obligation imposed by statute ought to be capable of enforcement with respect to all future dealings between parties affected by it. As to the result of past breaches of the obligation, people may come to what agreements they like, but as to future breaches of it there ought to be no encouragement given to the making of an agreement between A. and B. that B. shall be at liberty to break the law which has been passed for the protection of A. . . . If the supposed agreement . . . comes to this: that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him by statute, and shall connive at his disregard of the statutory obligation imposed on him for the benefit of others as well as of himself, such an agreement would be in violation of public policy, and ought not to be listened to."

The judges deciding the case of *Thomas v. Quartermaine*, L. R. 18 Q. B. Div. 685, 696, 703, had affirmed the view that assumption of risk did not apply to the neglect of a specific statutory duty imposed for the benefit of a class, but it was not the case before them. They said that the case of *Clarke v. Holmes*, 7 Hurlst. & N. 937, 6 Hurlst. & N. 349, proceeded on this ground, though it is

difficult to find the ground stated in the opinions. *Durant v. Lexington Coal Min. Co.* 97 Mo. 62, 10 S. W. 484; *Grand v. Michigan C. R. Co.* 83 Mich. 564, 11 L. R. A. 402, 47 N. W. 837; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; and *Boyd v. Brazil Block Coal Co.* (Ind. App.) 50 N. E. 388,—were all cases where assumption of risk would have been a complete defense if applicable in case of a failure by the master to discharge a statutory duty to the servant, and the latter's express or implied acquiescence therein; and yet the servant was given judgment. The reasons stated in some of these cases for the conclusion are not entirely satisfactory, and in the cases from Illinois and Indiana no distinction is made between the doctrine of assumption of risk and of contributory negligence, but they are all authorities on their facts for our conclusion. The case of *Knisley v. Pratt*, 148 N. Y. 382, 32 L. R. A. 367, 42 N. E. 986, however, presented the precise question for decision, and the court of appeals held expressly that a servant, by continuing in the employment of a master who is violating a statute passed to protect the servant, does assume the risk of danger from such violation, and cannot make it the ground of recovery. This is followed by the circuit court of appeals for the second circuit in a New York case. *E. S. Higgins Carpet Co. v. O'Keefe*, 51 U. S. App. 74, 79 Fed. Rep. 900, 25 C. C. A. 220. The court of appeals of New York, in *Huda v. American Glucose Co.* 154 N. Y. 474, 482, 40 L. R. A. 411, 48 N. E. 897, does not treat the question decided in the *Knisley Case* as controlling the case of servants acquiescing in and assuming the risk of a violation of a fire-escape statute by their master, and the court declined to decide it. The decision in the *Knisley Case* is largely based on the decision of *O'Maley v. South Boston Gaslight Co.* 158 Mass. 135, 47 L. R. A. 161, 32 N. E. 1119, and *Goodridge v. Washington Mills Co.* 160 Mass. 234, 35 N. E. 484. We think the learned court of appeals of New York failed to observe that the *O'Maley* and *Goodridge Cases* were not suits under a statute defining and enjoining a specific duty of a master for the protection of servants, but were suits under an employer's liability act, which relieved the servant from the burden of certain defenses by the master in suits for injury sustained by him while in his master's employ, but did not attempt to change the master's duty to the servant, or to change the standard of negligence between them as that was fixed at common law. Hence it was held by the supreme judicial court of Massachusetts that the doctrine of assumption of risk applied to suits under the statute as at common law, and *Thomas v. Quartermaine*, L. R. 18 Q. B. Div. 685, which was also a suit under an employer's liability act, was much relied on. And yet in *Thomas v. Quartermaine*, as we have seen, the two lord justices, forming the majority deciding the case, expressly pointed out that in a suit under a statute positively fixing a standard of duty the doctrine of assumption of risk could not 48 L. R. A.

be applied. The distinction between the employer's liability act and acts for the protection of servants in the nature of police legislation, like the act under consideration, is clearly shown in *Griffiths v. Dudley*, L. R. 9 Q. B. Div. 357, where, though the court held that a servant might "contract the employer out" of liability under the former act, it was said that this could not be done in respect of liability arising under a statute like the one at bar, passed for the protection of servants. The *Knisley Case*, which, in our judgment, was wrongly decided, and many others in which a right conclusion was reached, seem to us to confuse an agreement to assume the risk of an employment, as it is known to be to the servant, and his contributory negligence. That, under certain circumstances, the one sometimes comes very near the other, and cannot easily be distinguished from the other, may be conceded; but in most cases there is a broad line of distinction, and it is so in this case. For years employees worked in railroad yards in which blocks were not used, and yet no one would charge them with negligence in so doing. The switches and rails were mere perils of the employment. Assumption of risk is in such cases the acquiescence of an ordinarily prudent man in a known danger, the risk of which he assumes by contract. Contributory negligence in such cases is that action or nonaction in disregard of personal safety by one who, treating the known danger as a condition, acts with respect to it without due care of its consequences. The distinction has been recognized by the Supreme Court of the United States. In *Union P. R. Co. v. O'Brien*, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618, the court said: "The second instruction was properly refused because it confused two distinct propositions,—that relating to the risks assumed by an employee in entering a given service, and that relating to the amount of vigilance that should be exercised under given circumstances."

In *Hesse v. Columbus, S. & H. R. Co.* 58 Ohio St. 167, 169, 50 N. E. 355, Judge Shauk, speaking for the supreme court of Ohio, said: "Acquiescence with knowledge is not synonymous with contributory negligence. One having full knowledge of defects in machinery with which he is employed may use the utmost care to avert the dangers which they threaten."

The distinction is exceedingly well brought out in *Cleveland, C. O. & St. L. R. Co. v. Baker*, 63 U. S. App. 553, 91 Fed. Rep. 224, 33 C. C. A. 468, by Judge Woods, speaking for the circuit court of appeals for the seventh circuit. There the action was for damages against a railroad company for injury sustained by reason of a breach of a Federal statute requiring the company to furnish grab irons. The statute, out of abundant caution, expressly provides that the continued service of the employee with knowledge of the breach of statutory duty by the company should not be regarded as an assumption of the risk. The court held that this proviso did not prevent the company from

successfully maintaining the defense of contributory negligence. Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences. One who does not use such care, and who, by reason thereof, suffers injury, is guilty of contributory negligence, and cannot recover, because he, and not the master, causes the injury, or because they jointly cause it. Many authorities hold that contributory negligence is a defense to an action founded on a violation of statutory duty, and this undoubtedly is the proper view. Such is the case of *Krause v. Morgan*, 53 Ohio St. 26, 40 N. E. 886, where the employee, in spite of a warning from his superior, and in the face of the most palpable danger, exposed himself to certain injury, and then sought to hold his employer liable because he had not employed the statutory methods of protecting him from the danger. In *Lake Erie & W. R. Co. v. Craig*, 37 U. S. App. 654, 73 Fed. Rep. 642, 19 C. C. A. 631, we held that the *Krause Case* was one of contributory negligence, and followed

it as such. The syllabus confuses the difference between assumption of risk and contributory negligence, but the syllabus and opinion are, of course, to be restrained to the facts. The following cases, relied on by counsel for the railway company, were also cases of contributory negligence in suits for violation of specific statutory duty: *Pittsburgh & W. Coal Co. v. Estievenard*, 53 Ohio St. 43, 40 N. E. 725; *Victor Coal Co. v. Muir*, 20 Colo. 320, 26 L. R. A. 435, 38 Pac. 378; *Holum v. Chicago, M. & St. P. R. Co.* 80 Wis. 299, 50 N. W. 99; *Grand v. Michigan C. R. Co.* 83 Mich. 564, 11 L. R. A. 402, 47 N. W. 837; and *Taylor v. Carew Mfg. Co.* 143 Mass. 470, 10 N. E. 308. In the last two cases the distinction between contributory negligence and assumption of risk is clearly referred to.

For the reasons given, we think the court below was in error in holding that the plaintiff assumed the risk of injury from the failure of the defendant to comply with the statute passed for his protection, and that the case should have been submitted to the jury on the issue whether, assuming the unblocked guard rails and frogs as a condition of the situation, he used due care to avoid injury therefrom.

Judgment reversed, at costs of the defendant, with directions to order a new trial.

Petition for certiorari to remove case to Supreme Court of United States denied October 16, 1899.

LOUISIANA SUPREME COURT.

SUCCESSION OF Francois MEUNIER.

(52 La. Ann. 79.)

1. The judgment appealed from annulled the will and the probate thereof, and recognized plaintiffs as heirs of the deceased. But it did not in terms send them into possession, nor was there an award against the executors, specifically, for a sum as representing the net proceeds of the estate in their hands. *Held*, a case where the trial judge could fix the amount of the suspensive appeal bond.
2. One of the executors, acting in his individual capacity, was competent as surety on such appeal bond for the legatee who had appealed.
3. Objection that the appeal was taken in the name of the agent and attorney in fact of the legatee, instead of in the name of the legatee, *held*, under the facts and pleadings of the case, not tenable.
4. Donations and bequests are permissible to trustees for educational, charitable, or literary purposes, or for the benefit of institutions, existing or to be founded, the

object of which is to promote education, literature, or charity. Act 1882, No. 124.

5. But this permission is restricted to educational, charitable, and literary objects within the state of Louisiana, and to institutions founded and to be founded under the laws of the state for such purposes.
6. To avoid the dispositions of wills and testaments, it must plainly appear that they come within the prohibitions of the law.
7. Where a bequest in a will in one view is illegal, and in another view lawful, the latter will be adopted, and the will sustained.
8. A legacy to the commune of Carrouge, canton of Geneva, Switzerland, which is directed to be placed at interest, and with the interest to endow annually two poor girls, and to give a pension to ten old persons of the two sexes, is held to be a legacy to pious and charitable uses, and sustainable.

(June 12, 1899.)

A PPEAL by legatees under the will of A Francois Meunier from a decree of the Civil District Court for the Parish of Orleans, Division C, declaring the will void and recognizing claims of the heirs at law. *Reversed*.

The facts are stated in the opinion.

*Headnotes by BLANCHARD, J.

NOTE.—For bequest to community in a foreign country, see also *Re Huss* (N. Y.) 12 L. R. A. 620.

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Mr. Charles Louque, for appellants:

In 1882 the legislature passed act No. 124, p. 172, which irrevocably made the doctrine of charitable trusts a part of our system of laws.

Under this act, the state courts are bound to apply and enforce the full doctrines of charitable trusts.

The jurisdiction of the chancery courts has been recognized in all the states of this Union, and their jurisprudence has been applied uniformly to all charities of the nature of Francois Meunier's bequests.

Vidal v. Philadelphia, 2 How. 192, 11 L. ed. 231; Story, Eq. Jur. §§ 1136 *et seq.*; Perry, Tr. §§ 689 *et seq.*

Under the act of 1882 substitutions and *fidei commissa*, which were prohibited, are now permissible, as regards charitable trusts.

Supposing that the commune was incapable of acting as trustee, the charitable bequest is nevertheless good.

Vidal v. Philadelphia, 2 How. 197, 11 L. ed. 233; Perry, Tr. §§ 722-731, and note; *Handley v. Palmer*, 91 Fed. Rep. 949.

It is a maxim of the court never to allow a certain and valid trust to fail for want of a trustee.

Perry, Tr. § 731; *Burrill v. Boardman*, 43 N. Y. 254, 3 Am. Rep. 694; *Inglis v. Sailor's Snug Harbour*, 3 Pet. 113, 114, 7 L. ed. 622, 623; *Coggeshall v. Belton*, 7 Johns. Ch. 292, 11 Am. Dec. 471; *Vidal v. Philadelphia*, 2 How. 196, 11 L. ed. 233; *Perin v. Carey*, 24 How. 501, 16 L. ed. 710; *Handley v. Palmer*, 91 Fed. Rep. 949.

Courts look with favor upon charitable bequests, and endeavor to carry them into effect.

Story, Eq. Jur. §§ 1169, 1170, 1181; Perry, Tr. § 709.

It is immaterial whether the person to take be *in esse* or not, or the legatee was, at the time of the bequest, a corporation capable of taking or not.

Handley v. Palmer, 91 Fed. Rep. 952.

The legislature could incorporate the trustees afterwards.

Vidal v. Philadelphia, 2 How. 127, 11 L. ed. 205; *Girard v. Philadelphia*, 7 Wall. 1-15, 19 L. ed. 53-56; *Handley v. Palmer*, 91 Fed. Rep. 955.

If the beneficiaries were so named that the trustees would have no discretion, the bequest would not be classed as public charity.

Story, Eq. Jur. §§ 1169-1181; Perry, Tr. §§ 687, 710-732; *Vidal v. Philadelphia*, 2 How. 192, 11 L. ed. 231; *Perin v. Carney*, 24 How. 507, 16 L. ed. 712.

Indefiniteness is of its essence.

Handley v. Palmer, 91 Fed. Rep. 952.

Bequests will be paid over to trustees in foreign countries.

Perry, Tr. § 741; Story, Eq. Jur. §§ 1184-1186; *Richmond v. Milne*, 17 La. 322, 36 Am. Dec. 613.

Gifts of this nature were recognized valid before the act of 1882.

McDonogh's Succession, 7 La. Ann. 472. 48 L. R. A.

See also *Vidal v. Philadelphia*, 2 How. 184, 11 L. ed. 228; Perry, Tr. §§ 732, 741; Story, Eq. Jur. § 1184; *Inglis v. Sailor's Snug Harbour*, 3 Pet. 113, 114, 7 L. ed. 622, 623; *Perin v. Cary*, 24 How. 501, 16 L. ed. 710; *Williams v. Western Star Lodge No. 24 of F. & A. M.* 38 La. Ann. 629.

Mr. G. V. Soniat, for appellees:

A last will, which orders all the properties of the testator to be sold and the sums realized to be placed at interest, and with the interest to endow, each year, two poor girls, and to give pensions to ten old persons of the two sexes, does not convey full ownership to the legatee; it creates a trust estate, and thereby violates the law.

Civil Code, 1520; *Perin v. McMicken*, 15 La. Ann. 154; *Kernan's Succession*, 52 La. Ann. 48, 26 So. 749; *Harper v. Stanbrough*, 2 La. Ann. 380; *Franklin's Succession*, 7 La. Ann. 395; *Tournoir v. Tournoir*, 12 La. 23; *Marshall v. Pearce*, 34 La. Ann. 558; *McCan's Succession*, 48 La. Ann. 145, 19 So. 220; *Beauregard's Succession*, 49 La. Ann. 1176, 22 So. 348.

Such a will is also void on account of uncertainty in the beneficiaries; and their choice being left to the city of Carouge, the nominal donee, would make this a testament by the intervention of a commissary or attorney in fact, and thereby the same contravenes a prohibitory law.

Civil Code, 1573; *Fink v. Fink*, 12 La. Ann. 301.

The city of Carouge, Switzerland, is incapable of receiving a legacy of realty situated in Louisiana, because—

(a) The treaty of 1850, passed between Switzerland and the United States, limits such inheritances to citizens of the contracting parties. A city is not a citizen, and therefore the city of Carouge cannot inherit.

Bouvier, Law Dict. *verbo City*; *Walsh v. Lallande*, 25 La. Ann. 188; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Muller v. Dows*, 94 U. S. 277, 24 L. ed. 76.

(b) Because the said treaty expressly states that "the foregoing privilege (of acquiring property, etc.), however, shall not extend to the exercise of political rights, etc."

(c) The want of capacity in the city of Carouge at the death of the testator, resulting from a positive prohibition in the laws of Switzerland prohibiting cities to receive any legacy burdened with a condition, cannot be supplied, cured, or removed by a subsequent permission from the legislative body of Switzerland.

First Congregational Church v. Henderson, 4 Rob. (La.) 210; *New Orleans v. Hardie*, 43 La. Ann. 251, 9 So. 12; *Rachal v. Rachal*, 1 Rob. (La.) 115.

(d) Act 124 of 1882 is restrictive to corporations organized under the laws of Louisiana. It is evident that a city in Switzerland cannot organize as a corporation for charitable purposes under the laws of Louisiana.

La. Rev. Stat. 677; *Franklin's Succession*, 7 La. Ann. 416.

On application for rehearing.

Mr. J. McConnell, also for appellees:

The opinion declares in terms that "the will in question is not obnoxious to the maxim *Le mort saisit le vif*, for the title of the estate is immediately vested in the commune of Carouge." This conclusion, as the executors had no seisin, made the town of Carouge immediately, on the death of Meunier, acquire the title to the stores on Royal street and other property described in the will.

Cross, Succession, p. 44; *Addison v. New Orleans Sav. Bank*, 15 La. 527; *Brooks v. Norris*, 6 Rob. (La.) 183; *Calvit v. Mulhollan*, 12 Rob. (La.) 258; *Womack v. Womack*, 2 La. Ann. 339.

This conclusion is necessary because it is essential that the heir of the decedent, whether testamentary or legal, should acquire the succession immediately. It follows, therefore, that the court sanctions this will as a valid title to the stores on Royal street in New Orleans, in favor of this municipal corporation acquiring real estate here, although created and existing under a foreign European government. Such a result is condemned both by municipal and international law.

1 Dill. Mun. Corp. § 435, p. 533.

The testamentary executors did not have the seisin. This being the case, the sale made by the executors was unauthorized by law.

Civil Code, 1660, 1669; *Boatwright's Succession*, 12 La. Ann. 893; *Massey's Succession*, 46 La. Ann. 126, 15 So. 6; *Dumestre's Succession*, 40 La. Ann. 571, 4 So. 328.

Indefiniteness is of the essence of charity when exercised by municipal corporations. Such charities must be of a catholic or universal character.

1 Dill. Mun. Corp. p. 536, and note; *Perin v. Carey*, 24 How. 465, 16 L. ed. 701; *Vidal v. Philadelphia*, 2 How. 127, 11 L. ed. 205; 2 Kent, Com. 280.

Blanchard, J., delivered the opinion of the court:

Francois Meunier died, leaving a last will and testament, olographic in form, by which he bequeathed to the city of Carouge, canton of Geneva, Switzerland (his native city), all the property in the city of New Orleans owned by him, consisting of several pieces of real estate, shares of stock, money, and bills due him, all of the aggregate value of about \$25,000. He directed this property to be sold, and then followed a declaration to the effect that the city of Carouge "shall place the said sum at interest, and with the interest shall endow each year two poor girls, and shall give a pension to ten old persons of the two sexes, without any distinction of religion." He named Jerome Meunier, Joseph Bayle, and Emile Hoehn as testamentary executors. The will was admitted to probate, the executors were confirmed as such, and letters testamentary issued to them. Subsequently, collateral heirs of the deceased, his first cousins, residing in Switzerland and France, presented a petition for the annulment of the will.

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They represented that the deceased left no ascendants nor descendants, and that they, with others mentioned, were his closest of kin and sole heirs. The will is attacked as being against public policy and in derogation of the laws of the state of Louisiana, where the properties it deals with are situated, and where the will is to have effect. It is averred that the city of Carouge is a foreign municipal corporation, incapable of receiving and taking charge of an estate here; that the dispositions of the will in its favor are not sanctioned by the laws of Louisiana, nor by the treaty ratified between the United States and the Swiss Republic; that the laws of Switzerland did not at the date of the execution of the will, nor that of the probate thereof, authorize the city of Carouge to accept the legacy burdened with the conditions stipulated; and that no comity in this respect exists between the state of Louisiana, or the United States, and Switzerland. As further ground of avoiding the will, it is charged that the bequest to the city of Carouge creates a trust, or *fidei commissum*, obnoxious to the law of Louisiana; that by the terms of the will the said city is not vested with full ownership of the property or funds bequeathed, but, on the contrary, is required to invest the funds, and to hold the same in trust perpetually for the purpose of endowing each year "two poor girls" and pensioning "ten old persons," whose existence is uncertain, and whose names, residences, and nationality are not given; and that this is an attempt to will by testament, through the intervention of a commissary or attorney in fact, and constitutes a prohibited substitution. The petitioners represent that, with the will declared void, the inheritance of the property of the deceased devolves upon them, under the laws of Louisiana, and the treaties in force between Switzerland and the United States. The judgment of the court *a qua* sustained the opposition to the will, decreed its nullity, and recognized the claimants as heirs at law of the deceased. An order for a suspensive appeal from this decree was taken by the executors and the representative of the city of Carouge.

Motion to Dismiss Appeal.

A motion is made here to dismiss the appeal on several grounds, one of which is that the record is incomplete. It suffices to say, we do not find it so.

Another ground is that the trial court was without authority to fix the amount of the suspensive appeal bond, and that no appeal suspending the execution of the judgment could be taken without the giving of a bond exceeding by one half the sum of \$15,387.50, which was the net amount of the estate left in the hands of the executors after the payment of the debts of the deceased and the expenses of administration. The bond given was for less than the sum mentioned, but was for the amount fixed by the court. The judgment appealed from annulled the will and the probate thereof. It further recognized the petitioners as heirs of the de-

ceased, and as such entitled to the dead man's estate. But it did not, in terms, send them into possession. There was no order directing the recognized heirs to be put into possession. Neither did the judgment mention the amount of the net proceeds of the estate then in the hands of the executors. There was no judgment against the executors, specifically, for a sum as representing such proceeds. Under these circumstances, it was a case where the district judge was empowered to grant a suspensive appeal, and fix the amount of the bond to be given as such. *Edwards' Succession*, 34 La. Ann. 216; *Coyle v. Creevy*, 34 La. Ann. 539; *State ex rel. Durand v. Parish Judge*, 30 La. Ann. 285; *Cloney's Succession*, 29 La. Ann. 327.

A further objection is that the only party who signed the bond as surety is Edward Hoehn, who, in his capacity of coexecutor, is appellant herein. The contention is that Hoehn individually cannot be surety for Hoehn, executor, appellant. Neither can he. *State v. Probate Ct. Judge*, 2 Rob. (La.) 449; *Lafon v. Lafon*, 2 Mart. N. S. 571. It may be, too (though on this we express no opinion), that Hoehn, in his individual capacity, is not competent as surety for his coexecutor Jerome Meunier on an appeal bond given by the two executors. It is not necessary to decide this question, for Hoehn individually was clearly competent as surety on the appeal bond for the other appellant, the city of Carouge. Even, therefore, were the appeal held not good as to the executors, it must be maintained as to the real party in interest, the legatee under the will, and this necessarily would bring the case before us on its merits.

But it is contended the city of Carouge has not appealed. This contention is based on the fact that the motion and bond of appeal recite that "Louis Rittener, the duly-qualified agent of the commune of Carouge," appeals. It is urged that this is not an appeal by the city of Carouge. We find that citation in this proceeding to annul the will was prayed for against "the city of Carouge, Switzerland, through her accredited agent, Louis Rittener;" that the answer of the city of Carouge to the demand reads, "into court comes Louis Rittener, the duly-qualified agent and attorney in fact of the commune of Carouge," etc.; and that the judgment upon the issues made up by this answer is against "the city of Carouge, Switzerland, herein represented by Louis Rittener, its duly-qualified agent and attorney in fact." Under these circumstances, while the way in which the appeal was taken and the bond drawn may be objectionable from the standpoint of technically correct pleading, the appeal taken by the party filing the answer which joined the issue, and who is recognized in appellees' pleadings as the agent and attorney in fact of the city of Carouge, must be held to be the appeal of the latter. The motion to dismiss is denied.

On the Merits.

Testamentary substitutions and *fidei com-*
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missa, have been prohibited in this state from the earliest times. This prohibition was established in the interest of public order and state policy, and held to embrace within its scope the trust estates of the common law. Numerous decisions of this court attest the jealous care with which this policy of the law has been enforced. From the adoption of the Code of Louisiana of 1808 down to the year 1882, no legislative enactment appreciably modified its force, or weakened the stringency of its application to testamentary dispositions. In the latter year, however, a marked divergence from the beaten path of the law in this respect appeared among the statutes of the state. Act No. 124 of the Acts of 1882 was adopted, the object of which is to exempt all donations *mortis causa* or *inter vivos* made to trustees for educational, charitable, or literary purposes, or for the benefit of educational, literary, or charitable institutions already existing or to be founded, from the operation of the laws of the state relative to substitutions, trusts, and *fidei commissi*. It is part of the history of the state of that period that this departure from, or, rather, modification of, the ancient policy of the law, was coincident with the munificent dispositions made, or then about to be made, by the venerable and philanthropic Paul Tulane for the laudable purpose of founding in the city of New Orleans, where his active life had been spent and his fortune amassed, a great university, which, bearing his name, stands today alike a justification of the aforesaid modification of the law of trusts, a monument to his memory, and a blessing to mankind. As the law of Louisiana now stands, therefore, donations and bequests can be made to trustees for educational, charitable, or literary purposes, or for the benefit of institutions, existing or to be founded, the object of which is to promote education, literature, or charity. But it is clear from the language of the act of 1882 that its intention is to restrict this permission to educational, charitable, and literary objects within the state of Louisiana, and to institutions founded or to be founded under the laws of the state for such purposes. As the city of Carouge, a political institution in a foreign jurisdiction, can never exercise authority of any kind within the state of Louisiana, nor incorporate itself under our laws, nor authorize trustees to incorporate themselves here for the purpose of dispensing charity, it must be held that the act of 1882 can have no bearing, operation, or effect on the legacy under consideration, and no influence in the settlement of the question raised. It is equally clear that the charity intended by the bequest of the testator was to find its practical application in Switzerland, and not in Louisiana. We may therefore dismiss the act of 1882 from further consideration. The legacy to the city of Carouge is to be judged by the codal provisions of the law as the same stood prior to the act of 1882, and stand or fall according as it may or may not measure up to the requirements

of a valid testamentary disposition. The question, then, just now to deal with, is, Does this bequest evidence a substitution of *fidei commissum* prohibited by the law?

To create a substitution is to bequeath property to one or more, to be succeeded in the enjoyment thereof by others designated by the testator. The *fidei commissum* is to bequeath property to be held for and delivered to another. It is a mandate or trust, with no interest conferred on the legatee, who is charged only to preserve and deliver. *McCan's Succession*, 48 La. Ann. 157, 19 So. 220. It is a charge to receive for and deliver to another. [*Mathurin v. Licaudais*] 5 Mart. N. S. 303. To fail, this legacy must come clearly within the scope of one or the other of these prohibitions, for the law and the courts lean to the upholding of the dispositions made by testators of their estates. Eminent civilians have declared that, "wherever the testamentary power has been established, a will or testament is an exertion of human liberty and of human volition over property;" and by others truly has it been said that "the last will of those who depart this life is the last expression of their love, friendship, and gratitude," to be regarded as sacred, and, where it violates no law, to be respected, even as the grave of the dead is respected. *Michon Succession*, 30 La. Ann. 217. To anathematize the dispositions of wills, to decree them null, it must clearly appear they come within the prohibitions of the law. *Cole v. Cole*, 7 Mart. N. S. 416. A doubt existing must be resolved in favor of their validity. Rev. Civ. Code, art. 1713; *McCluskey v. Webb*, 4 Rob. (La.) 204; *Ducloslange's Succession*, 4 Rob. (La.) 409; [*Cole v. Cole*] 7 Mart. N. S. 417; *Farrar v. McCutcheon*, 4 Mart. N. S. 47; *Arnaud v. Tarbe*, 4 La. 504; *State v. McDonogh*, 8 La. Ann. 173; *Auld's Succession*, 44 La. Ann. 593, 10 So. 877.

The argument against the will is it was the intent of the testator that the commune of Carouge should have his estate, and be charged with the duty or trust to preserve the same for indefinite third persons, to wit, "two poor girls," and "ten old persons of the two sexes," to whom, annually, its profits should be paid,—not to the same "two poor girls" and "ten old persons" each year, but to such persons fulfilling that designation whom, each year, the commune may, in its discretion, select as beneficiaries of the charity. The requirement is that it be paid out each year to such persons. As to that, the commune has no discretion, but has discretion as to the choice of persons to become the recipients of the bounty, provided they are "poor girls," in the one instance, and "old persons," in the other instance. The argument, further, is that, while this clause in the will may not constitute a substitution, it does create a trust and *fidei commissum*; that it is a bequest in trust to the city of Carouge, which is charged with the duty of holding, preserving, administering, and investing the legacy, and applying its profits to the amelioration of the condition of

certain indefinite and innominate persons, to wit, two poor girls and ten old persons; that the city is the instrumentality made use of by the testator for preserving and conveying his estate to the indefinite persons named; that if the bequest had been made to "two poor girls" and "ten old persons," residents of the city of Carouge, it would be void for uncertainty (for instance, what "two poor girls," what "ten old persons"); that, to avoid this uncertainty, the bequest is made to the city of Carouge as trustee to select the "two poor girls" and "ten old persons" who annually shall be the beneficiaries of the bounty of the testator; that thus to the city of Carouge a commission in perpetual trust is given to be executed; that the funds representing the legacy are to remain unimpaired, are to be preserved indefinitely, and the proceeds of the investment of the same are to be distributed by the city as the commissary or attorney in fact of the testator, to the girls and old persons annually who may be selected by the trustee; and that the clause in the will, therefore, is a testamentary disposition committing to the choice of a third person the institution of the beneficiary of the will, and comes under the express ban and prohibition of article 1573 of the Revised Civil Code. This argument would prevail if it were the only interpretation of which the will is susceptible. But there is another view to be taken of the will, and we think a legal one. While the testator willed his estate, real and personal, in Louisiana, to the commune of Carouge, he directed his executors to sell the property, and to convert all the effects of the estate into cash, and to transmit the funds thus derived to the legatee. The executors have obeyed this injunction by selling the property, and the proceeds thus derived, minus the debts and charges of the administration, are the subject of this controversy. This will therefore does not complicate the simple tenures by which alone our laws permit the property to be held, nor does it tie up indefinitely, and take out of commerce, the property of the succession. Money was really the thing donated, and it was contemplated it should be used by the legatee so as to produce an annual revenue, which is not to be preserved and returned to another, but is to be applied to pious or charitable purposes. The title intended is one to the city of Carouge in full ownership, with a destination to pious or charitable uses. Such a disposition is lawful, and may be carried into effect if the uses to which it is to be put be such for which the city would be otherwise bound to provide. One of the directions of the will is to provide for old persons of the two sexes, and one of the duties recognized in all enlightened countries as resting upon communities incorporated into cities is to care for the indigent. *State v. McDonogh*, 8 La. Ann. 259. Legacies for pious uses are described to be those which are destined to some work of piety or object of charity. Id. 171. They are not only not prohibited by the law, but viewed with favor. *Ibid.* It

is no objection to the validity of a legacy to pious uses that it is for the benefit of the poor. The legatee of such a legacy is vested with the title, even though the destination affixed to the property by the testator follow it in his possession. *Id.* 172. The law makes no distinction between a legacy to the poor of a city, and a legacy to the city for the poor. In both cases it is a legacy for pious uses, and the city is the recipient. *McDonogh Will Case*, 8 La. Ann. 247. Legacies for pious uses are recognized by the law for the purpose of procuring aid from individuals in supplying those wants which the state itself, or the communities into which it is divided, are bound to provide for in the interest of society, and as a function of government, falling within the circle or coming within the scope of the duties of government. *Id.* 249. The police and good order of a city include the education of youth, and the care of the poor within its limits. Deduced at first from the principles of Christianity, it has become an elementary principle in the theory of government. *Id.* 255; *Domat, Des Comm.* 107.

When analyzed, the provisions of this will are found to be lawful, simple, and reasonable; to contain nothing hostile to any consideration of public policy. There is no trust created by it. The bequest is absolute to the city of Carouge for all time, burdened only with a charge to dedicate it to pious and charitable uses. It is not obnoxious to the maxim, *Le mort saisit le vif*, for the title of the estate is immediately vested in the commune of Carouge. It is not to be surrendered at any time to anyone. No one is named, to whom the estate is to be transmitted. The direction that the proceeds of the property are to be placed at interest, and the profits thus derived are to be used in the way indicated in the will, does not bring it within the scope of the prohibitions of the law. This direction is, we think, more to be regarded as in the nature of a request to the legatee. It was the expression of a wish, a desire. It was not a disposition. It was advice and recommendation. *Rev. Civ. Code*, art. 1713, we think, authorizes this meaning to be given to the words. 8 La. Ann. 237. It will be observed that it was only with regard to the interest on the fund representing the estate that any request is made or direction given, and even that is not required to be preserved for or disbursed to any particular person named. In a general way two poor girls and ten old persons annually are directed to be aided from the profits of the fund; but this must be held to be within the discretion of the commune, as to the persons to be aided, for no particular poor girls or old persons are invested with the right of enforcing the disposition. This does not come within the scope of *fidei commissum* which, as we have seen, is understood to be a disposition, *causa mortis*, by which the heir or legatee is requested to give or return a certain thing to another person. *Dom. lib.* 4, title 2, § 2. By "another person" is meant a person or institution so named or indi-

cated as to individualize him or her or it. That is not the case here. This bequest is to the city of Carouge, and to it alone. 8 La. Ann. 172. It was in no sense a legacy to any other person. The direction to use the interest for a given purpose did not vest any part of the legacy in any particular person as beneficiary thereof. The city of Carouge is instituted universal legatee. By virtue of this institution, it is clothed with full right of ownership over the funds of the succession. There is and can be no substitute to take the estate at any time. The city has perpetual existence. It is a moral person, perpetually renewed by the successive renewal of its inhabitants. While this legacy to it is to be viewed as one burdened with the charge of a specific destination for the behoof of the city, the latter is not encumbered with the duty of returning it at any time to anyone. It is an obligation consisting in *faciendo*, nothing more. 8 La. Ann. 230. It is a gift to the city made in *presenti*, with the charge of specific destination; and, since taking care of the destitute is a duty devolving on municipalities, this legacy is really to be viewed as one to the city of Carouge, with the charge of investment for its own interest. The most that can be said against the legacy is that it is one with a charge. But this does not make it a *fidei commissum*, for, under the law, charges and conditions may be placed on all heirs and legatees, except forced heirs as to their *légitime*. We hold that the city of Carouge, under the proper view to be taken of this will, is in no sense a trustee. It holds the legal estate of the property or funds donated to it. The terms of the will are terms of disposal. They express the transfer of ownership from the person of the testator to the legatee. The disposition and control of the fund after it is placed in the city's hands would be in virtue of ownership, not trusteeship. The testator did not devise the legacy to persons needing and entitled to receive charity, though it was the object and intention that needy persons are to be benefited by it, if carried out. *Burke's Succession*, 51 La. Ann. 538, 25 So. 387; *New Orleans v. Hardie*, 43 La. Ann. 255, 9 So. 12. But, even if the legacy had been devised directly to the poor of the city of Carouge, it would come within the letter of the law, for the city could and would take charge of it and administer it for the beneficiaries. *Rev. Civ. Code*, art. 1549; *Fink v. Fink*, 12 La. Ann. 301; [*State v. McDonogh*] 8 La. Ann. 256. We think the needy persons intended to be benefited by the provision of the will are those of the city of Carouge coming within the description of the will.

This case, we think, comes within the rule of those decisions of this court of which *Milne v. Milne*, 17 La. 46, the *McDonogh Will Case*, 8 La. Ann. 171, and the *Western Star Lodge Case*, 38 La. Ann. 620, are types, rather than within the rule of those decisions of which *Franklin's Succession*, 7 La. Ann. 395, is a type. The case of *Burke's Succession*, 51 La. Ann. 538, 25 So.

387, cited by plaintiffs, is not in point; and that of *Kernan's Succession*, 52 La. Ann. 48, 26 So. 749, is to be differentiated from the instant case. There the devise was to Archbishop Janssens, of the diocese of Louisiana, and to his successors, of certain real property (lots and houses) in the city of New Orleans "upon condition that out of the revenues or rents thereof an asylum or home for the poor of both sexes shall be founded, endowed, and maintained, similar, so far as possible, to that of St. Michael's in the city of Rome, Italy." Sustaining the attack of the heirs on the will on the ground that it sought to create a *fidei commissum*, and proposed a prohibited substitution, the court said: "Whether we hold the church or the archbishop to be the legatee, we are confronted with the difficulty arising from the title the will seeks to create. The will conveys no ownership. The title, such as it is, is one of mere administration. Whether held by the church or the archbishop, the property is to be forever inalienable." The court held the will obnoxious in seeking to introduce an impossible and illegal tenure, and that no such title as that conveyed has any place under our system of laws. Here the real bequest was a legacy of money, for the will directed the sale of the property, the proceeds of which were devised to the city of Carouge for pious and charitable uses. No property here was to be held forever inalienable. Had the argument advanced by plaintiff in the case at bar been sustained in the *McDonogh Will Case*, where substantially it was made, the munificent bequests made by that philanthropist to the cause of education in the cities of New Orleans and Baltimore would have failed, and the enduring monuments to his memory, in the form of commodious and substantial public-school buildings which dot the former city all over, would never have been erected. Had it been made and sustained against the bequest of Alexander Milne in 1841, the town of Fochabers, in Scotland, would never have enjoyed the bounty of its native son, who, amassing a fortune here, devised a portion thereof (\$100,000) to that municipality for the establishment and maintenance of free schools, and the Duke of Richmond's suit in its behalf [*Richmond v. Milne*] 17 La. 320, 36 Am. Dec. 613, would have been vain. If it had been made by the legal heirs of James Smithson in the courts of Great Britain, and sustained, against the princely bequest of £100,000 sterling devised by that enlightened Englishman to the United States for the purpose of founding at the capital of the Republic a great scientific institution "for the increase and diffusion of knowledge among men," the Smithsonian Institute would not to-day be in existence. The law of Louisiana is not the illiberal institution the argument against the validity of Francois Meunier's will presupposes. We find nothing prohibitive of the transmission of the funds of the legacy to the commune of Carouge, there to be dedicated to the charitable uses intended by the testator.

48 L. R. A.

But it is insisted the city of Carouge is incapable of receiving the legacy, and one of the grounds advanced for this contention is that the treaty of 1850 between the United States and the Swiss Republic restricts the right of acquiring property in the territory of the other to citizens, and that this excludes the city of Carouge, which cannot be held included within the term "citizens." The city of Carouge is a political corporation,—such a one as is defined by our Code as "an intellectual body." Rev. Civ. Code, art. 427. It is a college of inhabitants, the members of which succeed each other, so that the body continues always the same, notwithstanding the change of the individuals which compose it, and which, for certain purposes, is considered as a natural person. *Ibid.* Such corporations are substituted for persons, may possess an estate, have a common treasury, and are capable of receiving legacies and donations. Rev. Civ. Code, art. 433. It is too narrow a construction, therefore, which excludes the city of Carouge from the benefits of the first and fifth articles of the treaty with the Swiss confederation. The latter article gives to heirs (whether by testament or without) of citizens of each of the contracting parties the right to succeed to property, to inherit it and take possession thereof, with the further stipulation that one who, on account of being an alien, cannot hold real property (if such be the case), is to be accorded the right to sell same and remove the proceeds. Our law declares, "All persons may dispose or receive by donation *inter vivos* or *mortis causa*, except such as the law expressly declares incapable." Rev. Civ. Code, art. 1470. Cities and corporations are ranked among persons, and they are not incapable. "Corporations are placed by our laws on the same footing as natural persons, as to their capacity to take by devise." [*Milne v. Milne*] 17 La. 54. "Donations *inter vivos* and *mortis causa* may be made in favor of a stranger, when the laws of his country do not prohibit similar dispositions from being made in favor of a citizen of this state." Rev. Civ. Code, art. 1490. The treaty with Switzerland permits citizens, respectively, of the United States and of the Swiss Republic, to make such dispositions of property in favor of each other; and the laws of Switzerland do not prohibit dispositions of property from being made in favor of citizens of this state or of the United States. The *procureur général* of Switzerland certifies that no law of that confederation places any obstacle in the way of the acceptance of a legacy of the nature of that of Francois Meunier's will, when the council of state authorizes the acceptance, and it is shown that this authorization has been duly given. But it is insisted, as further ground for the contention that the city of Carouge is incapable of receiving the legacy, that this authorization by the council of state was necessary because the legacy contained a charge, and the law of Switzerland does not permit municipalities to accept "any legacy or donation containing any charges or con-

ditions." From this the argument proceeds that at the time of the death of the testator, and the probate of his will, the legatee, city of Carouge, did not possess the capacity of inheriting or taking the legacy; that the legal heirs did; and that the ownership and seisin thus invested in the latter could not by any subsequent event be taken away. We do not find that there is any prohibition in the laws of Switzerland against municipalities accepting legacies,—only that, where such legacies contain a charge or condition, the permit of the council of state to accept must be had. The capacity to accept, therefore, exists,—to become executory, however, in case a charge or condition is attached to the legacy, only upon permission being granted by the council of state. Where the legacy contains no charge or condition, the capacity to accept is executory, in full right. Where there is a charge or condition, this capacity to accept is merely suspended until the permit is granted. There was then no want of capacity in the city of Carouge to accept; and when the council of state acted, as it did, and gave the permission to accept, the bar was removed. The case of *First Congregational Church v. Henderson*, 4 Rob. (La.) 210, cited in opposition to this view, is not in point; for there, at the time of the testator's death, there was a positive prohibition in the charter of the church against receiving any legacy exceeding \$1,000. So the court held properly that "the want of capacity at the death of the testator, resulting from a positive statutory prohibition then in force, cannot be supplied, cured, or removed by any subsequent legislative enactment." In the instant case there was no "absence of those qualities required in order to inherit" at the moment the succession was opened. Rev. Civ. Code, art. 950. The legatee here existed at the time the testator died (Rev. Civ. Code, art. 953), and possessed the heritable quality, the exercise of which was merely suspended until permission to accept was had from the council of state. The capacity to receive was one thing, and existed. The exercise of it was another

thing, and was merely inoperative until the council of state acted. Rev. Civ. Code, art. 1473; *Milne v. Milne*, 17 La. 46. Many years ago, in this state, Julien Poydras, dying, bequeathed by will \$30,000 to the parish of Point Coupée, and a like sum to the parish of West Baton Rouge, the interest on which he directed to be appropriated as dowries to the indigent young women of the parishes, to encourage their marriage. Trouble arising as to the power or capacity of the parishes to accept the legacies, the legislature passed acts authorizing the police juries of the said parishes to accept the same, and it was done. [*Milne v. Milne*], 17 La. 55; Acts 1825, p. 82; Acts 1837, No. 29.

We hold against plaintiffs on both the grounds urged against the capacity of the city of Carouge to receive and take the legacy, and, deeming the legacy not one coming within the prohibitions of the law, it follows that the will attacked must be sustained as a valid disposition of the testator's estate.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and it is now ordered and decreed that the demand of plaintiffs herein be rejected and dismissed. It is further ordered, etc., that the last will and testament of Francois Meunier, deceased, be sustained as a lawful testamentary disposition of property, and the executors thereof are directed to recognize the city of Carouge, canton of Geneva, Switzerland, as the universal legatee under said will, and to pay over to the said city, or its duly-accredited representative, the funds on hand representing the net proceeds, after payment of the debts of the deceased and the charges of administration, of the sale of the property of the estate of the testator. It is further ordered, etc., that costs of this proceeding in both courts be taxed against plaintiffs.

Breaux, J., concurs in the decree. **Monroe, J.**, having decided the case in the court of first instance, takes no part in the decision on the appeal.

Rehearing denied November 20, 1899.

MICHIGAN SUPREME COURT.

Alfred RICE
v.

DETROIT, YPSILANTI, & ANN ARBOR
RAILWAY, *Pf. in Err.*

(.....Mich.....)

1. The duty of a street-railway company to sell tickets in quantities at reduced rates on each car, by virtue of the terms of its franchise, from a certain town from which it runs to a neighboring city, extends to a passenger on the line who gets on the car and offers to buy such tickets at a point outside the town.

NOTE.—For regulation of fares on street railways, see *Sternberg v. State* (Neb.) 19 L. R. A. 570, and *note*; and *Detroit v. Fort Wayne & B. I. R. Co.* (Mich.) 20 L. R. A. 79. 48 L. R. A.

2. A street-railway company which has assumed to comply with the terms of its franchise requiring sales of tickets at reduced prices for a certain trip, by providing separate tickets for different parts of the trip, without offering any through-trip tickets for sale, and which has accepted a ticket for one portion of the trip, cannot escape liability for refusing to sell tickets at the reduced price for the remaining part of the trip, on the ground that its franchise obliges it to sell through tickets only.

(February 20, 1900.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to recover back an excess of fare paid under protest on de-

defendant's cars because of defendant's refusal to sell a trip ticket at less cost. *Affirmed.*

The facts are stated in the opinion.

Mr. J. Emmet Sullivan for plaintiff in error.

Messrs. Smith & Curtis and Rice & Meeker for defendant in error.

Montgomery, Ch. J., delivered the opinion of the court:

The defendant and appellant in this cause is a street railway that maintains and operates a railway between the city of Detroit, the township of Springwells, the village and township of Dearborn, and other places. The cars of the defendant go over the track of the Detroit Citizens' Street-Railway Company to the city hall, in the city of Detroit. Defendant has been selling five tickets for 50 cents, each good for a trip between the city hall, in the city of Detroit, and the village of Dearborn. Each of the five tickets is divided into two parts,—one good from the village of Dearborn to the Flint & Pere Marquette Railroad crossing, and the other good between the Flint & Pere Marquette Railroad crossing and the city hall, in the city of Detroit. The franchise granted to defendant by the village of Dearborn provided as follows: "It is further provided that the same grantee shall charge not to exceed the following rates, to wit: From any point in said village of Dearborn to Woodward avenue, in the city of Detroit, fifteen (15) cents cash fare, good either way, or two tickets for twenty-five (25) cents, good either way; a strip of five (5) tickets shall be sold for fifty (50) cents." By the terms of the Dearborn franchise, the defendant may charge 5 cents for a ride in said township; and the Springwells franchise permits a charge of 5 cents from the Flint & Pere Marquette Railroad crossing to Dearborn township. The plaintiff on the 21st day of July, 1898, in the city of Detroit, boarded a car bound for the village of Dearborn. He gave the conductor a portion of a through ticket which entitled him to ride to the Flint & Pere Marquette Railroad crossing, in the township of Springwells. Upon arriving at the crossing the conductor came to take up fare for the trip between the Flint & Pere Marquette Railroad crossing and the village of Dearborn. Plaintiff tendered 50 cents, and demanded a sale to him of a strip of five tickets good between the city hall, or Woodward avenue, in the city of Detroit, and the village of Dearborn,—not specially for the purpose of paying his fare to Dearborn with a portion of the strip, but for the purpose of being carried to and fro between the city hall, in the city of Detroit, and the village of Dearborn. The conductor, not having any of these strips or tickets, demanded that the plaintiff pay 10 cents for the trip between the Flint & Pere Marquette Railroad crossing and the village of Dearborn, which plaintiff paid under protest. He thereafter brought suit against defendant for 5 cents. A judgment in the circuit court on appeal from the justice

was rendered for the plaintiff for 5 cents and costs, by direction of the court.

The pleadings are not printed in the record, so that we must assume that no point was intended to be made as to the sufficiency of the declaration. We have, then, a case in which defendant is operating under a franchise imposing a duty to sell five tickets for 50 cents, good between the city hall, Detroit, and any point in the village of Dearborn. The franchise further provided: "All such tickets shall be kept for sale upon each and every car operated by it." It is contended that the franchise is in force only within the territorial limits of the township, and does not cover territory in other townships. We do not think this contention can be sustained. The franchise is in the nature of a contract, and imposes obligations upon the company which those having occasion to ride from Dearborn to Detroit have a right to enforce. It is urged that the case of *Kissane* against this same defendant (Mich.) 79 N. W. 1104, is authority for defendant's contention. No such doctrine is announced in that case. It was held, it is true, that the plaintiff was not compelled to rely on the restrictions contained in the franchise granted by the municipality in which he boarded the car, but that he might, under such franchise, pay his fare to a point in another municipality, and there avail himself of the terms of a franchise granted by the latter. The plaintiff's right under this franchise is not different than it would have been had the franchise in Springwells been silent on the subject of fares. The defendant saw fit to contract with the village of Dearborn for a rate outside the limits of the village, and to agree that tickets should be sold on its cars. This contract it cannot repudiate.

But it is urged that no damage was shown, for the reason that the tickets which the defendant was accustomed to sell (consisting, as they did, of two parts) were not the kind of tickets required by the franchise, and that the company was not required to accept the strip from the Flint & Pere Marquette crossing to Dearborn, but was only required to furnish a through ticket. It might be a sufficient answer to say that a failure to sell the tickets to plaintiff when demanded entitled him to nominal damages, at least, and that no more than nominal damages were recovered; but a further answer is that defendant has placed its own construction on the requirements, and has provided tickets in form to suit itself. The plaintiff was entitled, by means of such tickets, to a ride from the city hall to Dearborn for 10 cents. He sought to obtain it by means of the only ticket kept by the defendant for sale. One part of such a ticket had been given up, and, if he had been able to obtain the tickets requested, the remaining portion of the ride could have been paid for with the other coupon.

The judgment is affirmed.

The other Justices concur.

William L. FULLER, *Plff. in Err.*,
v.

LOCOMOTIVE ENGINEERS' MUTUAL
LIFE & ACCIDENT INSURANCE AS-
SOCIATION.

(.....Mich.....)

The amputation of about one fourth of a person's foot does not give any right to the full amount of insurance on the ground that all the use of the foot is lost, under a by-law of a mutual benefit association providing for full payment in case of the "amputation of a limb (whole hand or foot)," as the word "whole" applies to the foot as well as the hand, and the injury insured against is not the loss of the use of a hand or foot, but the amputation of a limb that should include a whole hand or a whole foot.

(December 30, 1899.)

ERROR to the Circuit Court for St. Clair County to review a judgment in favor of defendant in an action brought to enforce payment of an amount alleged to be due on a policy of accident insurance. *Affirmed.*

The facts are stated in the opinion.

Mr. John B. McIlwain, for plaintiff in error:

If the question should depend upon the extent of plaintiff's disability, the testimony tending to show it should all have been admitted, and the court should have stated the law and left the jury to say whether plaintiff's disability came within the law as given to them.

Turner v. Fidelity & C. Co. 112 Mich. 429, 38 L. R. A. 529, 70 N. W. 898; *Lord v. American Mut. Acci. Asso.* 89 Wis. 19, 26 L. R. A. 741, 61 N. W. 293; *Sneck v. Travelers' Ins. Co.* 88 Hun, 94, 34 N. Y. Supp. 545; *Sheanon v. Pacific Mut. L. Ins. Co.* 77 Wis. 618, 9 L. R. A. 685, 46 N. W. 799.

In a contract of this kind the court will not be inclined to adopt a legal construction varying from the grammatical construction, to the prejudice of the party insured, or to defeat substantial justice.

The contract is open to the construction contended for by plaintiff, and, this being so, the law is well settled that where the provisions in an insurance policy are susceptible of two constructions, the one most favorable for the insured will be adopted.

Turner v. Fidelity & C. Co. 112 Mich. 429, 38 L. R. A. 529, 70 N. W. 898; *Utter v. Travelers' Ins. Co.* 65 Mich. 545, 32 N. W. 812; *Grand Rapids Electric Light & P. Co. v. Fidelity & C. Co.* 111 Mich. 148, 69 N. W. 249; *May, Ins.* § 175; *Wood, Ins.* §§ 60, 62; *Allen v. St. Louis Ins. Co.* 85 N. Y. 473; 11 Am. & Eng. Enc. Law, p. 286; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673, 24

L. ed. 563; *Hohn v. Inter-State Casualty Co.* 115 Mich. 79, 72 N. W. 1105.

The law does not specify where the foot must be amputated to entitle the insured to recover.

In contracts providing indemnity in case of the "loss of a foot" the decisions are uniform in holding these words to mean "the loss of the use of a foot," and that amputation is not necessary.

1 Am. & Eng. Enc. Law, 2d ed. p. 301; *Lord v. American Mut. Acci. Asso.* 89 Wis. 19, 26 L. R. A. 741, 61 N. W. 293; *Sheanon v. Pacific Mut. L. Ins. Co.* 77 Wis. 618, 9 L. R. A. 685, 46 N. W. 799; *Sneck v. Travelers' Ins. Co.* 88 Hun, 94, 34 N. Y. Supp. 545.

Messrs. Phillips & Jenks, for defendant in error:

The policy itself, in the absence of fraud, duress, or mistake, must be looked to, to ascertain the meaning and intent of the parties; and where the contract is clear, precise, and unambiguous in its terms, and the sense is manifest, there is no need of a resort to rules of construction.

Joyce, Ins. §§ 185, 205, 207; *Hartford F. Ins. Co. v. Davenport*, 37 Mich. 609; *Supreme Lodge, K. of H. v. Nairn*, 60 Mich. 44, 26 N. W. 826.

Hooker, J., delivered the opinion of the court:

The plaintiff was a member of a mutual benefit association, and held a certificate which he claims to entitle him to payment of \$3,000 under article 19 of the by-laws, which is as follows: "Any member while engaged in any lawful avocation receiving bodily injuries which alone shall cause amputation of a limb (whole hand or foot), or total and permanent loss of eyesight, he shall receive the full amount of his policy." The defendant refuses payment upon the ground that the injury sustained does not bring him within the by-law, for the reason that the injury did not cause amputation of a whole hand or foot. The circuit judge directed a verdict for the defendant, and the plaintiff has appealed.

The record contains diagrams showing the size and shape of the whole left foot and the maimed right foot. They were made by drawing a pencil around them while the plaintiff stood upon a piece of paper. The length of the whole foot is $11\frac{1}{4}$ inches to the end of the great toe, while the amputated foot is exactly $7\frac{1}{2}$ inches on a line drawn through the center of the foot, and $7\frac{3}{4}$ inches if drawn in the direction of the great toe. It is thus demonstrated that the foot is shortened $3\frac{1}{4}$ inches, which is as nearly one fourth as it well could be. This one fourth is from the toe, and it leaves three fourths of the foot. This would leave all of the heel, and substantially all of the hollow

NOTE.—As to what constitutes loss of foot or hand, see *Sheanon v. Pacific Mut. L. Ins. Co.* (Wis.) 9 L. R. A. 685; *Stever v. People's Mutual Acci. Ins. Asso.* (Pa.) 16 L. R. A. 448; *Lord v. American Mut. Acci. Asso.* (Wis.) 26 L. R. A. 741.

As to what constitutes a total loss of sight of 48 L. R. A.

both eyes, see *Humphreys v. National Benefit Asso.* (Pa.) 11 L. R. A. 504.

As to what constitutes total disability, see *Turner v. Fidelity & C. Co.* (Mich.) 38 L. R. A. 529, and *note*; also *Lobdill v. Laboring Men's Mut. Aid Asso.* (Minn.) 38 L. R. A. 537.

of the foot, and possibly a part of what is called the "ball of the foot." We do not overlook the statement that the skin of the sole was left longer to lap upward over the end, and perhaps part of the top, of the mutilated foot, but this cannot have lengthened it materially. It is claimed that it would be 1 inch. Counsel claim that the proof shows that all use of the foot is lost, and insist that this brings them within the spirit and meaning of the contract. They contend: First, that the contract should be read as though it said, "Foot or whole hand,"—in other words, that the qualifying adjective, "whole," should not be applied to "foot;" and, second, that in any event the whole foot was amputated when it was so far removed as to be useless in the performance of the natural functions of a foot.

The natural construction of the words would be the same as though the by-law had said, "Whole hand or whole foot." Furthermore, the injury insured against is not the amputation of a hand or foot, but a limb; and the words in brackets, "whole hand or foot," are used as explanatory of what was meant by the word "limb," i. e. an amputation, not necessarily a whole arm or leg, at the elbow or knee, but any amputation of a limb that should include a whole hand or a whole foot.

We are cited upon the second proposition to some authorities which are said to hold that, if the beneficial use of a member is lost, there may be a recovery. That would be a reasonable construction of a contract of insurance that should insure against the "loss of a hand or foot," for it might well be said that a foot or hand is lost when it is so impaired as to be of no further use, and that is as far as the authorities have gone. What is meant by the loss of a hand? Ordinarily the term "loss" is obvious, but when it is considered in the light of surrounding circumstances, viz., an insurance policy that indemnifies against the loss of a hand or an entire hand, it is not unreasonable to hold that the parties understood that any injury to the hand which rendered it useless was a loss of the hand or entire hand. In *Sheanon v. Pacific Mut. L. Ins. Co.* 77 Wis. 618, 9 L. R. A. 685, 46 N. W. 799, where "an insurance policy provided that the principal sum should be paid if the insured, from a violent and accidental injury which should be externally visible, should 'suffer the loss of the entire sight of both eyes, or the loss of two entire hands or two entire feet, or one entire hand and one entire foot,' the insured was accidentally shot in the back: the bullet penetrating his spine, and producing immediate and total paralysis of the lower part of his body, and entirely destroying the use of both feet. Held, that he had suffered 'the loss of two entire feet,' within the meaning of the policy." The court said: "The question is, Does the policy cover such an injury? The policy covers both death and indemnity; the company agreeing to pay the principal sum if the insured, from a violent and accidental injury which should be externally

visible, should 'suffer the loss of the entire sight of both eyes, or the loss of two entire hands or two entire feet, or one entire hand and one entire foot.' This is the language of the policy, and the question is, What does it mean, or what must be understood by it? Is its meaning that the insured is not entitled to recover the insurance money unless his legs and feet have been amputated or severed from his body, or does it mean that the injury must have destroyed the entire use of his legs and feet, so that they will perform no function whatever? The contention of the learned counsel for the defendant is that the clause is to be understood in the former sense, and implies an amputation or physical severance of the feet from the body, and does not include an injury such as paralysis, though such injury actually deprives the insured of all use of his feet and legs. We cannot adopt such a construction of the contract. To our minds the loss of the hands and feet embraced in the policy is an actual and entire loss of their use as members of the body; and if their use is actually destroyed, so that they will perform no function whatever, then they are lost as hands and feet. In ordinary and popular parlance, when a person is deprived of the use of a limb we say he has lost it. This is the ordinary sense attached to the word when used in such a connection. Now, if the feet and hands cannot be used for the purpose of moving about or walking, or for holding and handling things, they are in fact lost as much as though actually severed from the body. The expression 'loss of feet' would generally be understood to mean a loss of the use of these members; and if the lower portions of the plaintiff's body and his feet are completely paralyzed, and he is permanently and forever deprived of their use, he has suffered 'a loss of two entire feet,' within the meaning of the policy." The next case in chronological order to which our attention is called is *Stevens v. People's Mut. Acci. Ins. Assn.* 150 Pa. 132, 16 L. R. A. 446, 24 Atl. 662. There it was held that "an accident policy insuring against involuntary, external, violent, and accidental injuries, and not against disease of any kind, or against disabilities which are the result wholly or in part of disease or bodily infirmities, and providing for a stipulated indemnity for partial permanent disablement, which is defined to be the loss of one hand or foot or both eyes, does not cover the case of indemnity for an injury where the foot is not lost or injured, and it may be used constantly by means of an appliance of a plaster jacket to the spine, although the foot could not be used if the appliance were removed." It was held that he had neither lost the foot nor the use of it. The case of *Sneck v. Travellers' Ins. Co.* is next in order of time. This case was tried twice, and is reported in 81 Hun. 331, 30 N. Y. Supp. 881, and 88 Hun. 94, 34 N. Y. Supp. 545. The understanding in that case was based upon a "loss by severance of one entire hand or foot." At the first review the court held that it was error to submit the case

to the jury where the proof showed that the hand was removed a short distance back of the knuckle. Bradley, J., dissented; urging that the policy insured against loss of the hand, and that, it being shown that the entire use of the hand was lost, there might be a recovery. Upon the second hearing this view was taken; Warner and Ward, JJ., sustaining it; Lewis, J., dissenting; and Bradley, J., not voting; and this order was afterwards affirmed by the court of appeals in 156 N. Y. 669, 50 N. E. 1122. Again, in *Lord v. American Mut. Acci. Asso.* 61 N. W. 293, 26 L. R. A. 741, the supreme court of Wisconsin held that "it is for the jury to determine whether a total loss of three fingers and a part of another on the same hand, destruction of the joint of the thumb, and a cutting of the hand, is a loss of the hand, 'causing immediate, continuous, and total disability,' within the meaning of that clause in a policy of accident insurance." 89 Wis. 19, 26 L. R. A. 741. A number of cases are collected in a note to *Turner v. Fidelity & C. Co.* (Mich.) 38 L. R. A. 535, 536. In 1 Am. & Eng. Enc. Law, 2d ed. p. 301, this subject is summed up as follows: "It has been contended on behalf of the insurance companies that the provisions in regard to the 'loss' of the hands and feet must be understood to imply an actual amputation or physical severance of those members from the body. But this view has not met with favor from the courts; it being held that, to entitle the insured to recover, physical severance is unnecessary, but it is sufficient if he has been deprived entirely of the use of the feet and hands as members of the body. And there can scarcely be any doubt as to the soundness of this view, for if the feet and hands cannot be used for the purpose of moving about or walking, or for holding and handling things, they are in fact lost as much as though actually severed from the body. Many of the companies have altered their policies so as to read, 'the loss of feet or hands by severance' thereof; but this provision has been held to be intended to refer to the manner rather than to the exact physical intent of the in-

jury." These cases establish the proposition that where an insurance policy insures against the loss of a member, or a loss of an entire member, the word "loss" should be construed to mean the destruction of the usefulness of the member, or the entire member, for the purposes to which, in its normal condition, it was susceptible of application. In all of these policies the word "loss" is used, and it is the loss of the member that is in terms insured against. As indicated in the last authority cited, the attempts of the insurance companies to avoid this construction by so changing the policy that it reads, "Loss by severance of feet or hands," has failed; the courts holding, as before, that it is the loss of the use of the member which was the object of the contract. In the present case the word "loss" is eliminated, and the insurance is against "an injury that shall cause the amputation of a limb (whole hand or foot), or total and permanent loss of eyesight." This language is not ambiguous, and, if the insurance company intended to limit its liability to cases where the entire member was actually amputated, they could not well have chosen more apt and certain language to indicate it, without supplementing it with a negative statement that should exclude recovery for the amputation of less than the entire foot or hand; and it is doubtful if that would not be open to the same construction as the language actually used. This company is comprised of the insured. They make contracts of insurance which protect against certain injuries merely. It is not for us to make contracts for them, nor should we enlarge their liabilities. We may determine the intention of the contracting parties as disclosed by the contract if it is ambiguous, or in the light of the circumstances under which it is made, if it is fairly susceptible of a different meaning from that naturally implied by the unexplained use of the words. This is neither.

The instruction of the learned circuit judge was correct, and the judgment is affirmed.

The other Justices concur.

MINNESOTA SUPREME COURT.

STATE of Minnesota, *Resp't.*,

George A. ZENO, *Appt.*

(.....Minn.....)

- *1. It is competent for the legislature of this state, in the interests of the public health and welfare, to enact laws for the purpose of regulating and throwing restrictions around the occupation or calling of barbers.
2. Gen. Laws 1897, chap. 186, in so far as it prohibits any person from following the occupation of a barber in this state without first obtaining a certificate of registration

*Headnotes by Brown, J.

NOTE.—As to license for business affecting public health, see *State v. Nelson* (Minn.) 34 L. R. A. 318; *State ex rel. Moriarity v. McMahon* (Minn.) 38 L. R. A. 675.
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as therein required, is valid, and not in violation of the Constitution.

(February 5, 1900.)

APPEAL by defendant from an order of the Municipal Court of Minneapolis denying a new trial after conviction for violating the statute against following the occupation of barber without a license. *Affirmed.*

The facts are stated in the opinion.

Messrs. Albert H. Hall and C. J. Cahaley, for appellant:

The act under which defendant was tried and convicted is vicious in the extreme, since its evident purpose is the legalizing of a trade union or trust; and its offensive pa-

ternalism is in clear contravention of constitutional limitations.

Re Jacobs, 98 N. Y. 115, 50 Am. Rep. 636.

The act cannot be justified as an exercise of police power.

The law will not allow the right of property to be invaded under the guise of a police regulation for the promotion of health when it is manifest that is not the object and purpose of the regulation.

Austin v. Murray, 16 Pick. 121; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Re Jacobs*, 98 N. Y. 110, 50 Am. Rep. 636; *State v. Donaldson*, 41 Minn. 82, 42 N. W. 781.

The act is unconstitutional, since it deprives defendant of life, liberty, and property without due process of law.

People v. Girard, 73 Hun. 457; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Live Stock Dealers & B. Assn. v. Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 398, Fed. Cas. No. 8,408; *Wynhamer v. People*, 13 N. Y. 398; *People ex rel. Manhattan Sav. Inst. v. Otis*, 90 N. Y. 48.

Mr. L. A. Reed for respondent.

Brown, J., delivered the opinion of the court:

Defendant was convicted in the municipal court of the city of Minneapolis of a violation of chapter 186, Gen. Laws 1897, and appeals from an order denying his motion for a new trial. Defendant is a barber, and has followed that occupation since 1880,—most of the time in this state. At the time of the violation of the law in question he was located and engaged in such calling at the city of Minneapolis. On the 1st day of April, 1899, he performed certain acts within his calling upon the persons of John Madden and Rudolph Schall, without first having obtained a license as required by such law; and for this he was convicted, and sentenced to pay a fine. There is no controversy about the facts. Defendant violated the law by continuing in his occupation without a license, and was properly convicted, unless it be held that the law is unconstitutional and void. The sections of the law applicable to this case are as follows:

"Sec. 1. It shall be unlawful for any person to follow the occupation of barber in this state unless he shall have first obtained a certificate of registration as provided in this act; provided, however, that nothing in this act contained shall apply to or affect any person who is now actually engaged in such occupation, except as hereinafter provided."

Sections 2 *et seq.* provide for a board of examiners, and prescribe their duties. Section 7 provides that persons engaged in the occupation of barbers in this state at the time of the approval of the act shall be entitled to license certificates upon the payment of a fee of \$1, and filing with the secretary of the board an affidavit of residence, etc.

"Sec. 8. Any person desiring to obtain a

certificate of registration under this act shall make application to said board therefor, and shall pay to the treasurer of said board an examination fee of \$5, and shall present himself at the next regular meeting of the board for examination of applicants, whereupon said board shall proceed to examine such person, and being satisfied that he is above the age of nineteen (19) years, of good moral character, free from contagious or infectious diseases, has either (a) studied the trade for three (3) years as an apprentice under a qualified and practising barber, or (b) studied the trade for at least three (3) years in a properly appointed and conducted barber school under the instructions of a competent barber, or (c) practised the trade in another state for at least three (3) years, and is possessed of the requisite skill in said trade to properly perform all the duties thereof, including his ability in the preparation of the tools, shaving, hair-cutting, and all the duties and services incident thereto, and is possessed of sufficient knowledge concerning the common diseases of the face and skin to avoid the aggravation and spreading thereof in the practice of said trade; his name shall be entered by the board in the register hereafter provided for, and a certificate of registration shall be issued to him.

"Sec. 14. Any person practising the occupation of a barber without having obtained a certificate of registration, as provided by this act, . . . is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine," etc.

The question as to the constitutionality of this statute is the only one involved in the case. Counsel for defendant assail the statute from all directions, and urge its invalidity on several grounds, but we need consider the points made by them only so far as they are pertinent to the statute as applied to this particular case. We will not stop to inquire whether it would be within the power of the legislature to limit the number of apprentices a barber should be permitted to have at one and the same time. Such question has no bearing upon the one now before us. It will be time enough to consider and determine it when it is presented in some case where that particular violation is complained of. The question in this case is, Is it competent for the legislature to prohibit persons from practising the calling of a barber without first obtaining a license or certificate of registration? Laws enacted for the purpose of regulating or throwing restrictions around a trade, calling, or occupation, in the interests of the public health and morals, are everywhere upheld and sustained. Such laws are within the police power of the state, and are universally sustained where enacted in the interests of the public welfare. The question presented in cases where the validity of such laws is called in question is no longer the power or authority of the legislature to enact them, but whether the occupation, calling, or business sought to be regulated is one involving the public health and interests. A person

engaged in such an occupation is not alone interested therein. The public served by him is also interested. He is interested to the extent that it provides and furnishes him with employment and a means of livelihood. The public is interested in his competency and qualifications, and it is eminently proper that there be thrown around the calling protection from intrusion by incompetents, and others inimical to the public good. It is unnecessary to discuss the grounds upon which such laws are upheld, or the objections urged against them. Counsel for defendant ably present their side of the question, but the authorities are all against them. We cite, as pertinent to the question, *State ex rel. Poucell v. State Medical Examining Bd.* 32 Minn. 327, 50 Am. Rep. 575, 20 N. W. 238; *State ex rel. Chapman v. State Bd. of Medical Examiners*, 34 Minn. 387, 26 N. W. 123; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *People ex rel. Neckamcus v. Warden of City Prison*, 144 N. Y. 529, 27 L. R. A. 718, 39 N. E. 686; *Singer v. State*, 72 Md. 464, 8 L. R. A. 551, 19 Atl. 1044; *Dent v. West Virginia*, 129 U. S. 121, 32 L. ed. 625, 9 Sup. Ct. Rep. 231.

Is the occupation of a barber a calling or trade involving to any degree the public health and public good? If it is, the law must be sustained. We hold that it is, and that the health of the citizen, and protection from diseases spread from barber shops conducted by unclean and incompetent barbers, fully justify the law. It is a fact of which we must take notice that the people of to-day come in contact with, and engage the services of, those following the occupation of barber, as much as, if not more than, any other occupation or profession. We must take notice of the fact, too, that the interests of the public health require and demand that persons following that occupation be reasonably familiar with, and favorably inclined towards, ordinary rules of cleanliness; that diseases of the face and skin are spread from barber shops, caused, no doubt, by uncleanness or the incompetency of barbers. We must take notice of the fact that to attain proficiency and competency as a barber requires training, study, and experience,—training in the art, and study and experience in the management and conduct of the calling. A design and purpose to protect the public from injurious results likely to follow from such conditions is the foundation of statutes like this. And, as we must take judicial notice of the foregoing facts, the foundation for this law is apparent. And it may be said, further, that there is as much reason for a law of this kind as to barbers as there is for such a law as to dentists, pharmacists, lawyers, and plumbers. It is enacted in the interests of the public health and welfare, and we sustain it.

The contention of appellant that if the law is sustained he will be unable to continue in his business, because he cannot now obtain a license, is not sound. He was a barber engaged in the occupation at the time of the approval of the law, but he failed to make application for a license under the

terms of § 7, above quoted, within ninety days, or at all; and his contention is that, because he does not come within either of the three classes of applicants specified in § 8, he cannot obtain a license at all. This statute, like all statutes enacted in the interests of the public welfare, is entitled to a broad and liberal construction, and one that will give force and effect to the intention of the law-making power. Applying such a construction, we hold that a person who has followed the occupation of a barber for three years in this state, and is otherwise possessed of the necessary qualifications, is entitled to a certificate of registration, the same as a person coming into the state from another state. There was no intention to discriminate against barbers of this state and in favor of those residing in other states, and a construction of the law which would result in such discrimination cannot be permitted.

This disposes of all questions deserving special mention.

Order affirmed.

Conrad J. ERTZ, *Respt.*,

c.

PRODUCE EXCHANGE of the City of Minneapolis *et al.*, *Appts.*

(.....Minn.....)

*A complaint which alleges that the plaintiff, a dealer in farm produce, had a profitable business, that the defendants had conspired together to refuse to deal with him and to induce others to do likewise. It not appearing that their interference with his business was to serve any legitimate interests of their own, but that it was done maliciously, to injure him, and that the conspiracy had been carried into execution, whereby his business was ruined, states a cause of action.

(February 8, 1900.)

APPEAL by defendants from an order of the District Court for Hennepin County overruling a demurrer to a complaint filed to recover damages for injuries to plaintiff's business by defendants' alleged wrongful combination to refuse to deal with him. *Affirmed.*

The facts are stated in the opinion.

Messrs. Stiles & Stiles for appellants.

Messrs. James Robertson and M. C. Brady, for respondent:

The opinion in *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, *sub nom. Bohn Mfg. Co. v. Northwestern Lumber Men's Asso.* 21 L. R. A. 337, 55 N. W. 1119, was written with reference

*Headnote by START, Ch. J.

NOTE.—For boycott or conspiracy to injure business, see also *Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.* (Minn.) 21 L. R. A. 337, and *note*; *Cote v. Murphy* (Pa.) 23 L. R. A. 135; *Jackson v. Stanfield* (Ind.) 23 L. R. A. 588; *Graham v. St. Charles Street R. Co.* (La.) 27 L. R. A. 416; *Macauley Bros. v. Tierney* (R. I.) 37 L. R. A. 455; *Hartnett v. Plumber's Supply Asso.* (Mass.) 38 L. R. A. 194; *Brewster v. C. Miller's Sons* (Ky.) 38 L. R. A. 505; *Doremus v. Hennessy* (Ill.) 43 L. R. A. 797; and *Boutwell v. Marr* (Vt.) 43 L. R. A. 803.

only to the case under consideration, and it cannot stand (even in the absence of an anti-trust statute) as a general rule.

There was an attempt on the part of retail dealers to protect their business from the encroachments of a wholesaler. In the case at bar it is an attempt of some retailers, through malice, to injure the business of a competitor.

In the one case it was not actionable, and in the other it was.

Delz v. Winfree, 80 Tex. 400, 16 S. W. 111; *Van Horn v. Van Horn*, 52 N. J. L. 284, 10 L. R. A. 184, 20 Atl. 485; *Doremus v. Hennepin*, 176 Ill. 608, 43 L. R. A. 797, 52 N. E. 924.

The *Bohn Case* has not met with favor by the majority of the courts of last resort.

Hopkins v. Ozley Stave Co. 49 U. S. App. 709, 83 Fed. Rep. 912, 28 C. C. A. 99; *Jackson v. Stanfield*, 137 Ind. 592, 23 L. R. A. 583, 36 N. E. 345, 37 N. E. 14.

Injuries to property indirectly brought about by menaces, false representations, or fraud create as valid a cause of action as any direct injury from force or trespass.

Addison, Torts, p. 20; *Walker v. Cronin*, 107 Mass. 562; *Carew v. Rutherford*, 106 Mass. 10, 8 Am. Rep. 287.

The complaint in this action shows (1) intentional and wilful acts, (2) calculated to cause injury to plaintiff in his lawful business, (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of defendants (constituting malice), and (4) actual loss and damage resulting. This was sufficient.

Walker v. Cronin, 107 Mass. 562; *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111; *Van Horn v. Van Horn*, 52 N. J. L. 284, 10 L. R. A. 184, 20 Atl. 485; *Boutwell v. Marr*, 71 Vt. 1, 43 L. R. A. 803, 42 Atl. 607; *People ex rel. McIlhenny v. Chicago Live Stock Exchange*, 170 Ill. 556, 39 L. R. A. 373, 48 N. E. 1062; *Graham v. St. Charles Street R. Co.* 47 La. Ann. 214, 27 L. R. A. 416, 16 So. 806; *McHenry v. Sneer*, 56 Iowa, 649, 10 N. W. 234.

Chapter 359, Laws 1899, controls and governs the action at bar.

The legislature, not content with making the acts of appellants unlawful, has by § 2 of said act made them criminal.

The allegations of the complaint bring appellants clearly within the statute.

United States v. Trans-Missouri Freight Assn. 166 U. S. 324, 41 L. ed. 1021, 17 Sup. Ct. Rep. 540; *United States v. Addyston Pipe & Steel Co.* 54 U. S. App. 723, 85 Fed. Rep. 279, 29 C. C. A. 141, 46 L. R. A. 122.

Where a party commits an act which is criminal, and another suffers damages in consequence, a right of action accrues to the injured party.

Cooley, Torts, 88-124; 8 Am. & Eng. Enc. Law, 2d ed. p. 598; 1 Bishop, Crim. Law, 264; 2 Addison, Torts, 850; *Doremus v. Hennepin*, 176 Ill. 608, 43 L. R. A. 797, 52 N. E. 924.

Start, Ch. J., delivered the opinion of the court:

The defendants interposed a general demurrer.

In their demurrer the defendants admitted the truth of the complaint in this case, and they appealed from the order of the district court of the county of Hennepin overruling their demurrer. The material facts alleged in the complaint are these: The plaintiff is now, and for two and a half years past has been, engaged, at the city of Minneapolis, in the business of a commission merchant, buying and selling farm produce and commodities. His profits from his business, prior to the committing of the wrongs hereinafter stated by the defendants, were \$20,000 per year. To enable him to conduct his business, it has been and is necessary for him to buy such farm produce and commodities in the market at Minneapolis, and resell the same to his customers. The defendants, during the time the plaintiff has so conducted his business, have been, and still are, engaged in buying and selling farm produce and commodities, and they are practically all the persons, firms, and corporations who are engaged in such business in the city of Minneapolis, and during such time they have and still do control, regulate, and govern the quantity and price of such farm produce and commodities, and the purchase and sale thereof. The plaintiff, prior to July 19, 1899, was accustomed to and did purchase the produce and commodities so dealt in by him from the defendants, and paid them therefor in full. But on the day named, and at various subsequent times, the defendant the produce exchange conspired, confederated, and agreed to and with all of the other defendants herein not to sell to, or buy of, plaintiff, in any manner, any farm produce or commodities for the purpose of carrying on his business. The defendant the produce exchange then and there did maliciously solicit and procure from all of its codefendants, and each of them, and from many other persons to the plaintiff unknown, an agreement not to sell to, or buy from, plaintiff such products and commodities, and did so induce its codefendants, and each of them, and other persons, by the aid of, and through the influence of, all of the defendants, not to sell to, or buy of, the plaintiff any of such products and commodities, for the purpose of his business or otherwise. In pursuance of such conspiracy, each and all of the defendants have, with such malicious and unlawful intent, ever since July 19, 1899, refused so to sell to, or buy of, the plaintiff, and have daily circulated among and reported to the patrons of the plaintiff that he was unable to buy such products and commodities, with the intent of inducing such patrons to discontinue doing business with the plaintiff. The business of the plaintiff, by reason of the premises, has been ruined, and he has been damaged thereby in the sum of \$25,000.

If the allegations of the complaint are true, and the demurrer admits them, it is certain that the plaintiff has suffered material financial injury by the acts of the defendant. Does the law afford him any remedy? Counsel for the defendants insist that the question must be answered in the negative, because their acts in the premises were lawful, and, being so, the intent with which

they did the acts is immaterial. It may be conceded that, if the acts of the defendants were lawful, the motive which actuated them is immaterial in determining the strict legal rights of the parties. The question, then, is, Were the defendants' acts legal? In its broadest aspect, this question involves considerations of the highest importance to the individual and to the public. The genius of our free institutions encourages all men to seek better fortunes, higher levels, and larger opportunities for success in life. Therefore, within proper limits, it is both lawful and commendable for men to combine for the purpose of securing better wages or larger returns from their business ventures. It is not, however, our purpose to enter upon any general discussion as to the limitations upon this right of men to combine for the purpose of furthering their own interests, without reference to the rights of others. Our sole purpose is to inquire whether the acts of the defendants in this case were, as to the plaintiff, lawful. The defendants rely upon the case of *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, *sub nom. Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.* 21 L. R. A. 337, 55 N. W. 1119, in support of their contention that the defendants' acts in question were lawful. The general propositions of law laid down in the decision in that case are sound, as applied to the facts of that particular case, which were substantially these: The defendants were retail lumber dealers, and formed a voluntary association, by which they mutually agreed that they would not deal with any wholesale dealer who should sell lumber to persons not dealers at the place where a member of the association was carrying on business. The object of the association was to protect its members against sales by wholesale dealers to contractors and consumers. In case a wholesale dealer made any such sale, and refused to make amends therefor, as provided by the by-laws of the association, its secretary was required to notify all of its members of the fact, and thereafter such members were to refrain from dealing with the offending wholesale dealer. The plaintiff, the Bohn Manufacturing Company, a wholesale dealer, having made such a sale, the secretary of the association was about to send notice of the fact to all of its members. Thereupon the company commenced an action for a permanent injunction, enjoining the defendants from issuing such notices. This court held that the action would not lie. The decision was correct, but it is not applicable to the alleged facts in this case. It is to be noted that the defendants in the *Bohn Case* had similar legitimate interests to protect, which were menaced by the practice of wholesale dealers in selling lumber to contractors and consumers, and that the defendants' efforts to induce parties not to deal with offending wholesale dealers were limited to the members of the association having similar interests to conserve, and that there was no agreement or combination or attempt to induce other persons not members of 48 L. R. A.

the association to withhold their patronage from such wholesale dealer. In this respect the case differs essentially from the one at bar, in which the complaint does not show that the defendants had any legitimate interests to protect by their alleged combination. On the contrary, it is expressly alleged in the complaint that the combination, which was carried into execution, was for the sole purpose of injuring the plaintiff's business, and that the defendants conspired to induce the plaintiff's patrons and persons, other than the defendants, to refuse to deal with him. Such alleged acts on the part of the defendants are clearly unlawful.

It is true, as claimed by the defendants and as stated in the *Bohn Case*, that a man, not under contract obligations to the contrary, has a right to refuse to work for, or deal with, any man or class of men, as he sees fit, and that the right which one man may exercise singly many may lawfully agree by voluntary association to do jointly, provided they do not interfere with the legal rights of others. But one man singly, nor any number of men jointly, having no legitimate interests to protect, may not lawfully ruin the business of another by maliciously inducing his patrons and third parties not to deal with him. See *Walker v. Cronin*, 107 Mass. 562; *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111; *Graham v. St. Charles Street R. Co.* 47 La. Ann. 214, 27 L. R. A. 416, 16 So. 806; *Hopkins v. Oxley Stave Co.* 49 U. S. App. 709, 83 Fed. Rep. 912, 28 C. C. A. 99.

This is just what the complaint in this case charges the defendants with doing, and we hold that it states a cause of action.

Order affirmed.

STATE of Minnesota, *Resp't.*,
v.

Lyman E. COWDERY, *Appt.*

(.....Minn.....)

- *1. A provision in a storage receipt, issued under § 7646, Gen. Stat. 1894, that the stored property may be mingled with other property of the same kind, or transferred to other elevators or warehouses, does not confer authority on the warehouseman to sell the property described therein.
2. Under such a receipt, when it in other respects conforms to the provisions of § 7646, Gen. Stat. 1894, the contract is a bailment, and not a sale.
3. Flax is included within the meaning and intent of §§ 7645 *et seq.*, Gen. Stat. 1894, and is subject to the protection of the warehouse law.
4. The evidence in this case does not show beyond a reasonable doubt that there was an intent to defraud the prosecutor, which is an essential ingredient of the offense charged, and the conviction is therefore set aside.

(February 6, 1900.)

*Headnotes by LOVELY, J.

NOTE.—As to sale of goods stored by warehouseman, see *Hall v. Pillsbury* (Minn.) 7 L. R. A. 529, and *note*.

A PPEAL by defendant Cowdery from a judgment of the District Court for Dodge County convicting him of larceny in fraudulently misappropriating flax which had been delivered to him for storage. *Reversed.*

The facts are stated in the opinion.

Messrs. Childs, Edgerton, & Wickwire for appellant.

Messrs. W. B. Douglas, Attorney General, and *C. W. Somerby*, for respondent:

The tickets issued to complaining witness by the firm of Cowdery & Wheeler were contracts of bailment.

State v. Barry (Minn.) 79 N. W. 656; *Nichall v. Paige*, 10 Gray, 368; 3 Jones, Bailm. 56.

Wherever a criminal intent can be shown along with the other essentials of the offense, a prosecution under the Penal Code for larceny will lie.

The jury found from all the circumstances the essential criminal intent.

All that is necessary on this question of intent is that the intention to appropriate another's property to one's own use be present at the time of the taking, and it is sufficient if the intention be to appropriate such property for the time being; and a mental reservation or hope entertained, to be able in the future to make restitution, does not relieve the act of its criminal character.

McLain, Crim. Law, ¶ 641, 651.

The indictment was sufficient.

State v. Barry (Minn.) 79 N. W. 656; *State v. Comings*, 54 Minn. 359, 56 N. W. 50; *Ritter v. State*, 111 Ind. 324, 12 N. E. 501; *People v. Hill*, 3 Utah, 334, 3 Pac. 75; *State v. Comfort*, 22 Minn. 271; *State v. New*, 22 Minn. 76.

Mr. J. J. McCaughey also for respondent.

Lovely, J., delivered the opinion of the court:

Defendant, who was jointly indicted with another person, was convicted of the crime of larceny, as bailee, in fraudulently appropriating a quantity of flax to his own use, with intent, as charged in the indictment, "to deprive the owner thereof of his property," under the provisions of subdivision 2, § 6709, Gen. Stat. 1894. Lyman E. Cowdery was a warehouseman, and, with his partner, was running an elevator at Kasson, where he received, from time to time, quantities of flax from the prosecuting witness, Bradshaw, aggregating in amount 760 bushels, and evidenced by nine receipts or tickets, which were given to the owner of the flax, and which the prosecution insist constituted the relation of bailor and bailee between the parties thereto, under the warehouse laws of this state. Sections 7645 *et seq.*, Gen. Stat. 1894. The warehousemen became insolvent, made an assignment, and were unable either to furnish the flax or put up the equivalent in money. The defendant insists that the tickets or storage receipts did not create the relation of bailment between defendant (who was tried alone) and the owner of the flax, but by the terms of such

receipts constituted a sale thereof to the defendant and his partner, or, at least, authority to part with the flax; that the warehouse law, under which such contract of bailment must be established, does not apply to flax; also that, by reason of the previous business relations and conduct of the owner of the property stored with the defendant, the latter was led to believe that he was authorized to deal with the flax without reference to the terms of the receipts; from which, as defendant claims, it follows that there was no proof of the necessary intent to defraud, which as alleged in the indictment is an essential element of the statute, and must therefore be proved. The warehouse receipts referred to contain the requisites of § 7646, Gen. Stat. 1894, in all respects. They, "in clear terms state the amount, kind, and grade of the grain stored, the terms of storage," and, in addition, the following provision, which embraces the pith of the contention upon the construction of the storage receipt, *viz.*: "Express authority is given, by acceptance hereof, that said grain or seed may be mingled with grain or seed of other persons, and shipped or removed to any other elevator we may select." And it is urged that these provisions, which authorize a removal of the flax, etc., take this case out of the provisions of the Penal Code.

It is urged, in support of this claim, that an interpretation of the warehouse statutes should be made that does not conflict with the generally settled rules of the common law, and that the particular provision of these contracts quoted above is inconsistent with the theory of a bailment. While it is unquestionably true that the commingling of the property of one person with the property of another, with the consent of the owners, so as to destroy the specific identity of each, conclusively negatives the relation of bailor and bailee upon common-law rules, it must be remembered that it was the object of the statute to provide a remedy for the protection of the agricultural producers of this state which they did not have before, and, if the purpose and practical means by which such protection is afforded is to be found clearly expressed in the statute, it necessarily must be the statute, instead of the common law, that we are to interpret. It is our duty to discover the true legislative intent expressed by the statute, for, within constitutional limitations, that is always the real test in such cases. We cannot allow a repeal or modification of a statute by the law which the statute itself seeks to change; this is self-evident. Neither can we abridge the effectiveness of a wholesome statute by judicial construction or finesse. The very nature of the business that has long been conducted in this state by the owners of elevators and warehouses in dealing with the agricultural producers would lead to the inference that the provisions of the statute referred to were intended to create on the part of the warehousemen an obligation to have the owner's property or its equivalent ready for delivery when called for. The receipt, according to the statute, must be in

writing, and it must state amount and grade of grain, charges for storage, and advances paid, which receipt shall be prima facie evidence that the holder thereof has in store with the party issuing such receipt the amount of grain, of the kind and grade mentioned in such receipt, and penal provisions follow against false statements, etc. The suggestion arises, Why should this contract be in writing? Why so explicit? and Why, upon its face, should evidence of its present money value be required, unless it was intended to be evidence of title and to become negotiable? And it follows that, if the title of the property is to remain in the owner, by necessary implication, that the contract, while not a common-law bailment, becomes vested with the characteristics of that trust relation, and is a bailment under the statute. We do not think that the acts of mingling produce of one person with that of another, or the removal of such property from one elevator to another, are in necessary conflict with this view. These acts are essential in the conduct of the elevator and warehouse business. It must be mingled with other produce, if it is taken in store, or there would have to be a warehouse for every patron; and, in facilitating the business in question, it likewise may be necessary to remove the property stored from one depository to another, to accomplish practical ends. The earnestness of the able counsel for defendant in presenting their views upon this point has led to this consideration of this view, rather than any serious doubt upon the question itself; for we think the contention now urged has been anticipated and specifically provided against by the warehouse law itself. Section 7645, Gen. Stat. 1894,—the preceding section to the one last referred to,—provides, *inter alia*, "that whenever any grain shall be delivered for storage to any person . . . such delivery shall in all things be deemed and treated as a bailment, and not as a sale, of the property so delivered, notwithstanding such grain may be mingled by such bailee with the grain of other persons, and notwithstanding such grain may be shipped or removed from the warehouse, elevator, or other place where the same was stored," etc. While this language remains in the statute, it is difficult to see how there can be room for interpretation, for the language of the receipts in this case is almost identical with the provisions which the statute declares shall not affect the liability of the warehouseman as bailee, and that this court has so understood its effect is clear from its decision in *State v. Barry* (Minn.) 79 N. W. 556. Upon the receipts themselves we think it is clear that defendant was a bailee, and amenable to the law under which he was indicted.

Again, it is urged for defendant that the warehouse acts do not provide for storage of flax, which is not included in any proper definition of the word "grain." The distinctive word of the statute is "grain," and "flax" is not specifically referred to by that name, and it, of course, becomes a question whether the storage of flax was within the 48 L. R. A.

legislative intent when these acts were passed. An imposing array of dictionaries and encyclopedias were produced on the argument to show that grain is a berry and flax a fiber. But this is a question of reasonable construction of a statute, rather than a scientific analysis, which must yield to the popular understanding that ought to prevail in such cases. Courts appeal to dictionaries in questions of doubt in science, and perhaps in search of evidence of popular understanding, when in doubt. But where, within the knowledge of the court, the dictionary conflicts with popular understanding, the latter will be adopted, although it may require a subsequent enlargement of the definitions of the lexicographer, which is continually necessary, since the dictionary is an evidence, rather than an originator, of definitions. We have no doubt whatever from the custom at the time these statutes were enacted that they were supposed to apply to flax. It would startle the legislature that enacted them, or the legislatures that have convened since without recognizing the necessity of amending them, as well as the farmers of this state, who have continuously, since the law was passed, accepted receipts for deposits of flax, to tell them that in that respect it was not the intention of the law-makers to protect them as well as the growers of wheat and barley. We think it would likewise startle the warehousemen themselves to construe such a distinction into the law. The defendant evidently saw no difference at the time of the issuance of his receipts to Bradshaw, for the words "grain" and "flax" are used convertibly in such receipts, and we judge from the record that his able counsel did not urge this view during the trial, or until after their briefs in this court had been printed. While in criminal cases, under the harsh penal statutes that once governed in England, nice and technical constructions upon indictments and statutes were adopted in *favorem vite*, a more liberal rule has since prevailed, more consistent with common sense, and we shall adopt in this case the construction which protects the numerous bailors of flax in this state, which we have no doubt was within the legislative, as well as the popular, mind when these laws were enacted.

The remaining assignments of error, with the exception of one, relate to alleged errors that are not likely to occur again, and, in view of the disposition we shall make of this case, need not be considered.

The evidence of defendant's intent to defraud in this record is solely the presumption arising from his inability to turn over to the prosecutor the flax stored upon demand, and it seems doubtful if the complaining witness intended a criminal prosecution until many months afterwards, when such demand, which seems to have been merely formal, without expectation that it would be complied with, was made. It is true that this proof of demand and refusal raises a presumption of guilt, and makes a *prima facie* case against defendant, but this presumption is so overcome by opposite infer-

ences, from admitted and undisputed facts, that we cannot permit the verdict to rest upon it alone. We do not find in this record any of the indicia of crime usual in similar prosecutions. The defendant had made no preparations for business collapse. He had run his affairs in the usual way, which had grown up, under the sanction of prosecutor and his other patrons, for many years, until, on a declining market, he found himself short, and unable to meet all his obligations. That defendant was a man of irreproachable character was established at the trial by a formidable number of witnesses, some of whom had stored produce with him, and had suffered loss, under the same circumstances as the complaining witness. Previous to the suspension of defendant's business, he and

the prosecutor had conducted their business relations upon terms of unlimited confidence, for many years. The latter had stored his produce with defendant, sometimes receiving receipts and sometimes not. In all such cases it seems that such deposits were treated by defendant as if he had authority to dispose of them according to his best judgment, with the sanction of the prosecutor. These and other facts disclosed by the record lead us to the conclusion that this verdict should not be allowed to stand. Our views in this respect are strengthened by a statement of the learned trial court, which expressed doubts of the justness of the result. It is ordered that the judgment of the court below be set aside, and a new trial awarded.

MISSISSIPPI SUPREME COURT.

J. J. HODGES, *Appt.*,

v.

W. L. CAUSEY.

(.....Miss.....)

1. A trespassing dog cannot lawfully be killed merely because the owner has been notified to keep the dog off the premises.
2. The reasonable necessity for killing a trespassing dog is a question for the jury under all the facts and circumstances of the case.
3. The value of a dog which has no market value may be shown by proving the pedigree, characteristics, and qualities of the dog, and then proving by witnesses who know these things their opinions as to the value.

(January 1, 1900.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Sunflower County in favor of defendant in an action brought to recover damages for the killing of a dog. *Reversed.*

The defense was that the dog was trespassing, and that the killing was done to prevent it from damaging corn and cotton in the field through which it was running, and that plaintiff had been notified to keep the dog off defendant's premises.

Further facts appear in the opinion.

Messrs. W. S. Chapman and W. R. Chapman for appellant.

Messrs. Frank Johnston and Thomas R. Baird for appellee.

Whitfield, J., delivered the opinion of the court:

It may be that "property in dogs is of an imperfect or qualified nature," as held in *Escott v. New Orleans & C. R. Co.* 166 U. S. 624, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693; *Ward v. State*, 48 Ala. 161, 17 Am. Rep. 31; *Wilton v. Weston*, 48 Conn. 325; and *Carthage v. Rhodes*, 101 Mo. 175, 9 L. R. A. 352,

14 S. W. 181. And it is doubtless true that much of the conflict of decision touching this subject is due to the varying statutes of different states as regards their being the subject of larceny, etc. But it is very correctly said in the learned note to *Hamby v. Samson* (Iowa) 67 Am. St. Rep. at page 297, that "in the United States there has been a quite noticeable tendency in legislation and judicial decisions to recognize a complete property in dogs." When the right to kill a trespassing dog is in question, doubtless the difference in nature and instincts between the dog and ordinary domestic animals, as the horse or cow, may properly enter into its solution. It is said in the exhaustive note to this same case of *Hamby v. Samson* (Iowa) 40 L. R. A. at page 510, that "it is generally held that a merely trespassing dog cannot be killed," and the authorities pro and con are cited. In that note, and also in the note to *Tonaicanda R. Co. v. Munger*, 49 Am. Dec., at page 260, illustrations are given of the conditions under which it would be lawful to kill a trespassing dog: Sheep-killing dogs may be killed; dogs destroying deer, fowls, or other animals, where necessary to their preservation; howling dogs on one's premises may be killed, etc. But it is said the dog must be killed at the time and not on account of past damage done by him. *Id.*, and authorities. The true rule is thus stated in 67 Am. St. Rep., note, at pages 294, 295: "But one is never justified in going to excessive lengths in the defense of himself or his property from assault or injury. The method of defense adopted must bear a certain relation to the character or seriousness of the threatened injury. . . . The fact that a dog is trespassing does not justify his wanton or malicious destruction." And again: "In any case, the question as to whether the defendant was justified in killing or injuring plaintiff's dog should be submitted to the jury, to be decided from a consideration of the pe-

NOTE.—As to the right to kill dogs, see *Hubbard v. Preston* (Mich.) 15 L. R. A. 240, and *note*; also *Simmonds v. Holmes* (Conn.) 15 L. R. A. 253; *Jenkins v. Ballantyne* (Utah) 16 L. R. A. 689; *Nehr v. State* (Neb.) 17 L. R. A. 48 L. R. A.

771; *Bowers v. Horan* (Mich.) 17 L. R. A. 773; *Patton v. State* (Ga.) 24 L. R. A. 732; and *Hagerstown v. Witmer* (Md.) 39 L. R. A. 649.

culiar facts and circumstances of the case." The court virtually told the jury, in its modifications of plaintiff's instructions, that, "if they believed defendant had warned plaintiff not to let his dogs run in his field," defendant was not liable. This was error. Notice to keep his dogs out was one fact, but not the only fact, to be considered. Notice of that sort is not conclusive. See authorities collected in paragraph 3, 49 Am. Dec. 259. When it is borne in mind of what great value some dogs are, the reasonableness of the general rule against the right to kill a meretrespassing dog is apparent. See *Mullaly v. People*, supra, 86 N. Y. 365, and note, 40 L. R. A. p. 510. Here, at the time this English deerhound was killed, she was running through the corn rows in November, when the corn was thoroughly matured. She had done at that time no damage to the cotton. The defendant says he killed her to prevent her doing damage by knocking out cotton from the stalks. The jury should not have been told that notice was a perfect defense. All the circumstances in evidence were before them,

and the reasonableness of the alleged necessity of killing the dog to save property should have been left to them, as a question of fact, under proper instructions as to the law.

The court also erred in its instruction as to the necessity of proving market value. The doctrine supported by reason and the authorities is that you may prove the market value if the dog has any, and, if not, then his "special or pecuniary value to his owner, that may be ascertained by reference to his usefulness and services." *Heiligmann v. Rose*, 81 Tex. 222, 13 L. R. A. 275, 16 S. W. 932. And it is perfectly competent to prove the pedigree, characteristics, and qualities of the dog, and then prove, by witnesses who know these things, their opinions as to the value. *Boucers v. Horcn*, 93 Mich. 420, 17 L. R. A. 773, 53 N. W. 535. And on both these propositions see, specially, the notes to *Hamby v. Samson* (Iowa) 67 Am. St. Rep. 292, 293, with the authorities, and the other in 40 L. R. A. 515, 518 (viii.), et seq.

Judgment reversed, verdict set aside, and cause remanded for a new trial.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Daniel D. FORD

vs.

MT. TOM SULPHITE PULP COMPANY.

(172 Mass. 544.)

1. An employer need not warn an employee whose special business is to oil a shaft and bearing, of his introduction of a set screw to fasten a collar near the end of the shaft, although it projects in such a manner as to be likely to catch the clothing of persons coming near it.
2. Evidence that it is not customary in factories to have collars with projecting set screws placed on revolving shafts near pulleys, where it is necessary for employees to go frequently, is not admissible to show the duty of a particular employer towards his employees.

(February 28, 1899.)

NOTE.—Right of a servant to recover for injuries caused by projecting screws in shafts and other moving machinery.

- I. Discussion of the question whether the maintenance of a set screw imports negligence at common law.
- II. Liability of master under statutes.
- III. Defenses of assumption of risks and contributory negligence.
- I. Discussion of the question whether the maintenance of a set screw imports negligence at common law.

The doctrine adopted by some courts is that a master is, as matter of law, not guilty of negligence in maintaining an uncovered shaft with a projecting screw, this doctrine being referred to the principle that it is a common contrivance preferable to any known device for the purpose which it is designed to serve. *Hale v. Cheney* (1893) 158 Mass. 268, 34 N. E. 255 (there plaintiff was only sixteen years of age, but no weight was attached to this fact); *Goodnow v. Walpole Emery Mills* (1888) 146 Mass. 261, 15 N. E. 576; *Dillman v. Hamilton* (1898) 14 Mont. Co. L. Rep. 92 (plaintiff was twenty years old); *Lewis v. Simpson* (1892) 3 Wash. 641, 29 Pac. 207.

48 L. R. A.

REPORT by the Superior Court for Hampshire County for the opinion of the Supreme Judicial Court, of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Judgment for defendant.*

The facts are stated in the opinion.

Mr. John B. O'Donnell, for plaintiff:

The principle by which the servant is presumed to assume the risks of the business should not be so extended as to impair in the least degree the obligation resting upon the master, in the prosecution of a business involving unusual risk of health, of life, or limb, to employ well-guarded instruments and competent agents.

Cayser v. Taylor, 10 Gray, 274, 69 Am. Dec. 317.

Or, as the rule may also be stated, to leave gearings, set screws, and other parts of machinery unboxed is not negligence, where other manufacturers in the same line of business operate their machinery in the same manner. *Wabash Paper Co. v. Webb* (1896) 146 Ind. 303, 45 N. E. 474.

It follows, therefore, that although there may be a safer kind of set screw which is also in common use, the master owes the servant no duty to box the pulley or shaft, or to change the set screw for a safer one. *Rooney v. Sewall & D. Cordage Co.* (1894) 161 Mass. 153, 159, 36 N. E. 368; *Goodnow v. Walpole Emery Mills* (1888) 146 Mass. 261, 15 N. E. 576.

But it has recently been held by one of the Federal courts of appeals that the doctrine that a master is not bound to abandon the use of a particular machine which is in common use because there are other better and safer machines to be had, cannot be successfully invoked for the purpose of excusing him for his failure to place a suitable guard around machinery which is of such a nature, or so located, as to be a constant menace to the safety of those who, in the discharge of their duties, are constantly compelled to pass in close proximity to it. In such a case the obligation to place a suitable guard around the machinery is

When the plaintiff entered the defendant's service he impliedly agreed to assume all the obvious risks of the business, including the risk of injury from the kind of machinery then openly used. This could not include working near such a set screw in the dark.

Rooney v. Sewall & D. Cordage Co. 161 Mass. 153, 36 N. E. 789.

Any person who allows a dangerous place to exist on his premises is responsible for an injury caused thereby to any other person who enters on the premises by his invitation or procurement, in the use of due care and without notice of the danger.

Coombs v. New Bedford Cordage Co. 102 Mass. 572, 3 Am. Rep. 506.

Assuming that the set screw was always there, in the dark and not seen or known by the plaintiff, the risk was not so obvious that the plaintiff must be taken to have assumed it.

Redmund v. Butler, 168 Mass. 367, 47 N. E. 108; *Ciriack v. Merchants' Woolen Co.* 151 Mass. 152, 6 L. R. A. 733, 23 N. E. 829; *Dolphin v. Plumley*, 167 Mass. 167, 45 N. E. 87; *McKee v. Tourtellotte*, 167 Mass. 69, 44 N. E. 1071.

The set screw was not there when plaintiff made his contract, and he did not know of its existence. He therefore did not assume the risk.

Rooney v. Sewall & D. Cordage Co. 161 Mass. 153, 36 N. E. 789.

If the set screw was there when the plaintiff was employed, he, being a laboring man, should have been informed of it and instructed; *a fortiori* if it was not there till long afterwards. In either case he should have been informed and instructed by the defendant.

De Costa v. Hargraves Mills, 170 Mass.

no less imperative than his duty to remedy a defect in the machine itself. *Homestake Min. Co. v. Fullerton* (1895) 36 U. S. App. 32, 69 Fed. Rep. 923, 16 C. C. A. 545.

This humane and reasonable doctrine, which embodies the principle laid down by the Supreme Court of the United States, that conformity to the usage of other employers does not conclusively negative the existence of negligence (*Wabash R. Co. v. McDaniels* (1882) 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 982), was enunciated in refusing to uphold the contention of defendant's counsel that an employee might be held to assume the risk of bolts protruding from a coupling of a revolving shaft, notwithstanding a promise of the foreman to cover it, on the ground that such promise was, not to repair an existing defect in the machinery, but to supply a new or additional appliance which the employer is under no obligation to furnish.

The liability of the master was held to be for the jury to decide, the evidence being that the servant's clothing was caught upon protruding bolts of a coupling of a rapidly revolving shaft located in a narrow and dark tunnel, near a cross timber under which such employee was obliged to stoop or crawl while passing through the tunnel in the discharge of his duties. *Ibid.*

In Minnesota, also, it has been held that the question as to a master's negligence is for the jury, in an action for injuries to a servant whose coat sleeve was caught by a set screw on a revolving shaft as he was attempting to place a belt upon a pulley 2 inches therefrom, where it appears that the head of the screw was not protected or guarded in any way, that it was a cube $\frac{1}{4}$ inch square and projected at least $\frac{1}{4}$ of an inch from the shaft, which was revolving about 150 times to the minute, and that it was frequently necessary to adjust the belt upon the pulley. *Pruke v. South Park Foundry & Mach. Co.* (1897) 68 Minn. 805, 71 N. W. 276.

But in another case the same court took the rather refined distinction that even if the defendant was negligent in having a shaft with a set screw projecting so far as to be dangerous to a servant whose work required him to be in close proximity to it, there could be no liability for an injury received by a servant who was oiling the machinery at some distance away, where the chances of his falling against the shaft were so slight and remote that they could not reasonably have been anticipated. *Groff v. Duluth Imperial Mill Co.* (1894) 58 Minn. 333, 58 N. W. 1049.

The present writer ventures to think that the reference to the test of reasonable anticipation is, under such circumstances, wholly unwarrantable. That the duty to provide a safe place of work inures in favor of all servants who are rightfully at the particular point where the dangerous conditions which are alleged to

import culpability are found, seems to be a necessary corollary from the principles which define the position of a person invited on premises, as contrasted with the position of one who is a mere licensee or trespasser. The only ground, it is submitted, upon which a servant injured by uncovered machinery should be debarred from recovery is that his presence at the spot where the accident occurred amounted to positive contributory negligence, and that this is the single case in which a master should be allowed to excuse himself by the plea of non-negligence.

In *Galveston Oil Co. v. Thompson* (1890) 76 Tex. 235, 13 S. W. 60, the court seems to have regarded a shaft with protruding screws as an appliance the maintenance of which imported negligence, but the specific ground of recovery was that the plaintiff had been negligently ordered to perform a service not within the scope of his employment.

Whether a master can be held liable for omitting to instruct a servant as to the position of a set screw depends upon whether the servant was inexperienced to such a degree that he could not reasonably be expected to understand the danger arising from it, and the master knew or ought to have known of that inexperience. *Ingerman v. Moore* (1891) 90 Cal. 410, 27 Pac. 806.

A machinist and engineer is chargeable with knowledge that set screws are in constant use in machinery, and cannot hold a master liable for an omission to apprise him of the danger caused by one on a shaft which he is repairing. *Goodnow v. Walpole Emery Mills* (1888) 146 Mass. 261, 15 N. E. 576; *Keats v. National Healing Mach. Co.* (1895) 21 U. S. App. 656, 65 Fed. Rep. 940, 13 C. C. A. 221.

As to the duty of instruction, see, generally, *note* to *James v. Rapides Lumber Co.* (1898; La.) 44 L. R. A. 33.

II. Liability of master under statutes.

Under the Massachusetts employers' liability act of 1887 it is held that a set screw on a machine used for reeling wire does not of itself constitute a defect in the ways, works, or machinery, where it is not out of order, and is a common device for the purpose for which it is used. *Donahue v. Washburn & M. Mfg. Co.* (1897) 169 Mass. 574, 48 N. E. 842.

But under the similar Ontario act, known as the workmen's compensation for injuries act (*Ont. Rev. Stat. 1887, chap. 141*), the conclusion arrived at has been that a verdict of a jury based on the theory that a set screw is a defect is justifiable. *O'Connor v. Hamilton Bridge Co.* (1894) 25 Ont. Rep. 12, 21 Ont. App. Rep. 596, 24 Can. S. C. 598.

Whether a set screw is a breach of a statute expressly requiring the covering of machinery

375, 40 N. E. 735; *La Fortune v. Jolly*, 167 Mass. 170, 45 N. E. 83; *Laplante v. Warren Cotton Mills*, 165 Mass. 487, 43 N. E. 294; *O'Connor v. Adams*, 120 Mass. 427.

Messrs. Brooks & Hamilton, for defendant:

There was no evidence of any breach of duty by the defendant to the plaintiff.

Rooney v. Sewall & D. Cordage Co. 161 Mass. 153, 36 N. E. 789; *Connelly v. Hamilton Woolen Co.* 163 Mass. 156, 39 N. E. 787; *Goodnow v. Walpole Emery Mills*, 146 Mass. 261, 15 N. E. 576; *Carey v. Boston & M. R. Co.* 158 Mass. 228, 33 N. E. 512; *Donahue v. Washburn & M. Mfg. Co.* 169 Mass. 574, 48 N. E. 842.

The evidence of custom in other factories was immaterial.

Rooney v. Sewall & D. Cordage Co. 161 Mass. 161, 36 N. E. 789; *Moynihan v. King's Windsor Cement Dry Mortar Co.* 168 Mass. 450, 47 N. E. 425; *Tenanty v. Boston Mfg. Co.* 170 Mass. 323, 49 N. E. 654.

Holmes, J., delivered the opinion of the court:

This is an action by one of the defendant's workmen, brought under the statute and at common law, for personal injuries caused

by being caught by a set screw fastening a collar near the end of a revolving shaft. According to the evidence for the plaintiff, the set screw had been put in since the beginning of his employment, and, although he had charge of the machinery in the room, and oiled the shaft and bearing, he never had seen this screw. It seems not to have been disputed that there were other similar set screws in the place. The shaft referred to was about 13 feet from the floor, and at the time of the accident the plaintiff was on a platform 3 feet lower than the shaft, trying to throw a belt off a pulley at the end of it, on the other side of the bearing, and 1 foot distant from the set screw. There was not must light. The presiding judge took the case from the jury, and it is here on report.

We are of opinion that the ruling was right, and that the case cannot be distinguished satisfactorily from the numerous other cases in this commonwealth already decided concerning set screws. *Donahue v. Washburn & M. Mfg. Co.* 169 Mass. 574, 48 N. E. 842, and cases cited. This case shows that a few years ago a set screw was a common device. There is no evidence that it has ceased to be one. In *Goodnow v. Walpole Emery Mills*, 146 Mass. 261, 267, 15

seems to depend upon the terms in which it is expressed.

Thus, shafting and set screws in a factory, suspended 9 feet above the floor, are not within the provisions of N. Y. Laws 1892, chap. 63, § 8, requiring them to be "properly guarded." *Glassheim v. New York Economical Printing Co.* (1895) 13 Misc. 174, 34 N. Y. Supp. 69.

On the other hand, the maintenance of unprotected spindles with a projecting set screw has in Canada been regarded as a breach of the factories act (Ont. Rev. Stat. 1887), chap. 208, § 15, subsec. 1, by which the requirement is that "moving machinery shall be fenced." *O'Connor v. Hamilton Bridge Co.* (1894) 25 Ont. Rep. 12, 21 Ont. App. Rep. 598, 24 Can. S. C. 598.

III. Defenses to assumption of risks and contributory negligence.

An experienced workman not shown to have been under full age or of less than average understanding assumes the risk of his glove catching on the set screw of a machine used for reeling wire, while reaching in his hand to get the wire for the purpose of taking the reel from the block. *Donahue v. Washburn & M. Mfg. Co.* (1897) 169 Mass. 574, 48 N. E. 842.

It is for the jury to say whether the risk of crossing a revolving shaft with two set screws projecting therefrom was appreciated by a servant who had no knowledge of machinery, and who was performing such duties that he had nothing to do with the operation of the shaft. *Roth v. Northern P. Lumbering Co.* (1889) 18 Or. 205, 22 Pac. 842.

It is not a conclusion of law from the fact that the plaintiff was aware of the existence of a set screw, and sprightly for one of his years, that he was aware of the risk of passing over the shaft while in motion. *Dowling v. Allen* (1881) 74 Mo. 18, 41 Am. Rep. 298.

Whatever danger there is in the fact that a screw projects beyond the crank of a hand car, and that there is for this reason an increased probability that the clothes of a man turning the crank may be caught, is as well known and as obvious to one who has used the car for several days as it is to his employer. *Carey v. Boston & M. R. Co.* (1893) 158 Mass. 228, 33 N. E. 512.

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An employee in a mill, who, acting within the scope of his duty, is ordered by the foreman to go up a ladder standing against a belt box into which a revolving shaft runs at right angles and nail a board on the box, in performing the service is injured by his apron and jacket catching on the shaft which is plainly visible and is seen by him, cannot recover from his employer. *Russell v. Tillotson* (1885) 140 Mass. 201, 4 N. E. 231.

A servant who drives a wagon along a particular way by the express direction of his master's representative, and is injured by the projecting bolts of a revolving shaft which, when it is too late, he finds himself unable to clear, while seated in the wagon, is not debarred from recovery by the rule that a servant must, at his peril, choose the safer of two alternative methods of doing his work. Such a direction is an implied statement that the way indicated is reasonably safe, and an instruction withdrawing the consideration of the direction from the jury is erroneous, when the question of the servant's exercise of due care is submitted to them. *Hawkins v. Johnson* (1886) 105 Ind. 29, 55 Am. Rep. 169, 4 N. E. 172.

The question as to contributory negligence of a servant injured by catching his coat sleeve upon a set screw upon a revolving shaft while he was attempting to adjust a belt upon a pulley on the shaft is for the jury, where it appears that he had often adjusted the pulley, and had never noticed the screw, and that other employees who had adjusted the belt in the same manner had not noticed it. *Pruke v. South Park Foundry & Mach. Co.* (1897) 68 Minn. 305, 71 N. W. 276.

In *Dowling v. Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298, it was held that it was for the jury to determine whether a boy of seventeen, who was working in a foundry, was negligent, where he was ordered to stop an engine and to hurry, this not being a part of his regular duties, and in executing the order his trousers were caught by an uncovered set screw and collar on a revolving shaft over which he stepped.

C. B. L.

N. E. 578,—a case very like the present,—it was said that “there was no danger which, in view of the plaintiff’s knowledge and capacity, must not have been well understood by and apparent to him, and there was, therefore, no negligence on the part of the defendant in exposing him to it.” See also *Hale v. Cheney*, 159 Mass. 268, 271, 272, 34 N. E. 255. In *Rooney v. Sewall & D. Cordage Co.* 161 Mass. 153, 36 N. E. 789, it was held that an employer did not need to warn an adult workman of the presence and dangers of a set screw when employing him. As has been said or implied in other cases, where the danger is obviously great, as in the case of a revolving shaft, it is not necessary to give warning of elements which merely enhance the risk. *Carey v. Boston & M. R. Co.* 158 Mass. 228, 231, 33 N. E. 512. See also *Keats v. National Heeling Mach. Co.* 21 U. S. App. 656, 65 Fed. Rep. 940, 13 C. C. A. 221. The same considerations apply to the subsequent introduction of a set screw, when, as here, there is no pretense that the plaintiff remembered the alleged previous condition of the shaft, and was acting in re-

liance upon his former observation; and when, further, it was the plaintiff’s especial business to take charge of the machinery, and therefore to inform himself of its construction.

The question “whether or not it is customary in factories to have a collar with a projecting setscrew placed near a pulley where it is necessary for a person to go frequently to do something with reference to putting on a belt,” etc., was properly excluded. See *Rooney v. Sewall & D. Cordage Co.* 161 Mass. 153, 161, 36 N. E. 789. The question in this highly specific form, supposing it to admit of an honest answer, must have been intended to furnish a pattern upon which the jury were to model the defendant’s duty, and it was at least within the discretion of the judge to exclude evidence directed to that point. It would have been admissible, no doubt, to show that set screws were going out of use, and no longer were to be expected or looked out for without special warning. But that was not what the evidence meant.

Judgment for defendant.

NEW HAMPSHIRE SUPREME COURT.

STATE of New Hampshire

v.

Louis L. WELLS.

(.....N. H.....)

One who solicits orders for a firm having a permanent place of business in the state, without carrying any goods except those which have been previously ordered by his customers, or exposing any goods for sale, is not doing “business as a hawker or peddler,” nor “exposing for sale or selling” goods, within the meaning of Laws 1897, chap. 76, requiring a license from peddlers.

(March 17, 1899.)

DESERVATION by the Belknap County Court for the opinion of the full bench of an indictment for selling goods without a license contrary to the provisions of the statute. *Judgment for defendant.*

Defendant resides in Laconia, and is employed to go from place to place within the county taking orders for certain kinds of groceries. The orders would be taken and filled from the employer’s store in Concord, and delivered by defendant in about a week from the time when taken. He neither carried nor exposed for sale any goods, but confined himself to taking orders and delivering the goods to fill them.

Further facts appear in the opinion.

Mr. F. M. Beckford, for the State:

Chapter 76 of the Laws of 1897 was intended to protect local dealers in their locality, and also the public against the fraud too often imposed upon the people by hawkers and peddlers.

Grafty v. Rushville, 107 Ind. 502, 57 Am. Rep. 131, 8 N. E. 609; 3 Jacob, Law Dict. 1st Am. ed. 1811, p. 241; 10 Petersdorff, Abr. p. 206; 1 Bouvier, Law Dict. p. 631; 2 Bouvier, Law Dict. p. 306.

Going about taking orders constitutes a sale within the meaning of the law.

Grafty v. Rushville, 107 Ind. 502, 57 Am. Rep. 131, 8 N. E. 609; 9 Am. & Eng. Enc. Law, p. 307; *State v. Ascher*, 54 Conn. 299, 7 Atl. 822.

The question of where the goods were purchased by a hawker or peddler is of no consequence.

Laws 1897, chap. 46; *State v. Powell* (N. H.) 41 Atl. 171.

Messrs. Streeter, Walker, & Hollis, for defendant:

A peddler is one who carries about small commodities on his back or in a cart or wagon, and sells them.

Pegues v. Ray, 50 La. Ann. 574, 23 So. 904; *Kennedy v. People use of LaJunta*, 9 Colo. App. 490, 49 Pac. 373; *Com. v. Farrum*, 114 Mass. 270; *Com. v. Ober*, 12 Cush. 493; *Davenport v. Rice*, 75 Iowa, 74, 39 N. W. 101.

Neither taking the order, nor delivering the goods, constitutes one a peddler.

NOTE.—On the question, Who is a peddler?—see *Com. v. Gardner* (Pa.) 7 L. R. A. 666, and note; *Wrought Iron Range Co. v. Johnson* (Ga.) 5 L. R. A. 273, and note; *Emmons v. Lewistown* (Ill.) 8 L. R. A. 328; *Re Wilson* (D. C.) 12 L. R. A. 624; *Stuart v. Cunningham* (Iowa) 20 L. R. A.

R. A. 430; *Hewson v. Englewood* (N. J.) 21 L. R. A. 736; *State v. Morehead* (S. C.) 26 L. R. A. 585; *South Bend v. Martin* (Ind.) 29 L. R. A. 581; and *State v. Coop* (S. C.) 41 L. R. A. 501.

Res v. M'Knight, 10 Barn. & C. 734.

The fundamental idea contained in the definition of a peddler is that he is a person carrying his stock in trade with him in a pack or cart, and having the capacity to then and there close a bargain and consummate the sale by immediate delivery.

Com. v. Ober, 12 Cush. 493; *Graffy v. Rushville*, 107 Ind. 502, 57 Am. Rep. 128, 8 N. E. 609.

Wallace, J., delivered the opinion of the court:

The indictment is for a violation of chapter 76, Laws 1897, entitled "An Act in Relation to Hawkers and Peddlers." Section 1 provides that "no person shall do any business as a hawker or peddler, or go about from town to town, or from place to place in the same town, exposing for sale or selling any goods, wares, or merchandise," except certain kinds of property therein named, without a license. It is apparent from the title of the act and from its terms that it was designed to affect hawkers and peddlers, and to regulate their business. The language used expresses the understanding of the legislature as to what acts constitute the business of a hawker or peddler. This definition is in accordance with the generally understood and accepted meaning of those terms.

The only question presented is whether the defendant, in doing what he did without a license, was guilty of a violation of the statute. "The leading primary idea of a hawker and peddler is that of an itinerant or traveling trader, who carries goods about in order to sell them, and who actually sells them, to purchasers, in contradistinction to a trader, who has goods for sale, and sells them, in a fixed place of business." *Com. v. Ober*, 12 Cush. 493, 495. The defendant did not carry any goods about with him for sale; neither did he expose any for that purpose. He solicited orders for his employers, a firm having a permanent place of business in this state, and subsequently delivered the goods thus ordered. He made no sales on his own account. The sales were made by the firm through the defendant, as their agent. The defendant, in what he did, was not doing "business as a hawker or peddler," nor was he "exposing for sale or selling" goods, within the meaning of the statute. *Com. v. Ober*, 12 Cush. 493; *Com. v. Farnum*, 114 Mass. 267; *Davenport v. Rice*, 75 Iowa, 74, 39 N. W. 191; *Stuart v. Cunningham*, 88 Iowa, 191, 20 L. R. A. 430, 55 N. W. 311; *Res v. M'Knight*, 10 Barn. & C. 734. The acts of the defendant in taking the orders, and afterwards delivering the goods on those orders, for the company who employed him, were substantially the same as those of the employee of the ordinary retail grocery firm who takes orders and delivers goods. The only difference is that the grocer's clerk usually confines his operations to the town or city in which his firm is located, while the defendant extended his over a wider field. But no distinction can be made between the acts of the two on this ground, because the 48 L. R. A.

language of the statute makes it equally an offense for a person to go about "from place to place in the same town, exposing for sale or selling any goods," or for one to "go about from town to town" doing the same thing. It is plain that the legislature never intended to include the usual taking of orders and delivering of goods by the employee of a grocery store in the town where it is located within the prohibition of the statute, and to compel that class of persons to procure a license. Such a construction would defeat one of the most important objects of the statute,—the protection of local traders. When the only construction of the statute under which the defendant can be held leads to so absurd a result, it is evident the legislature never intended that acts like those of the defendant should be included within the operation of the statute.

Case discharged.

Kimball WEBSTER, Exr., etc., of James Ryan, Deceased,
v.

Mary SUGHROW et al.

(.....N. H.....)

1. A will creating a trust for the saying of masses may be upheld as a "charitable use," since the saying of mass in open church, where all who choose may be present and participate therein, is a solemn and impressive ritual, from which many may draw spiritual solace, guidance, and instruction, and the money expended therefor is of benefit to the clergy, thus accomplishing one of the cherished objects of religious uses.
2. A separate fund for the care of a burial lot and another for the saying of masses cannot be set aside by an executor under a will creating a trust "to pay the expense of keeping my burial lot in a proper and respectable condition and for having anniversary mass said annually," leaving it entirely to the executor's discretion to provide for the perpetuation of such services in any way he may deem proper, since the branches of the trust are to be administered together by the same trustee.

(July 29, 1898.)

RESERVATION by the Supreme Court for Hillsboro County for the opinion of the full court of a bill for instructions as to the proper construction of a will. *Case discharged.*

The property was given in trust, first to pay funeral expenses; "the remainder to be held by said executor at his sole discretion, the income of which, and, if necessary, the principal, to pay the expense of keeping my burial lot in a proper and respectable condition, and for having anniversary mass said annually from the date of my decease, for myself, my deceased wife, and for her de-

NOTE.—As to validity of bequest for masses, see *Festorazzi v. St. Joseph Roman Catholic Church* (Ala.) 25 L. R. A. 360, and *note*; and *Sherman v. Baker* (R. I.) 40 L. R. A. 717, and *note*.

ceased sister, Lizzie. And I hereby leave it entirely at the discretion of my said executor to provide in any way that he may deem proper for the continuation or perpetuation of said services, without any authority or interference of the probate court or any person whomsoever, either in regard to this, or to the first, section of this will." The executor sought instructions upon two questions: (1) Does this provision of the will create a charitable trust in the matter of annual masses? (2) If it does, can he exercise his discretion in setting apart two certain sums,—one for the fund for the burial lot, the other for the saying of masses,—and appoint trustees to carry into effect the provisions of the trust, and provide for securing perpetual succession thereof?

Mr. George B. French, for plaintiff:

The plaintiff entertains doubts as to whether this will create a religious or charitable trust in the matter of annual masses, so as to constitute an exception to the law against perpetuities.

The doctrine of superstitious uses does not prevail in this country, and perhaps a limited amount can be expended for present masses.

Egerly v. Barker, 66 N. H. 434, 28 L. R. A. 323, 31 Atl. 900.

As to this being outside the exceptions to perpetuities, see—

Kent v. Dunham, 142 Mass. 216, 56 Am. Rep. 467, 7 N. E. 730; *Rhymer's Appeal*, 93 Pa. 142, 39 Am. Rep. 736, 738, and note; 2 Roper, Legacies, p. 138; *Schnorr's Appeal*, 67 Pa. 138, 5 Am. Rep. 415; 2 Perry, Tr. § 687; *Schouler, Petitioner*, 134 Mass. 426; *Jackson v. Phillips*, 14 Allen, 539; 3 Am. & Eng. Enc. Law, p. 130, note 4; Jarman, Wills, * 205, 208; *Old South Soc. v. Crooker*, 119 Mass. 1, 20 Am. Rep. 299; *Saltontall v. Sanders*, 11 Allen, 446; *Lewin, Trusts*, (*529) p. 715, Am. ed. chap. 21; *Duke v. Fuller*, 9 N. H. 536, 32 Am. Dec. 392; 2 Wm. Exrs. p. 1118, 1055, note.

Mr. Jeremiah J. Doyle for defendants.

Pike, J., delivered the opinion of the court:

1. The statute of 43 Eliz. chap. 4 (1601), was the culmination of all prior legislation concerning charities. Since its passage, those objects are considered charitable that are named therein, and many others that are "not named, and not within the strict letter of the statute, but which come within its spirit, equity, and analogy." 2 Perry, Tr. § 692. Although the general principles of charitable trusts have been repeatedly recognized in this state (*Duke v. Fuller*, 9 N. H. 536, 32 Am. Dec. 392; *Chapin v. School Dist. No. Two*, 35 N. H. 454; *Second Cong. Soc. v. First Cong. Soc.* 14 N. H. 315; *Brown v. Concord*, 33 N. H. 285; *Atty. Gen. ex rel. Abbot v. Dublin*, 38 N. H. 459; *New Market v. Smart*, 45 N. H. 87), it "has not been judicially determined" whether this statute has been adopted. But concerning this it is not important to inquire, since "courts of equity have an original and an inherent jurisdiction over charities, independent of the statute." 48 L. R. A.

Goodale v. Mooney, 60 N. H. 528, 533, 49 Am. Rep. 334, 335; Pub. Stat. chap. 205, § 1. A charity, "in the legal sense, may be . . . defined as a gift to be applied, consistently with existing law, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature." *Jackson v. Phillips*, 14 Allen, 556. No question arises as to the testator's right to create a trust for the purpose of keeping the "burial lot in a proper and respectable condition." The state approves of the creation of such trusts, and provides a way for the appointment of trustees therefor whenever a vacancy exists. Pub. Stat. chap. 40, § 5; Id. chap. 51, § 8; Laws 1891, chap. 19, §§ 1, 2; Laws 1893, chap. 68, §§ 1, 2; Laws 1897, chap. 6, § 1. It is in relation to the creating of a trust for the saying of masses about which there is contention. "The doctrine of superstitious uses arising from the statute (1 Edw. VI., chap. 14) under which devises for procuring masses were held to be void, . . .

has never obtained in the United States. In this country there is absolute religious equality, and no discrimination in law is made between different religious creeds or forms of worship." *Hoeffer v. Clogon*, 171 Ill. 402, 40 L. R. A. 730, 49 N. E. 527; U. S. Const. Amend. 1; Bill of Rights, art. 5; *Holland v. Alcock*, 108 N. Y. 312, 329, 16 N. E. 305; *Gass v. Wilhite*, 2 Dana, 170, 26 Am. Dec. 446; *Methodist Church v. Remington*, 1 Watts, 224, 26 Am. Rep. 61; *McHugh v. McCole*, 97 Wis. 166, 40 L. R. A. 724, 72 N. W. 631; *Rhymer's Appeal*, 93 Pa. 142, 39 Am. Rep. 736; *Schouler, Petitioner*, 134 Mass. 426. It remains to be considered whether the saying of masses can be upheld as a "charitable use." In *Seda v. Huble*, 75 Iowa, 429, 39 N. W. 685, a bequest in trust for the benefit of a Catholic church, with directions to "invest said money safely for the benefit of said church, and that services should be held in said church for his soul yearly," was held to be valid as a bequest to a charitable use. In *Schouler, Petitioner*, 134 Mass. 426, a bequest for "burial and funeral expenses, and the residue for charitable purposes, masses," etc., was held to be valid on the ground that "masses are religious ceremonies or observances of the church of which she [the testatrix] was a member, and come within the religious, pious uses which are upheld as public charities." In *Rhymer's Appeal*, 93 Pa. 142, 39 Am. Rep. 736, the testator, after certain legacies, bequeathed all the residue of his estate "to St. Mary's Catholic Church, to be expended in masses for the benefit and repose of" his soul; and it was held to be a religious use, but failed because of a statute of that state requiring all such bequests to be executed with due formality at least one cal-

endar month before the decease of the testator. The court said: "The testator has clearly declared the use or purpose to which his bequest shall be applied. It is to be expended in masses for the benefit and repose of his soul. While this may not be regarded as a charitable use, within the accepted meaning of the word, it is certainly in every proper sense of the term . . . a religious use. In the denomination with which the testator appears to have been identified, the mass is regarded as a prominent part of the religious service and worship. According to the Roman Catholic system of faith, there exists an intermediate state of the soul, after death and before final judgment, during which guilt incurred during life and unatoned for must be expiated; and the temporary punishments to which the souls of the penitent are thus subjected may be mitigated or arrested through the efficacy of the mass as a propitiatory sacrifice. Hence the practice of offering masses for the departed. It cannot be doubted that in obeying the injunction of the testator, and offering masses for the benefit and repose of his soul, the officiating priest would be performing a religious service; and none the less so because intercession would be specially invoked in behalf of the testator alone. The service is just the same in kind whether it be designed to promote the spiritual welfare of one or many. Prayer for the conversion of a single impenitent is as purely a religious act as a petition for the salvation of thousands. The services intended to be performed in carrying out the trust created by the testator's will, as well as the objects designed to be attained, are all essentially religious in their character." In harmony with this last case is the recent decision of *Hoeffer v. Ologan*, 171 Ill. 462, 40 L. R. A. 730, 49 N. E. 527, where the testator left to the Holy Family Church, its successors and assigns, real estate in trust to sell and expend the proceeds in saying masses for the repose of his soul and the souls of his deceased wife, mother-in-law, and brother-in-law, and a legacy in trust to be expended in saying masses for the repose of the souls of his father, mother, and sister. The devise and legacy were held to be charitable, and were not allowed to fail by want of a competent trustee. It is said in the opinion that, "while the testator may have a belief that it will benefit his soul or the souls of others doing penance for their sins, it is also a benefit to all others who may attend or participate in it. An act of public worship would certainly not be deprived of that character because it was also a special memorial of some person, or because special prayers should be included in the services for particular persons. Memorial services are often held in churches, but they are not less acts of worship because of their memorial character. . . . The mere fact that the bequest was given with the intention of obtaining some benefit, or from some personal motive, does not rob it of its character as charitable." The saying of mass is a ceremonial celebrated by the priest in open church, where all who choose may be present and participate there- 48 L. R. A.

in. It is a solemn and impressive ritual, from which many draw spiritual solace, guidance, and instruction. It is religious in its form and in its teaching, and clearly comes within that class of trusts or uses denominated in law as charitable. And, while the effect of these services upon the members of this church is impressive and beneficial, the money expended for the celebrations thereof is of benefit to the clergy, and is upheld and maintained for this reason, as one of the cherished objects of religious uses. *Atty. Gen. ex rel. Abbot v. Dublin*, 38 N. H. 459; *Hoeffer v. Ologan*, 171 Ill. 462, 40 L. R. A. 730, 49 N. E. 527. The upholding of such trusts is in harmony with the principles of our law.

2. The executor is not empowered to set apart one sum for the care of the burial lot, and another for the saying of masses. The branches of the trust are to be administered together, and by the same trustee. The discretion with which the executor is invested extends only to the methods to be adopted in the performance of this duty. The whole trust is to be administered by him (*Brock v. Sawyer*, 39 N. H. 547), or by someone else appointed in his place by the probate court. Pub. Stat. chap. 198, § 6.

Case discharged.

All concur.

STATE of New Hampshire
v.

Michael KEAN.

(.....N. H.)

An indictable nuisance is created by a bay window which extends 4 feet and 7 inches over a street, at a point 8 feet above the ground, although it does not interfere with travel on the highway, where the statute declares that a building, structure, or fence shall be deemed a public nuisance if "erected or continued upon or over any highway so as to obstruct the same or lessen the full breadth thereof."

(March 12, 1897.)

RESERVATION by the Supreme Court for Hillsboro County for the opinion of the full court of an indictment charging defendant with erecting a nuisance consisting of a bay window in a public highway. *Judgment against defendant.*

The case sufficiently appears in the opinion.

NOTE.—For encroachment on street by awnings, bay windows, etc., see *Augusta v. Burum* (Ga.) 26 L. R. A. 340, and note; *State v. Clarke* (Conn.) 39 L. R. A. 670, with annotation commencing on page 667; and *Hibbard v. Chicago* (Ill.) 40 L. R. A. 621.

For provision in deed limiting projection of bay window, see *Atty. Gen. v. Algonquin Club* (Mass.) 11 L. R. A. 500.

For municipal power over buildings as nuisances in street, see note to *Hagerstown v. Witmer* (Md.) 39 L. R. A., beginning on page 662.

Mr. James P. Tuttle, for the State:

When this bay window was projected over the street and into the street 4 feet 7 inches, the condition of that street was changed.

The ruling in the present case is correct. *Hopkins v. Crombie*, 4 N. H. 524.

When land is taken for public use as a highway, the landowner is entitled to receive a sum in damages, which in theory of law is an indemnity for the use of the land taken.

Winchester v. Capron, 63 N. H. 605, 58 Am. Rep. 554, 4 Atl. 795; *Makepeace v. Worden*, 1 N. H. 16.

Mr. Oliver E. Branch, for defendant:

It is not an indictable offense, to which there is no defense, to erect a building, structure, or fence of any kind upon or over a highway.

The rights of the public in a highway are in the nature of an easement or right of passage, and the soil and freehold belong to the owners of the land.

Morrison's Digest, p. 468, § 148; *Winship v. Enfield*, 42 N. H. 197; *Chamberlain v. Enfield*, 43 N. H. 356; *Cressey v. Northern R. Co.* 59 N. H. 564, 47 Am. Rep. 227.

Whether an obstruction of a highway constitutes a nuisance is a question of fact for the jury.

Graves v. Shattuck, 35 N. H. 257, 69 Am. Dec. 536; *State v. Hall*, 22 N. H. 384.

On petition for rehearing.

In the decision the court did not consider that the defendant, being under an indictment, is entitled to a jury trial on all the facts alleged and not admitted.

N. H. Const. pt. 1, art. 15.

The court did not consider that the offense for which the respondent was indicted is by statute made a public nuisance (Pub. Stat. chap. 77, § 8), and, being a public nuisance, the respondent has a constitutional right to a trial by jury.

State ex rel. Rhodes v. Saunders, 66 N. H. 39, 13 L. R. A. 646, 25 Atl. 588.

The court in the decision did not consider that upon the trial of the indictment the respondent would have been entitled, if no facts had been admitted, to instructions to the jury upon the following questions:

(1) Is the bay window erected upon or over the highway? (2) If it is so erected, does it obstruct the same? (3) If it is so erected, does it lessen the full breadth of the highway?

A purpresture is not necessarily a public nuisance. A public nuisance must be something which subjects the public to some degree of inconvenience or annoyance; but a purpresture may exist without putting the public to any inconvenience whatever. Sections 1-6 inclusive, chap. 77, Pub. Stat., cover cases of "actual obstruction," and furnish a remedy for their prompt and immediate removal. But they must not be confounded with the subject-matter contained in § 8, under which the respondent was indicted.

Parsons, J., delivered the opinion of the court:

"By the common law anyone may abate a 48 L. R. A.

nuisance to a highway." 1 Hawk. P. C. chap. 75, § 12; Id. chap. 76, § 61; 3 Bl. Com. *5. To justify such action, it must appear that the object removed was an obstruction to the public travel,—an actual nuisance. In such case, "whether any object permanently placed, temporarily left, or slowly moving in a public highway" unnecessarily obstructs public travel, and therefore is a common nuisance, is a question of fact to be determined by the jury from all the circumstances of each particular case. *Hopkins v. Crombie*, 4 N. H. 520, 525; *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536. "If any timber, lumber, stone, or other thing is upon a highway, encumbering it," a prompt remedy for the immediate removal of the obstruction is provided. Pub. Stat. chap. 77, §§ 1-6. In proceedings under this statute, whether the object complained of is an encumbrance, and its removal necessary for the public convenience, are questions of fact to be determined upon competent evidence. *Richardson v. Smith*, 59 N. H. 517. The public, however, is entitled to the full and free use of all the territory embraced within the limits of a highway, not only for actual passage, but for all purposes that are legitimately incident thereto. Every actual encroachment upon a highway by the erection of a building or fence thereon, or any other permanent or habitual occupation thereof, is an invasion of the public right, even though it does not operate as an actual obstruction to public travel. Wood, Nuisances, §§ 81, 250. "Where there is a house erected, or an inclosure made, upon any part of the King's demesnes, or of a highway, or common street, or public water, or such like public things, it is properly called a *purpresture*." 4 Bl. Com. *167. "Pourpresture" cometh of the French word 'pourprise,' which signifieth a close, or enclosure; that is, where one encroacheth, or maketh several to himself that which ought to be common to many." Co. Litt. 277b; Co. Magna Charta, 38, 272. Any unauthorized erection over a highway is a purpresture. Wood, Nuisances, § 77; *Know v. New York*, 55 Barb. 404; *Atty. Gen. v. Ewart Booming Co.* 34 Mich. 462. Since the public right is coextensive with the limits of the highway, that the traveled part is not thereby impeded is no defense to an indictment charging the erection or maintenance of a building or other construction within the highway. Roscoe, Crim. Ev. 3d Am. ed. 567; *Com. v. Wilkinson*, 16 Pick. 175, 26 Am. Dec. 654; *Com. v. King*, 13 Met. 115; *Com. v. Blaindell*, 107 Mass. 234; *Harrover v. Ritson*, 37 Barb. 303; *Dickey v. Maine Teleg. Co.* 46 Me. 483; *Wright v. Saunders*, 65 Barb. 214; *Queen v. United Kingdom Electric Teleg. Co.* 31 L. J. Q. B. N. S. 167; *Rex v. Wright*, 3 Barn. & Ad. 681; *Reimer's Appeal*, 100 Pa. 182, 45 Am. Rep. 373. This does not conflict with the adjoining owner's right to make any reasonable temporary use of the street which does not unnecessarily obstruct the public passage. 1 Hawk. P. C. chap. 76, § 49; Wood, Nuisances, §§ 256, 257; *Rex v. Cross*, 3 Campb. 224; *Rex v. Jones*, 3 Campb. 230; *Winchester v. Capron*,

63 N. H. 605, 4 Atl. 795; *Winship v. Enfield*, 42 N. H. 197, 216; *Chamberlain v. Enfield*, 43 N. H. 356, 360, 361; *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; *Hopkins v. Crombie*, 4 N. H. 520; *Makepeace v. Worden*, 1 N. H. 16; *Avery v. Maxwell*, 4 N. H. 36; *Copp v. Neal*, 7 N. H. 275; *Baker v. Shephard*, 24 N. H. 208, 213.

The defendant is charged with erecting and continuing a bay window upon and over a public highway. The bay window is a projection from the defendant's building, which extends into and over the highway 4 feet and 7 inches, but does not extend downward within 8 feet of the surface of the way. The sole question reserved is whether, upon the admission of these facts as charged, there is any question for the jury. The defendant claims that these facts do not show such obstruction of the highway as is contemplated in § 8, chap. 77, Pub. Stat., because the bay window does not obstruct the traveled part of the highway, nor interfere with the travel upon the same, and that upon these facts it is a question for the jury whether they constitute an obstruction. The statute is: "If any building, structure, or fence is erected or continued upon or over any highway so as to obstruct the same or lessen the full breadth thereof, it shall be deemed a public nuisance, and any person erecting or continuing the same shall be fined not exceeding fifty dollars; and the court shall order such building, structure, or fence to be removed." The defendant's bay window is a "structure" erected and continued by him over the highway. It lessens the full breadth of the highway 4 feet and 7 inches at a point 8 feet above the ground. The only question is whether the statute is aimed at mere encroachments upon the limits reserved for public use, or has as its object only the removal of actual impediments to the passage. The statute has been the law of the state for nearly 200 years. Its title, when apparently first enacted, in 1714, was "An Act to Prevent Encroachment upon Highways." Laws 1696-1725, p. 32. The provincial act was re-enacted with the same title, with slight verbal change, February 27, 1786. Laws 1797, p. 315; Laws 1805, p. 334; Laws 1830, p. 581. In the revision of 1842 the act appears with the same title, "Encroachments on Highways," but greatly condensed, and in substantially its present form (Rev. Stat. chap. 60), while the provision for the immediate removal of encumbrances is found in the preceding chapter, entitled "Encumbrances in Highways." The substance of the former act was also adopted February 27, 1786. It was not until 1867 that the two provisions were brought together, into one chapter under the present head, "Encumbrances and Encroachments on Highways." Gen. Stat. p. 151, chap. 70. The legislature understood encroachment and encumbrance to be different evils requiring different remedies. An object is not an encumbrance in a highway unless it obstructs the use of the way, while an encroachment is an unlawful gaining upon the right or possession of another; as where a man sets his fence beyond

his line. Bouvier, Law Dict. Thus the title furnishes evidence that the object of the statute was the preservation of the limits of the public right, not the prevention of obstruction to travel. The less condensed form of expression of the early statute also gives aid as to its present meaning. Omitting needless repetition not applicable to the present case, it is: "No edifice, building, or fence whatever shall be raised, erected, built, or set up in, upon, over, or across any of the said highways, roads, streets, . . . or any part of them, whereby to stop them up or straighten the passage, or any ways lessen the full breadth of any such street." The three evils which might result from encroachment are described, and were: (1) Stopping up the street, actually preventing passage; (2) straightening, making narrow the path, and the passage difficult; (3) any ways lessening the full breadth of the street. In the modern revisions and re-enactments of the statute the first two are written as a single clause, "to obstruct," but no change has been made in the last,—"lessen the full breadth of the street." If a jury might find that the defendant's bay window did not stop up the street or straighten the passage, they could not find that, projecting 4 feet and 7 inches over the highway, it does not to some extent lessen its full breadth. That a building so projecting into the highway upon the surface, but not so as to obstruct travel, is in violation of the statute, was decided in 1829 in *Hopkins v. Crombie*, 4 N. H. 520. The case was trespass for breaking and entering the plaintiff's close and removing a house frame. The defense set up was that the house was within the limits of the highway, and under the statute was an obstruction and nuisance, wherefore the defendants, selectmen of the town, entered, and removed the same. The court.—Richardson, Ch. J.,—said (p. 525): "This statute [February 27, 1786] was not, in our opinion, intended to make mere encroachments upon highways, where the passage was not obstructed, liable to be removed by individuals. The object was to prevent certain encroachments upon highways, and for this purpose they are declared to be common nuisances, and provision made for their removal and the punishment of the offender. Individuals are permitted to abate actual nuisances which obstruct the passage of highways, because the public convenience requires an immediate remedy, and cannot wait for the slow progress of the ordinary course of justice. But no such reason exists for the interference of individuals in this way, in the case of encroachments which do not obstruct the passage. The statute has not changed the nature of things, and made that an actual obstruction which was not so before its enactment." It was further held in the same case that the cellar and frame complained of, which extended 10 feet within the limits of the highway, but in no way impeded, or obstructed, or rendered less safe or convenient the traveled path, was clearly an encroachment, for the simple reason that it was within the limits of the highway. It

was said to be (p. 526) "clearly an illegal encroachment, which rendered the plaintiffs liable to be indicted and punished, and which might at any time, upon a conviction, have been legally taken down, demolished, and removed." For this reason, although, since the frame did not obstruct the travel, the defendants' acts in removing it were unlawful, the plaintiffs were allowed only nominal damages.

Under *Hopkins v. Crombie*, the only question remaining is whether the elevation of the projecting structure 8 feet above the highway surface raises any question of fact under the statute. If it does, it is only because at that elevation a jury might find it did not in fact obstruct the public in their use of the way. But if such a finding, which might, and probably must, have been found in *Hopkins v. Crombie*, does not excuse a building upon the surface of the way made because abundant space was left on one side of the structure for the public passage, the same finding cannot avail when based on the ground that there is abundant room beneath the structure. The finding being immaterial, a different ground upon which it might be based is equally unimportant. Further evidence of the understanding of the legislature is to be found in the section of the statute immediately following: "Signs and awnings put up in conformity with the police regulations in force in the town are excepted from the provisions of the preceding section." Pub. Stat. chap. 77, § 9. This exception appeared first in the Revised Statutes of 1842 (Rev. Stat. chap. 60, § 2), presumably considered necessary because in 1823 police officers were authorized to make regulations for the height and position of any awning, shade, or other fixture that may be erected or placed in any such street (Laws 1839, p. 271; Rev. Stat. chap. 114, § 7; Pub. Stat. chap. 249, § 5). The legislature understood that a sign or awning over a highway was within the statute. The projection of the roof and eaves of a house over and into a street is within the statute, and a building so constructed is a nuisance. *Garland v. Towne*, 55 N. H. 55, 20 Am. Rep. 164. "Whether the fee of the street be in the municipality in trust for the public use, or in the adjoining proprietor, it is in either case of the essence of the street that it is public, and hence . . . under the paramount control of the legislature as the representative of the public." 2 Dill. Mun. Corp. 2d ed. § 541. The reasonable and proper use which the adjoining owner may make of the way is subject to legislative regulation. Id. § 585; 3 Kent, Com. *433; *Allen v. Boston*, 159 Mass. 324, 335, 34 N. E. 519. Buildings projecting over a highway may make doubtful the true line of the street, as well as those erected upon the surface, and render the way dangerous to the public use. Whether any such use should be permitted is properly determinable by the

legislature. Considering the common-law rule that any encroachment upon a highway is unlawful, the object of the statute, as disclosed by its title, the language used in the original and subsequent enactments of the section in question, the exceptions made by the legislature tending to establish the legislative understanding of the meaning of the section, the existence of another statute remedy for the removal of actual obstructions, and the previous interpretation that has been declared by the court, we entertain no doubt that the construction contended for by the defendant cannot be sustained. The facts agreed contain all the elements of the offense charged. There is no question for the jury.

Trees by the side of the roadway (*Graves v. Shattuck*, 35 N. H. 270, 69 Am. Dec. 536), are not within the terms of this statute, and are recognized and protected by law. Pub. Stat. chap. 266, § 19. While the suggestion of the defendant's brief that the omission of the clause, "so as to obstruct the same, or lessen the full breadth thereof," would leave the statute with precisely the meaning given to it is undoubtedly true, yet we do not think the insertion of this clause authorizes the position that there may be a structure upon or over a highway which does not either obstruct it or lessen its full breadth. Such a structure is plainly inconceivable, and the proposition is self-contradictory. If the structure is upon or over the highway, it must either obstruct it or lessen its full breadth. If it does neither, it is neither upon nor over the highway. The origin of the clause is to be found in the excessive particularity of the original draftsman in the effort, by a superabundance of words, to exclude the possibility of failure to embrace within the terms of the statute every variety of encroachment. The clause is in fact a recital of evils guarded against, and not the insertion of a condition to be found as a fact. The original laying of the street is conclusive that the whole space is necessary for the public use, either for passage, or the necessary incidents thereto. Whether the space reserved can, consistently with safety to the public, be permanently encroached upon by structures overhanging the same, other than signs and awnings, is purely a legislative question. As the case and the law now stand, the defendant's window is an illegal encroachment upon the street. The legislature has not left it to the court to decide whether, as a purpresture merely, it should be allowed to remain. Wood, Nuisances, § 80. The statute declares it a nuisance, and orders its removal. Further proceedings in accordance with these views and the stipulations of the reserved case will be had at the trial term.

Case discharged.

All concur.

Rehearing denied.

NEW JERSEY SUPREME COURT.

Claus DETTMERING, *Plff. in Err.*,
v.
Richard ENGLISH.

(.....N. J.....)

- *1. Plaintiff received an injury from the fall of a wall which was being constructed by workmen of the defendant. Plaintiff was lawfully on the premises where the wall was being constructed. *Held*, that defendant owed plaintiff a duty to take reasonable care that the wall should be so constructed as not to fall.
2. At the close of the whole evidence the trial judge directed a verdict for the defendant on the ground that the single question presented was whether the wall in question should have been braced, and that upon the evidence it appeared that bracing was unnecessary. *Held*, that, under the circumstances appearing in the case, there was a question for the jury, and it was error to withdraw it from them by a direction.

(November 13, 1899.)

ERROR to the Circuit Court for Hudson County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed*.

The facts are stated in the opinion.

Mr. Flavel McGee for plaintiff in error.
Messrs. Corbin & Corbin, for defendant in error:

Plaintiff cannot avail himself of grounds of negligence not pleaded. He must set out the facts showing negligence.

Race v. Easton & A. R. Co. 62 N. J. L. 533, 41 Atl. 710.

The absence of braces on the south side was not evidence of negligence.

Usage is the test of ordinary care.

McGrell v. Buffalo Office Bldg. Co. 153 N. Y. 265, 47 N. E. 305.

It is a mistake for one to take his stand after an accident, and to impute responsibility from a view thus obtained. It is nearly always easy, after an accident has happened, to see how it could have been avoided.

Burke v. Witherbee, 98 N. Y. 562; *Frobisher v. Fifth Ave. Transp. Co.* 151 N. Y. 431, 45 N. E. 839.

The mere falling of the wall does not prove negligence; the plaintiff must not stop with bare proof of the accident.

Bahr v. Lombard, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167; *Cadwell v. Arnheim*, 152 N. Y. 182, 46 N. E. 310.

*Headnotes by *MAGIE*, Ch. J.

NOTE.—As to liability for injury by fall of wall, see *Anderson v. East* (Ind.) 2 L. R. A. 712, and *note*; *Factors & T. Ins. Co. v. Werlein* (La.) 11 L. R. A. 361, and *note*.

As to dangerous chimney, see, with respect to landlord's liability, *note* to *Lee v. McLaughlin* (Me.) 26 L. R. A. on page 200; see also *Cork v. Blossom* (Mass.) 26 L. R. A. 256, 48 L. R. A.

The only competent expert evidence was for witnesses having experience in wall construction to describe what was the proper mode.

Crane v. Northfield, 33 Vt. 126; *Bliss v. Wilbraham*, 8 Allen, 564.

Magie, Ch. J., delivered the opinion of the court:

Dettmerring brought this action against English to recover damages for an injury received by him by the fall of a portion of a wall which was being constructed by English for the city hall of Jersey City. English had contracted with the city for the mason and iron work of the city hall, and had subcontracted the iron work to the Fagin Iron Works, in the employ of which Dettmerring was working on the building. The occurrence is the same which was before the court of errors in *Jansen v. Jersey City*, 61 N. J. L. 243, 39 Atl. 1025. On the authority of that case, the employees of English in building the wall which fell were not fellow servants of Dettmerring.

The bills of exception show that at the close of plaintiff's case a motion for nonsuit was interposed on the ground that there was a failure of proof of any negligence on the part of English, or of any negligence which was chargeable to him. The trial judge reserved decision on motion, and proceeded to hear the evidence of the defendant. At the close of the whole case defendant asked for a direction for a verdict in his favor upon the same ground upon which he had moved for the nonsuit. This motion was granted; the trial judge giving as a reason that the only question in the case was whether the wall that fell should have been braced, and that it then appeared to him, on the evidence, that bracing was not necessary. Exception was allowed to the direction of a verdict, and plaintiff's main contention is directed to it as erroneous. The bill of exceptions presenting this question contains the whole evidence adduced at the trial. It appears therefrom that Dettmerring was lawfully upon the premises, engaged in his duty to his employer in performing the work which the Fagin Iron Works had contracted with English to do. It follows that English owed to Dettmerring a duty to take reasonable care that the wall in question should be so constructed as not to fall upon and injure him while thus lawfully on the premises. If, upon the evidence, a reasonable inference of failure to perform that duty could be drawn by the jury, it was obviously erroneous to withdraw the case from the jury by the direction for a verdict. Such a course could only be justified by the total lack of evidence from which such an inference could properly be drawn. It appears from the evidence that the wall in question was about 80 feet long, and had been built of a width of 16 inches to a height of about 60 feet, and had been allowed to dry and settle for some days. Then the workmen of English commenced to

build thereon a wall of 12 inches in width, and within two days had completed it for the whole length to the additional height of 18 or 20 feet, when it, or part of it just erected, fell upon the plaintiff. It is evident that the trial judge conceived that the sole question was whether the duty of English required him to brace the wall then in course of construction, and, upon his finding that such bracing was unnecessary, his direction for the verdict was grounded. It is at least open to doubt whether the view taken by the trial judge was not too narrow. The wall was of brick, and it is a matter of common knowledge that when such cubes are laid one upon another, with care to keep the wall plumb, it will stand by virtue of the law of gravity; and a fall of a wall of brick would indicate either that it had been improperly laid, or that the fall had been caused by some force from without. Under such circumstances it may well be that the maxim, *Res ipsa loquitur*, would be applicable, and one who constructed a wall which thus fell might be required to show the cause of the fall, and that it was not the result of negligent construction. That would justify a resort to evidence such as was adduced by English, of a sudden and violent gust of wind occurring at the time the wall fell. Whether that was sufficient to account for the fall, or whether the probability of such an occurrence was within the contemplation of a prudent man engaged in the erection of a wall at such a height, and whether such probability required some protection by bracing or otherwise, would then be questions for a jury. Again, it might be open to question whether a jury might not be permitted to infer a lack of duty on English's part in erecting this part of the wall in haste, and without giving time for drying and settling. But, looking at the evidence as the trial judge did, I have reached the conclusion that it was erroneous to withdraw the case from the jury. On the

part of Dettmering there was evidence offered, which was rejected by the court below, which, it is claimed, tended to show that, in the customary mode of erecting such walls, bracing was resorted to as a protection against falling. If the evidence offered was adapted to show the ordinary and customary mode of erection, it may have been admissible; but the questions asked, and excluded by the court, called for the observation of witnesses in isolated cases, and, if answered, would not have tended to prove any general custom. It may be that the evidence would have been admissible in rebuttal of defendant's proof that bracing was not customary or possible under the circumstances, but the questions asked and rejected in plaintiff's original case were not renewed in rebuttal. The evidence, however, clearly shows that bracing was provided for by the plans. There was a wall of the building already erected, and parallel to that which fell, and 8 or 9 feet distant from it. Iron beams were designed to be fastened or anchored at the top of that wall, and to extend to, and be masoned in, the wall that fell. There was evidence that such beams were provided, and were masoned in the wall in question. There was evidence, however, that the ends of some of them, at least, were not fastened or anchored in the parallel wall. It is true that the evidence on that subject was controverted, but it was for the jury to judge the weight of evidence, and the credit to be given to witnesses from whom it was drawn; for such beams were obviously intended as braces, and, if they were left unfastened to the parallel wall, it raised a question as to the performance by English of his duty in constructing this wall. It was not for the court to pronounce such bracing unnecessary.

The result is that *the judgment founded upon the verdict so erroneously directed must be reversed for a venire de novo.*

NEW YORK COURT OF APPEALS.

BUFFALO GERMAN INSURANCE COMPANY, *Appt.*,

v.

THIRD NATIONAL BANK OF BUFFALO, *Resp.*

(162 N. Y. 168.)

1. A statement to a bank by a borrower, that stock in his safe may be considered as collateral for his loans, is executory in its nature so long as the stock remains in his possession and until it is in fact pledged to the bank by a delivery.
2. An equitable lien, in favor of a national bank, upon its shares of stock,

cannot be asserted against a third person by virtue of a loan to a stockholder on the security of the shares, under a by-law providing that any liability of the stockholder should be a lien upon the stock, which by-law is printed on the face of the certificate of stock so as to be notice to all persons dealing therein, since such by-law is in conflict with the provisions of the national banking act of 1864, § 35, prohibiting any loan by such bank on the security of its own shares of stock.

3. The invalidity of a lien on shares of stock in a national bank under a by-law in conflict with the national banking act of Congress can be asserted by a bona fide transferee of the stock, and the right to raise the

NOTE.—As to the lien of a corporation on stock for debt of stockholder, see also *Jennings v. Bank of California* (Cal.) 5 L. R. A. 233; *Birmingham Trust & Sav. Co. v. Louisiana Nat. Bank* (Ala.) 20 L. R. A. 600; *Craig v. Hesperia Land & Water Co.* (Cal.) 35 L. R. A. 306; *Al-48 L. R. A.*

dine Mfg. Co. v. Phillips (Mich.) 42 L. R. A. 531.

As to the effect of transfer of shares of stock upon liability for unpaid subscription, see *Rochester & K. Falls Land Co. v. Raymond* (N. Y.) 47 L. R. A. 246, and *note*.

question of its invalidity is not restricted to the Federal government.

(February 27, 1900.)

A PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of an Equity Term for Erie County in favor of defendant in a proceeding brought to compel the transfer of stock upon the books of the defendant corporation. *Reversed.*

Statement by **Gray, J.:**

This action was brought to obtain a judgment directing the defendant to transfer upon its books to the plaintiff 450 shares of its capital stock. All of these shares stood in the name of Emanuel Levi, who had, some years previously, pledged the same with, and delivered the certificates thereof to, the plaintiff, to secure the payment of his promissory notes for moneys loaned. At the time that he so pledged the shares of stock, he executed and delivered to it an assignment of the same in the usual form, by which he assigned and transferred to it, by name, the shares of defendant's capital stock standing in his name on the books, and constituted one of the officers of the plaintiff his attorney to effect the transfer thereof, etc. He at the same time executed and delivered to the plaintiff a receipt for the moneys loaned to him, which stated the rate of interest the loan should carry, the assignment of collateral security for its payment, and that the plaintiff was authorized, in case of default in payment of the principal and interest of the loan, to sell the securities at public or private sale, etc. Levi having died, a demand was made upon his executors for payment of the notes, with notice that, in the event the same were not paid, and the stock redeemed, on or before a certain date, the stock would be sold at public auction, and the proceeds applied in liquidation of the indebtedness of their testator. On June 30, 1896, a public sale was regularly had, at which the stock was purchased by the plaintiff. Thereafter, a demand of the plaintiff upon the defendant to transfer the stock so purchased upon its books was refused. The defendant claims a lien upon the stock by force of a statement printed upon the face of the certificates, in the following language: "This is to certify that Emanuel Levi is the owner of ——— shares of one hundred dollars each of the capital stock of the Third National Bank of Buffalo, subject to the lien referred to in section 15 of the by-laws of said bank in the following words: 'No transfer of the stock of this association shall be made without the consent of the board of directors by any stockholder who shall be liable to the association, either as principal debtor or otherwise, which liability shall be a lien upon the said stock and all profits thereof and dividends.' And that the said stock is transferable only upon the books of the bank by him or his attorney on the surrender and cancellation of this certificate and

on compliance with said by-law." Levi had been a director of the defendant, and at the time he pledged his stock to the plaintiff he was under an indebtedness to the defendant. The trial judge made this finding with respect to it: "That at the time of the sale of the stock in question to, and its purchase by, the plaintiff, the estate of Emanuel Levi was largely indebted to the defendant, and the defendant then had and now has a right to a lien upon said certificates and stock as security for the payment thereof; that Levi's indebtedness to the defendant accrued prior to the pledge of any of said certificates to the plaintiff; that no tender or offer to pay said indebtedness by the plaintiff, or by any other person or party, has ever been made; that the plaintiff was notified of the defendant's claim before the sale of June 30, 1896, and the defendant forbade such sale except subject to the defendant's claims, demands, and liens." The defendant at no time had possession of Levi's certificates of stock, and its claim is of an equitable lien upon the same for all the indebtedness owing by him as its stockholder, by reason of the statement upon the certificates. It is also claimed that he orally stated to the defendant's president that "he had a large amount of stock in the bank, and that was security for his loans," and that, though "it was in the safe-deposit vault," the bank "could consider it there as delivered as collateral to its loan." The trial court made no finding as to these facts, nor otherwise upon the subject than the finding above given. The conclusion reached by the trial court upon the facts was, in substance, that the defendant had a lien upon the stock for the amount of the indebtedness existing against the estate of Levi, when the certificates were purchased by the plaintiff, and that the latter's right to a transfer to itself of the stock was subject to the lien of the former. Judgment was entered dismissing the complaint upon the merits, upon the sole ground that the plaintiff is entitled to a transfer of the stock in question by the defendant, and to have new certificates issued to it in place of those to be surrendered and canceled, when, but not until, it should pay to the defendant an amount sufficient to satisfy its lien for the indebtedness to it owing by Levi's estate. This judgment was affirmed in the appellate division by a divided court, and the plaintiff has appealed to this court.

Messrs. Hickman & Palmer, for appellant:

There is no authority in the law for the enactment of a by-law containing the provisions of § 15 in this bank's by-laws, and there is an express provision prohibiting any such by-law in the act of Congress, which prohibits the bank from loaning on the security of its own stock.

First Nat. Bank v. Lanier, 11 Wall. 369, 20 L. ed. 172; *Bullard v. National Eagle Bank*, 18 Wall. 589, 21 L. ed. 923; *Second Nat. Bank v. National State Bank*, 10 Bush, 367.

The statement contained in the certificate

of stock, that the indebtedness of the stockholders should be a lien upon the stock, does not affect the right of the plaintiff, the insurance company.

Conklin v. Second Nat. Bank, 45 N. Y. 655; *Driscoll v. West Bradley & C. Mfg. Co.* 59 N. Y. 96; *Evansville Nat. Bank v. Metropolitan Nat. Bank*, 2 Biss. 527, Fed. Cas. No. 4573; *Feckheimer v. National Exch. Bank*, 79 Va. 80; *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. Rep. 376; *New Orleans Nat. Bkg. Asso. v. Wiltz*, 10 Fed. Rep. 330; *Cook, Stock & Stockholders*, 3d ed. (1894) § 533; *Jones, Liens*, 1894, 2d ed. § 384; 2 *Thomp. Corp.* 1894 ed. § 2319; 16 *Am. & Eng. Enc. Law*, p. 201, § 14; *Paine, Banking Laws*, p. 533; *Bullard v. National Eagle Bank*, 18 Wall. 597, 21 L. ed. 926; *First Nat. Bank v. Lanier*, 11 Wall. 369, 20 L. ed. 172; *Johnston v. Lang*, 103 U. S. 803, 26 L. ed. 534; *Sargent v. Franklin Ins. Co.* 8 Pick. 90, 19 *Am. Dec.* 306; *Bundy v. Jackson*, 24 Fed. Rep. 628; *Johnson v. Laffin*, 5 Dill. 65, Fed. Cas. No. 7,393; *Delaware, L. & W. R. Co. v. Oxford Iron Co.* 38 N. J. Eq. 340; *Feckheimer v. National Exch. Bank*, 79 Va. 80.

The defendant had no actual pledge of the stock in suit as collateral for any indebtedness which Levi might have owed it.

To make a valid pledge there must be delivery, actual or constructive, of the pledge by the pledgee or his agent, into the possession of the pledgee or his agent, in order to pass any right of property in the thing pledged.

Cortelyou v. Lansing, 2 Cal. Cas. 200; *Garrick v. James*, 12 Johns. 146; *Wilson v. Little*, 2 N. Y. 443, 51 *Am. Dec.* 307; 18 *Am. & Eng. Enc. Law*, pp. 595-598.

A pledgee can only retain his lien by retaining possession. When he delivers up possession, his lien ceases.

Black v. Bogert, 65 N. Y. 601; *Macomber v. Parker*, 14 Pick. 497.

The verbal agreement supplemented by the by-law did not give the national bank a lien on its stock.

Delaware, L. & W. R. Co. v. Oxford Iron Co. 38 N. J. Eq. 340.

The taking of stock can alone be justified when it is done in compromising a debt due to the bank, or a claim against it.

First Nat. Bank v. National Exch. Bank, 92 U. S. 122, 23 L. ed. 679.

If the defendant ever had any lien upon the stock in question, either actual or constructive, it waived that lien by a failure to enforce it.

The taking of other security by the defendant for its debt from Levi was a waiver of any lien, implied or otherwise.

Barrett v. Goddard, 3 Mason, 107, Fed. Cas. No. 1,046; *Gilman v. Brown*, 1 Mason, 191, Fed. Cas. No. 5,441; 4 *Wheat.* 255, 4 L. ed. 564.

Mr. Adelbert Moot, with Messrs. Lewis & Lewis, for respondent:

As the defendant secured an equitable lien upon the stock in question before the plaintiff secured a lien thereon, the lien of the defendant is prior in time and prior in 48 L. R. A.

right, and the plaintiff having taken the stock of the defendant, with notice of the defendant's rights therein, because the stock contains a notice thereof, it follows that the plaintiff acquired its lien subject to the lien of the defendant, and the plaintiff cannot compel the defendant to transfer the stock upon its books until the plaintiff has redeemed the stock from the lien of the defendant thereon.

National Bank v. Whitney, 103 U. S. 99, 26 L. ed. 443; *Thompson v. Saint Nicholas Nat. Bank*, 146 U. S. 240, 36 L. ed. 956, 13 *Sup. Ct. Rep.* 66.

Defendant's answer to this equitable suit of the plaintiff is a perfect answer upon the undisputed facts in this case, because the plaintiff cannot maintain this suit if the Levi estate could not maintain this suit.

The plaintiff put this stock in evidence as a part of its evidence, and therefore the recital of this document put in evidence by plaintiff, and transferred to plaintiff, raises a presumption of the fact recited, unless plaintiff overcomes that recital by evidence that it is untrue.

1 *Greenl. Ev.* 14th ed. § 23.

The by-law of the defendant, made a part of its stock certificate, is not void, and is not repugnant to the statute; but it is part of the very stock and contract with Levi, of which plaintiff claims the benefit as the privy and assignee of Levi; hence plaintiff is a party thereto, and is estopped from claiming it does not bind plaintiff as a part of such contract and collateral.

The by-law and the stock itself, and the arrangement made with Levi when the loan was made, together, give the defendant an equitable lien upon the stock.

3 *Pom. Eq. Jur.* § 1233.

Gray, J., delivered the opinion of the court:

The decision of the question in this case turns upon provisions of the national banking act, passed by Congress in 1864, and the construction which they should receive in the light of opinions of the Supreme Court of the United States. The original act for the incorporation of national banks, which was passed in 1863, contained, in § 36, the provision that the capital stock "shall be assignable on the books of the association in such manner as its by-laws shall prescribe, but no shareholder in any association under this act shall have power to sell or transfer any share held in his own right so long as he shall be liable, either as principal debtor, surety, or otherwise, to the association for any debt which shall have become due and remain unpaid; . . . and no stock shall be transferred without the consent of a majority of the directors while the holder thereof is thus indebted to the association." In 1864 the act of 1863 was repealed by a new enactment as to national banking associations, whereby it was provided, in § 35, "that no association shall make any loan or discount on the security of the shares of its own capital stock, nor be purchaser or holder of any such shares, unless

such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith," etc. 13 Stat. at L. 110, chap. 106. The act of 1864 did not reenact any of the provisions which were contained in § 36 of the act of 1863, and the section, therefore, was expressly repealed. *Bullard v. National Eagle Bank*, 18 Wall. 594, 21 L. ed. 923. The defendant was organized under the act of 1864, and there was not only no authority in the act for the by-law referred to and embodied in the language of the certificates of stock, but such a by-law would be inconsistent therewith. *Bullard v. National Eagle Bank*, 18 Wall. 594, 21 L. ed. 923. The restrictions imposed by § 36 of the act of 1863 upon the shareholders had been removed, and banking associations were prohibited from permitting any indebtedness on the part of their stockholders upon the security of the shares of their own capital stock. It would seem, therefore, that a by-law seeking to impose restrictions upon transfers of stock by declaring a lien upon the stock to the extent of any liability of the stockholder to the bank would be quite inoperative to accomplish such a purpose, and, equally so, any statement upon the certificate of stock based upon the existence of such a by-law. The bank being prohibited from loaning moneys upon the security of its own shares of capital stock, it is difficult to understand upon what legal principle it could claim the right to an equitable lien. The appellate division, in an opinion which was concurred in by the majority of the justices of that court, thought that, as the question was one which arose under a Federal law, it should be governed in its determination by the decisions of the Supreme Federal Court, and that the more recent ones had established a controlling doctrine that a contract made in contravention of any provision of the national banking act is not, in the absence of any declaration to that effect, void, or incapable of enforcement. Under the authority of certain cases in the United States Supreme Court, which are considered in the opinion, it was pointed out that the validity of certain transactions by national banks with their debtors was held to be a question only for the government to raise, and that the effect of their violation of the statute was, not to invalidate the transaction itself, but to subject them to charter proceedings on the part of the government. *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *National Bank v. Whitney*, 103 U. S. 99, 26 L. ed. 443; *Thompson v. Saint Nicholas Nat. Bank*, 146 U. S. 240, 36 L. ed. 956, 13 Sup. Ct. Rep. 66. Hence it was deemed to follow that in the present case the bank's claim to be entitled to an equitable lien, though against a purchaser for value, and in good faith, of its shares in the market, must be allowed, and any offense against the banking act involved must be left to governmental cognizance. I believe this conclusion to be fallacious, and that the reasoning of the learned justices below is without regard to the distinction which exists between those cases in their 48 L. R. A.

facts and in the principle underlying their decision, and the earlier cases which construed the national banking acts, and declared the doctrine that loans by banking associations to their stockholders do not give a lien to the bank upon their stock. *First Nat. Bank v. Lanier*, 11 Wall. 369, 20 L. ed. 172; *Bullard v. National Eagle Bank*, 18 Wall. 589, 21 L. ed. 923. I am quite unable to agree in the view that these earlier cases have been overruled, or their doctrine refused credit, by the later cases which are relied upon for the defendant. If we assume the existence of a contract between the defendant bank and Levi (and all we know of it is the testimony of the president of the defendant as to a conversation with Levi, in which he said the bank could consider the stock in his safe as collateral for his loans), it was executory in its nature as long as the stock remained in his possession, and until it was in fact pledged to the bank by a delivery. Possession is of the essence of a pledge, in order to raise a privilege against third persons. *Casey v. Cavaroc*, 96 U. S. 467, 24 L. ed. 779; *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307.

The defendant is asking the court to declare an equitable lien in its favor upon the shares of stock against a third person, and in that respect the case is unlike those cases where the Federal court has held that a national bank might enforce a security which it had taken and held, notwithstanding the claim of the borrower that the transaction was in violation of some express provision of the law. The defendant never had possession of the stock, and, being under the prohibition of the banking act as to a transaction of a loan upon the security of its own shares of stock, it is compelled to take the position that, having dealt with Levi upon the faith that his ownership of the stock would be an added security for the performance of his promise to pay his loans, and the certificates of stock carrying notice to persons dealing with Levi with respect to them that any transfer thereof would be subject to a lien in favor of the bank for any liability of the stockholder, it should be allowed an equitable lien thereon, superior to any right of the plaintiff thereto. I should say that there was a marked difference between any such claim of the bank, which slights a provision of the banking law, intended to negative the right to a lien and to confer the valuable character of transferability upon national bank shares, in the public interests, and a claim which a borrower or his representative asserts against the right of a national bank, as his creditor, to realize its debt upon securities which have been held by it in pledge, though not within the class of those it was authorized to hold. The demand of the bank is to have the court declare an equitable lien upon its outstanding stock by virtue of a by-law and of notice thereof on the certificates, when the banking act prohibited loans by it upon the security of its own shares, and thereby rendered any by-law in contravention of the act,

or any notice based thereon, wholly inoperative.

In *First Nat. Bank v. Lanier*, 11 Wall. 369, 20 L. ed. 172, the certificate of stock declared that the shares were transferable on the books of the bank only on surrender of the certificates. This limitation was imposed by the by-laws, which further provided that the stock of the bank should be assignable, subject to the provisions and restrictions of the 36th section of the act of 1863. Lanier and Handy purchased the stock of Culver, to whom it had been issued, and, their request for a transfer being refused, an action was brought against the bank to obtain pecuniary satisfaction. The bank defended upon the ground that it had a lien upon the stock for Culver's indebtedness; to it, by virtue of the provisions of the 36th section of the act of 1863, which remained in operation, notwithstanding its repeal in 1864, by means of a by-law, adopted while the section was in force, declaring that the stock should be transferable subject to the provisions and restrictions of the act of Congress aforesaid. It appeared that the bank had sold and transferred the Culver shares upon its books to a third person, and had applied the proceeds of the sale upon the indebtedness, before Culver assigned the certificates to Lanier and Handy. It was held that the provisions of the act of 1864 governed the conduct of banking associations, whether they were organized before or after it became a law, and that the prohibition upon the making of loans on the security of the shares of their own capital stock applied. The object of the new act was stated to be to make national banks subserve public purposes, and to place shareholders, in their pecuniary dealings with the bank, on the same footing with other customers. It was a change in the policy of the government, and, as the restrictions of the act of 1863 fell, "so did that part of the bank's by-law relating to the subject fall with them." The judgment against the bank was affirmed.

In *Bullard v. National Eagle Bank*, 18 Wall. 594, 21 L. ed. 923, the defendant was organized under the national banking act of 1864, and issued to one Clapp certain shares of its capital stock. He borrowed moneys from the bank on his notes, and subsequently was adjudged a bankrupt. The plaintiff, as his trustee in bankruptcy, demanded a transfer of the stock to him as part of the bankrupt's assets; but the bank refused, claiming a lien upon it, by force of its by-law, to the extent of the notes held by it. The action was then brought against the bank for refusing to allow the transfer asked for, and the questions certified for determination were whether a national bank could acquire a valid lien upon the shares of its stockholders by its articles or by-laws, and whether the bank was entitled to hold the interest of Clapp in the stock by way of lien, or security for all or any of the notes. It was held, on the authority of the *Lanier Case*, 11 Wall. 369, 20 L. ed. 172, that these questions must be answered in the negative. 48 L. R. A.

Mr. Justice Strong, who delivered the opinion of the court, observed that the repeal of the 36th section of the act of 1863 by the substituted act of 1864, "was a manifestation of a purpose to withhold from banking associations a lien upon the stock of their debtors," and that a by-law founded upon the 36th section of the act of 1863 was "a regulation inconsistent with the new currency act, the policy of which was to permit no liens in favor of a bank upon the stock of its debtors." It was there argued for the bank that, though the act of Congress does not itself create a lien on a debtor's stock (as did the act of 1863), it does, by its 5th section, authorize the creation of such a lien by the articles of association and by by-laws made under them. But it was answered that the words of the 5th section would bear no such meaning, and that a by-law giving to the bank a lien upon its stock, as against indebted stockholders, ought not to be considered as one of those regulations of the business of the bank, or for the conduct of its affairs, which it was authorized to adopt, and that Congress evidently did not understand the section as extending to the subject of stock transfers, because in another part of the statute express provision was made for them.

The doctrine of *First Nat. Bank v. Lanier*, was followed in this court in *Conklin v. Second Nat. Bank*, 45 N. Y. 655, where the stock certificates contained the statement that the stock was not transferable "until all liabilities of the stockholder to the bank were paid." The rule of the *Lanier Case* was held applicable to the transaction between the bank and the plaintiff's assignor, and it was held, against the claim of the bank to a lien upon the stock for moneys due from the stockholder, that "when the statute has prohibited all express agreements between a bank and its stockholders or a lien in favor of the former upon the stock of the latter to secure any debts or liabilities of the stockholders to the bank, that no such lien can be created by a mere by-law of the bank is too clear to require discussion."

Do the cases which are cited and relied upon below as establishing a new doctrine apply to the present case, and come to the support of the defendant's position? They are *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188, and *National Bank v. Whitney*, 103 U. S. 99, 26 L. ed. 443. The national banking law authorizes a national banking association to loan money on personal security, and then declares that "it may purchase, hold, and convey real estate for the following purposes, and no others: First, such as may be necessary for its immediate accommodation in the transaction of its business; second, such as shall be mortgaged to it in good faith by way of security for debts previously contracted; third, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; fourth, such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts to it." In the case of *Union*

Nat. Bank v. Matthews, Matthews and another person had given their joint note to a mercantile company, and secured it by a deed of trust, covering certain real property, executed by Matthews alone. Subsequently the company assigned the note and deed of trust to the defendant bank to secure a loan made at the time. The loan was not paid, and the bank directed the trustee to sell. In the state courts Matthews obtained a perpetual injunction against the sale, upon the ground that the loan was made upon real-estate security, which was forbidden by the statute, and the deed of trust was therefore void. The case was taken by writ of error to the United States Supreme Court, where the decree of the state court was reversed, and the cause remanded, with direction to the court below to dismiss the bill. It was held that the prohibitory clause of the national banking law did not vitiate real-estate securities taken for loans, and that a disregard of the law only laid the association open to proceedings by the government. Justice Swayne remarked that "the impending danger of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by Congress." The guiding principle of the decision, however, was that it would be inequitable that a borrower should be rewarded by giving success to his defense of the invalidity of the bank's act in taking a prohibited security for its loan, and that, as a punishment was prescribed for the violation of its charter, it was for the government to object. See p. 629, L. ed. p. 190. In *National Bank v. Whitney*, Whitney had executed a mortgage to the bank, which declared that it was made as collateral security for the payment of all notes which the bank held at the time against him, and for his other indebtedness then due or thereafter to become due. The question for determination was stated to be whether the mortgage was valid so far as it applied to future advances to him. The question was regarded as determined by the decision in *Union Nat. Bank v. Matthews*, which was reviewed in the opinion. It was observed that, "whatever objection there may be to it, as security for such advances, from the prohibitory provisions of statute, the objection can only be urged by the government." In both these cases the bank held the trust deed or mortgage, and was endeavoring to enforce the security which it actually had taken from its debtor.

In *First Nat. Bank v. Stewart*, 107 U. S. 676, 27 L. ed. 592, 2 Sup. Ct. Rep. 778, the bank had taken, as security for a debt due from the stockholder, thirty shares of its own stock, and upon default in payment had sold the same, and applied the proceeds in payment of the debt. The action was brought to recover back the proceeds of sale upon the ground that the bank had no right to take the security. The right to recover was denied upon the ground that "the contract has been executed, the security sold, and the proceeds applied to the payment of the debt," and that "both bank and borrower are, in such case, equally the objects of legal censure, and, they will be left by the courts

where they have placed themselves." By suing for the proceeds of the sale, it was observed, the plaintiffs had affirmed the sale, and the moneys loaned were an offset to the proceeds.

In *Thompson v. Saint Nicholas Nat. Bank*, 146 U. S. 240, 36 L. ed. 950, 13 Sup. Ct. Rep. 66, the question arose upon the overcertification of a check, in violation of the United States statute which made it "unlawful for any officer, clerk, or agent of any national bank to certify any check drawn upon said bank, unless the person or company drawing said check shall have on deposit in said bank, at the time such check is certified, an amount of money equal to the amount specified in such check." The statute further provided that any check so certified shall be a good and valid obligation against said bank, but that any officer, etc., violating the provisions of the act, would subject the bank to proceedings on the part of the comptroller for the appointment of a receiver to wind up the affairs of the association. 13 Stat. at L. 114, chap. 106. The action was brought to recover the possession of certain railroad bonds, which the bank was charged with having become illegally possessed of. The bank answered that the bonds had been pledged to it as collateral security for call loans or advances, and that, the pledgees having failed to pay their indebtedness, the bonds had been sold under an agreement permitting the bank to do so upon the pledgor's default. The question was whether, inasmuch as the defendant had certified checks without having on deposit an equivalent amount of money to meet them, it became a bona fide holder of the bonds. Upon the authority of the cases of *Union Nat. Bank v. Matthews* and *National Bank v. Whitney*, it was held that, "where the provisions of the national banking act prohibit certain acts by banks, or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties." This clause from the opinion is quoted below in the present case, but I fail to perceive its precise applicability. The transaction, as in *First Nat. Bank v. Stewart*, had been executed. *Union Nat. Bank v. Matthews* and *National Bank v. Whitney*, only, of these cases, might be claimed to have a bearing upon the discussion; but their analogy is not apparent. I do not think that the United States Supreme Court intended to announce any new rule, for they simply applied a doctrine established as early as in the case of *Fleckner v. Bank of United States*, 8 Wheat. 339, 5 L. ed. 631. That the *Matthews* and *Whitney Cases* have not overruled the doctrine of the *Lanier* and *Bullard Cases* or of the *Conklin Case* in this court, with respect to the enforceability of such a by-law as the bank had in this case, is the general understanding of text writers, and it has been so understood by courts. Cook, Stock, Stockholders, & Corp. Law, 3d ed. § 533; Jones, Liens, 2d ed. § 384; 2 Thomp. Corp. ed. 1894, § 2319; Paine, Banking Laws, p. 533; 16 Am.

& Eng. Enc. Law, p. 201, §§ 14, 15; *Evansville Nat. Bank v. Metropolitan Nat. Bank*, 2 Biss. 527, Fed. Cas. No. 4,573; *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. Rep. 376; *New Orleans Nat. Bkg. Asso. v. Wiltz*, 10 Fed. Rep. 330; *Feckheimer v. National Exch. Bank*, 79 Va. 80.

I do not understand that by virtue of any rule established in the *Matthews* and *Whitney Cases*, a national banking association is enabled, by force of a by-law, or by a notice upon certificates, to restrict the transferability of its stock by imposing a lien thereon for any liability owing to it by its stockholder. How can it reserve to itself a right to a lien upon shares of its own stock, in contravention of the provisions of the national banking act, and become entitled to demand of the courts to enforce it as against a purchaser of the shares, whose title thereto is acquired bona fide, and for value? If the defendant bank can successfully insist upon the right to an equitable lien, which the courts must enforce in the face of the statutory prohibition, then I do not see that certificates of capital stock in national banking associations will possess that marketable character which has been considered to give them a greater value as investments. The transferability of the stock is one of the most valuable franchises conferred by Congress upon banking associations as it was said by Mr. Justice Davis in the *Janier Case*. The learned judge further remarked, in that case: "It is no less the interest of the shareholder than the public that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage." Nor can it be said that this plaintiff, when offered by Levi the certificates of stock as collateral security for a loan of money, was chargeable with notice of any lien of the bank thereon. The certificates were in his possession, and were delivered to the plaintiff; and the printed matter thereon was of no importance, inasmuch as the public law, under which the bank was organized, prohibited it from making any loan or discount on the security of the shares of its own capital stock. The plaintiff could not be bound by notice of something which the law prohibited. The plaintiff, in the language of Justice Davis in the *Janier Case*, was "told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know that whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to anyone not in possession of the certificates." If the case had been one where the bank, not regarding the prohibition of the banking act, had taken from Levi his

certificates of stock as collateral security for the payment of any indebtedness which he had incurred or might incur, and had realized upon them for application upon his debt, it might well be that it would not lie in his mouth, or anyone claiming under him, to assert the illegality of the transaction. The case would then resemble more the cases of *Union Nat. Bank v. Matthews* or *First Nat. Bank v. Stewart*. If the bank had violated the law, it laid itself open to proceedings on the part of the government, and the courts might leave the parties where they were, and might decline to interfere to benefit the borrower to the prejudice of the stockholders and creditors. There is no conflict between the *Janier* and *Bullard Cases* and the *Matthews* and *Whitney Cases*. Each class is distinct, and its doctrine is controlling where the principle involved is the same. It is one thing if the contract has been executed, and to avoid it would be to deplete the assets of the bank to the amount represented by the contract. It is quite another thing where the bank is seeking to create a lien upon an implied executory contract, or a security where it has none, and where it admits it has none, in the face of the statute which provides that it shall not have such a lien or take such a security.

The conclusion I reach is that the cases relied upon in the court below in the decision of this case do not control it. They do not authorize the assertion of an equitable lien by the bank upon the shares of its own capital stock; and the plaintiff, having acquired the certificates from Levi, the stockholder, for value, and in good faith, was entitled to have the same absolutely transferred into its name upon the books of the corporation.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

Parker, Ch. J., and Bartlett, Martin, Vann, Cullen, and Werner, JJ., concur.

PEOPLE of the State of New York *ex rel.*
Elizabeth CISCO, *Appt.*,

v.

SCHOOL BOARD OF THE BOROUGH OF
QUEENS, New York City, *Resp't.*

(161 N. Y. 598.)

1. The right of colored children to attend any school they or their parents may choose, instead of being restricted to the separate schools established for colored children, is not conferred by Pen. Code, § 383, which makes it a misdemeanor for teachers or officers of schools to exclude any citizen from the equal enjoyment of any accommodation or privilege, if the schools for colored children furnish facilities and accommodations equal to those which are furnished by the other schools.

NOTE.—As to the rights of colored children in schools, see cases in *note* to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. on page 581.

2. The constitutional requirement of the maintenance and support of a system of free common schools wherein all the children of the state may be educated does not require a school board to admit to any school under its control all the children who may desire to attend that particular school, or prevent the legislature from exercising its discretion as to the best method of educating the different classes of children in the state, whether those classes are determined by nationality, color, or ability, so long as it provides for all alike in the character and extent of the education furnished and facilities for its acquirement.

(February 6, 1900.)

APPPEAL by relator from an order of the Appellate Division of the Supreme Court, Second Department, affirming an order of a Special Term for Queens County denying a writ of mandamus to compel defendant to admit relator's children into one of the public schools. *Affirmed.*

The facts are stated in the opinion.

Mr. George Wallace, for appellant:

The court of appeals, in its latest deliverance on the subject, holds that there can be no distinction on account of color in the admission of persons to places of amusement, to common schools, or their bodies to the cemetery.

People v. King, 110 N. Y. 418, 1 L. R. A. 293, 18 N. E. 245.

Messrs. William J. Carr and John Whalen, for respondent:

The school board had the power to organize a separate school for the instruction of children of African descent, and to assign thereto the children of the relator.

People ex rel. King v. Gallagher, 93 N. Y. 438, 45 Am. Rep. 232; *Ward v. Flood*, 48 Cal. 36, 17 Am. Rep. 405; *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738; *Roberts v. Boston*, 5 Cush. 198; *Lehen v. Brummell*, 103 Mo. 546, 11 L. R. A. 828, 15 S. W. 765; *McMillan v. School Committee*, 107 N. C. 609, 10 L. R. A. 823, 12 S. E. 330; *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348.

Equality of rights does not involve the necessity of educating white and colored persons in the same school, any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school. Any classification which preserves substantially equal school advantages is not prohibited by either the state or the Federal Constitution, nor would it contravene the provisions of either.

State ex rel. Barnes v. McCann, 21 Ohio St. 211.

Martin, J., delivered the opinion of the court:

The single question in this case is whether the school board of the borough of Queens is authorized to maintain separate schools for the education of the colored children within the borough, and to exclude them from the other schools therein, it hav-

ing made the same provisions for their education as are made for others, so far as the nature, extent, and character of the education and facilities for obtaining it are concerned. In *People ex rel. King v. Gallagher*, 93 N. Y. 438, the statute of 1864, which was the common school act, chapter 143, Laws 1850, and chapter 863, Laws 1873, which related to the public schools of the city of Brooklyn, were under consideration. They authorized the establishment of separate schools for the education of the colored race in cities and villages of the state, and in the city of Brooklyn. In that case it was held that they were valid, that they did not deprive children of African descent from the full and equal enjoyment of any accommodation, advantage, facility, or privilege accorded to them by law, and that they in no way discriminated against colored children. It was also held that the 14th Amendment of the Federal Constitution only required that such children should have the same privilege of obtaining an education with equal facilities as are enjoyed by others, without regard to race or color, and that the requirement that they should be educated in separate schools did not impair or interfere with their rights under the Constitution, or with any other legal rights of colored pupils. The consolidated school law (Laws 1894, chap. 556, title 15, § 28) contains the same provisions relating to this subject as were contained in the statute of 1864. Thus, the same statutory authority for the maintenance of such separate schools now exists as existed when the *King Case* was decided. Therefore, as this question has already been decided, it is not an open one in this court.

But it is insisted by the appellant that, as the Penal Code (§ 383) makes it a misdemeanor for teachers or officers of common schools and public institutions of learning to exclude any citizen from the equal enjoyment of any accommodation or privilege, it in effect confers upon colored children the right to attend any school they or their parents may choose, and that the school board had no authority to establish separate schools and deny them the right to attend elsewhere. The first answer to this insistence is that the Penal Code was in existence at the time of the decision of the *King Case*, and must be regarded as having been considered in that case. Moreover, independently of that decision, we do not see how that statute changes the effect of the conclusion reached in the case referred to, provided the facilities and accommodations which were furnished in the separate schools were equal to those furnished in the other schools of the borough. It is equal school facilities and accommodations that are required to be furnished, and not equal social opportunities. The case of *People v. King*, 110 N. Y. 418, 1 L. R. A. 293, 18 N. E. 245, is relied upon as modifying or overruling *People ex rel. King v. Gallagher*. We do not think such is its effect. In the former case a colored person was excluded from a place of public amusement controlled by the defendant, and it was there held that the latter was guilty of a misdemeanor. In

that case there was a total denial of the complainant's right to attend or to participate in the enjoyment of the entertainment. There no other accommodation or facility was furnished by the defendant. Not so here. In this case the colored children were given the same facilities and accommodations as others. We are of the opinion that the case of *People v. King* neither modifies nor affects the principle of the decision in *People ex rel. King v. Gallagher*, so far as it applies to the question under consideration.

Again, it is said that the present Constitution requires the legislature to provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated, and therefore the school board was required to admit to any school under its control all the children who desired to attend that particular school. Such a construction of the Constitution would not only render the school system utterly impracticable, but no such purpose was ever intended. There is nothing in that provision of the Constitution which justifies any such claim. The most that the Constitution requires the legislature to do is to furnish a system of common schools where each and every child may be educated,—not that all must be educated in any one school, but that it shall provide or furnish a school or schools where each and all may have the advantages guaranteed by that instrument. If the legislature determined that it was wise for one class of pupils to be educated by themselves, there is nothing in the Constitution to deprive it of the right to so provide. It was the facilities for and the advantages of an education that it was required to furnish to all the children, and not that it should provide for them any particular class of associates while such education was being obtained. In this case, there is no claim that the relator's children were excluded from the common schools of the borough, but the claim is that they were excluded from one or more particular schools which they desired to attend, and that they possessed the legal right to attend those schools, although they were given equal accommodations and advantages in another and separate school. We find nothing in the Constitution which deprived the school board of the proper management of the schools in its charge, or from determining where different classes of pupils should be educated, always providing, however, that the accommodations and facilities were equal for all. Nor is there anything in this provision of the Constitution which prevented the legislature from exercising its discretion as to the best method of educating the different classes of children in the state, whether it relates to separate classes, as determined by nationality, color, or ability, so long as it provides for all alike in the character and extent of the education which it furnished and the facilities for its acquirement.

The order should be affirmed, with costs.

Parker, Ch. J., and Gray, O'Brien, Bartlett, and Haight, JJ., concur. Vann, J., not voting.
48 L. R. A.

William J. TRIMBLE, Assignee, etc., of
Eugene T. Curtis *et al.*, Resp't.,

NEW YORK CENTRAL & HUDSON
RIVER RAILROAD COMPANY, App't

(162 N. Y. 84.)

1. All controverted facts, and all inferences therefrom, must be deemed conclusively established in favor of the party for whom judgment is rendered, when both parties are in the position of having asked for the direction of a verdict.
2. A railroad company is liable for the loss of a sample trunk on a contract for its transportation as freight, where it was checked without any misrepresentation, and without any release of liability or any request therefor, on payment of a charge for excess baggage, which was the same for sample trunks as for ordinary baggage, and the baggageman had constructive notice of the character of the trunk from its appearance and from other circumstances, although there was a rule of the company prohibiting the checking of sample trunks without a release of liability.
3. Both parties are deemed to have asked for the direction of a verdict, where defendant's counsel, after moving unsuccessfully for a nonsuit, replied to an inquiry from the court, that he did not care to have any question submitted to the jury, and, after a request by plaintiff's counsel for the direction of a verdict, stated that he desired to stand on his motion for a nonsuit, while neither party asked to have any question of fact submitted to the jury.

(Parker, Ch. J., and O'Brien and London, JJ., dissent.)

(February 27, 1900.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Monroe County in favor of plaintiff in an action brought to recover damages for the destruction of a trunk while in defendant's possession for transportation. *Affirmed.*

The facts are stated in the opinions.

Messrs. Harris & Harris, for appellant: The defendant was not liable for the loss of these samples, and the plaintiff should have been nonsuited.

Talcott v. Wabash R. Co. 159 N. Y. 461, 54 N. E. 1; *Cattaraugus Cutlery Co. v. Buffalo, R. & P. R. Co.* 24 App. Div. 267, 48 N. Y. Supp. 451; *Gurney v. Grand Trunk R. Co.* 37 N. Y. S. R. 155, 14 N. Y. Supp. 321, *Affirmed* in 138 N. Y. 638, 34 N. E. 512; *Cahill v. London & N. W. R. Co.* 10 C. B. N. S. 154, 13 C. B. N. S. 818; *Becher v. Great Eastern R. Co.* L. R. 5 Q. B. 241; *Great Northern R. Co. v. Shepherd*, 8 Exch. 30; *Belfast & B. R. Co. v. Keys*, 9 H. L. Cas. 555; *Lee v. Grand Trunk R. Co.* 36 U. C. Q. B. 350; *Macrow v. Great Western R. Co.* L. R. 6 Q. B. 612; *Blumantle v. Fitchburg R. Co.*

NOTE.—As to liability of passenger carrier in transporting merchandise intrusted to it by a passenger, see also *Kansas City, M. & B. R. Co. v. Higdon* (Ala.) 14 L. E. A. 515, and *note*.

127 Mass. 322, 34 Am. Rep. 376; *Alling v. Boston & A. R. Co.* 126 Mass. 121, 30 Am. Rep. 667; 5 Am. & Eng. Enc. Law, 2d ed. p. 534; *Humphreys v. Perry*, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711; *Toledo & O. C. R. Co. v. Dages*, 57 Ohio St. 38, 47 N. E. 1039; *Hutchinson*, Carr. 2d ed. pp. 822, 823; *Thomas*, Neg. p. 333.

Under the contract for passage the defendant is not liable for damage to this trunk.

Gurney v. Grand Trunk R. Co. 37 N. Y. S. R. 155, 14 N. Y. Supp. 321, Affirmed in 138 N. Y. 638, 34 N. E. 512; *Orange County Bank v. Brown*, 9 Wend. 116.

Mr. David Hays, for respondent:

At common law the carrier of goods was responsible for all losses not occasioned by the act of God or of the public enemy.

Story, Bailm. § 491.

The right of a passenger to take with him as baggage such articles as may be reasonably necessary for his convenience on the journey has always been accorded by carriers of persons to attract travelers.

Merrill v. Grinnell, 30 N. Y. 594.

The term "baggage" was limited to such personal effects as were ordinarily taken by travelers for their personal use and convenience. The rule defining the general meaning of the word "baggage" has varied from time to time, according to changes in the customs of carriers and travelers.

Lawson, Bailm. § 273.

During the past quarter of a century a large and lucrative part of the passenger business of railroad companies has consisted in carrying traveling salesmen and their samples.

It has inured greatly to the profit of the railroads to have the system of the sale of goods on the road by commercial travelers substituted in place of the former custom of merchants making their purchases at the manufacturing centers. In order to promote the change it was necessary for the railroad companies to permit the sample trunks of the traveling salesmen to be carried on passenger trains with them.

The fact that merchandise so accepted by the carrier does not come within the definition of personal baggage cannot relieve the carrier from all liability respecting it.

Schouler, Bailm. § 673; 4 *Elliot*, Railroads, § 1649.

The defendant having received the trunk with notice that it contained property other than the personal baggage of the passenger, and having charged extra compensation for its transportation, it is liable for its loss.

Each party having clothed the court with the functions of the jury, the verdict for the plaintiff stands as would the finding of a jury. All the controverted facts and all inferable facts in support of the judgment will be deemed conclusively established in favor of the plaintiff.

Smith v. Weston, 159 N. Y. 194, 54 N. E. 38; *Adams v. Roscoe Lumber Co.* 159 N. Y. 176, 53 N. E. 805.
48 L. R. A.

The judgment is conclusive with respect to the following facts:

1. That the defendant had notice that the trunk contained property other than Taylor's baggage.

2. That the defendant had notice that the trunk and its contents were not Taylor's property.

3. That it was the defendant's custom to check trunks of commercial travelers containing samples of merchandise in the same manner, and for the same compensation, and for transportation on the same trains, as ordinary baggage.

4. That the defendant's servants in its baggage room were authorized to check sample trunks of commercial travelers as baggage.

The plaintiff's right of action does not depend upon proof of all the foregoing facts, but they are all in the case, and strengthen his position.

Sloman v. Great Western R. Co. 67 N. Y. 208; *Talcott v. Wabash R. Co.* 159 N. Y. 461, 54 N. E. 1.

The regulation of the defendant, unknown to the passenger, requiring its baggage agent to exact a release, cannot relieve the defendant from its responsibility.

Talcott v. Wabash R. Co. 159 N. Y. 461, 54 N. E. 1; 4 *Elliot*, Railroads, § 1649; *Hutchinson*, Carr. § 269; *Lawson*, Bailm. § 284.

Even if it had been the custom of the defendant to exact releases, and Taylor knew it, the defendant would, nevertheless, be liable in this case, having waived the condition.

Rathbone v. New York C. & H. R. R. Co. 140 N. Y. 48, 35 N. E. 418; *Lake Shore & M. S. R. Co. v. Foster*, 104 Ind. 293, 54 Am. Rep. 319, 4 N. E. 20.

The defendant is liable on the ground of negligence.

The plaintiff having proved delivery of the property to the defendant in good condition, and the defendant having assumed to carry it, and the owner having demanded it at the place of destination, where the defendant produced it in a ruined condition, the damage is presumed to have been due to defendant's negligence.

Fairfax v. New York C. & H. R. R. Co. 67 N. Y. 11, 73 N. Y. 167, 29 Am. Rep. 119; *Canfield v. Baltimore & O. R. Co.* 93 N. Y. 532, 45 Am. Rep. 268.

The facts set forth in the complaint constitute a cause of action for negligence, as well as for breach of contract.

Catlin v. Adirondack Co. 11 Abb. N. C. 377; *Curtis v. Delaware, L. & W. R. Co.* 74 N. Y. 116, 30 Am. Rep. 271.

The limitation contained in the passenger ticket does not affect the plaintiff's right to recover.

The ticket is a mere token or voucher, and a notice on it does not bind a passenger as by contract.

Perkins v. New York C. R. Co. 24 N. Y. 196, 82 Am. Dec. 281; *Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701.

Assuming the notice on the ticket to have

any force, it might excuse the defendant from its common-law liability as insurer, but it would not excuse it from liability for negligence, as it does not expressly exempt from such liability.

Lynard v. Syracuse, B. & N. Y. R. Co. 71 N. Y. 180, 27 Am. Rep. 28; *Rathbone v. New York C. & H. R. R. Co.* 140 N. Y. 48, 35 N. E. 418.

Bartlett, J., delivered the opinion of the court:

This action is brought to recover the value of a trunk and its contents destroyed while in the possession of the defendant, to which it had been delivered by the plaintiff's assignors for transportation from Rochester to New York on the evening of October 23, 1897. Curtis & Wheeler were manufacturers of shoes in the city of Rochester, and Joseph E. Taylor acted as their traveling salesman on the 23d day of October, 1897, and had been in their employ in that capacity for a period of nine years. On the evening in question, Taylor, acting for his employers, went from Rochester to New York on business. Before starting he arranged with the baggageman of the defendant for the transportation of a trunk and an article called a "telescope." The trunk and its contents, consisting of samples of shoes, belonged to Curtis & Wheeler, except a few articles of wearing apparel, the property of Taylor, for which no claim is made. The telescope contained the wearing apparel of Taylor. For the trunk Taylor received from the baggageman a card known as "Excess Baggage Check," for which he paid 85 cents excess of baggage. For the telescope he received the ordinary metallic check. Taylor described the trunk, when a witness at the trial, as a regular sample trunk, made of wood and covered with canvas, about 32 or 34 inches in height, 36 to 38 inches in length, and 22 to 24 inches in width. The "number taker" of the Rochester baggageroom was sworn, and stated that he took a record of the baggage in and out. He produced a sheet containing a record covering October 23, 1897, which showed the description of plaintiff's baggage as a sample trunk. He further testified that he so designated it from its appearance. Taylor testified that he had been in the habit of leaving Rochester with his samples on an average of four, six, or eight times a year for about twelve years. The night checkman was sworn for defendant, and stated that he did not know what the contents of the trunk were, and that nothing was said to him as to the contents. He was asked on cross-examination if he remembered anything about this particular trunk, or its appearance. He answered, "I couldn't just now; no." It is to be observed that this witness was not asked by defendant's counsel whether he recognized this piece of baggage as a sample trunk from its external appearance. He does not contradict the number taker as to the external appearance of the baggage showing it was a sample trunk. The defendant does not question receiving the trunk, or

the failure to deliver it, but insists it is not liable for its loss, with contents, for the reason that Taylor, when paying for excess of baggage on the trunk, failed to inform the checkman that it contained samples. The learned counsel for the defendant very frankly states in his brief that it is true the trunk was what is commonly known as a "sample trunk," and had the appearance of one, but nevertheless argues that the plaintiff should have been nonsuited.

The liability of common carriers for the loss of sample trunks carried by commercial travelers in the transaction of their business has been frequently considered by the courts of this and other jurisdictions during the last twenty-five years, and, while the decisions are conflicting, many of them are distinguishable in their facts from the case at bar. The law relating to this subject has been in a state of evolution, and certain rules have finally been laid down in this state, calculated to protect the rights of both parties, in view of the fact that a vast amount of the wholesale business of the country is transacted through commercial travelers, to the great profit of the railroad companies and convenience of merchants. As this case is in the position where each party is to be regarded as having requested the direction of a verdict (a point we will discuss later), and the trial judge having directed a verdict for the plaintiff, all the controverted facts, and all inferences in support of the judgment, will be deemed conclusively established in his favor.

The defendant read in evidence certain rules of the company which provide, in brief, that baggage consists only of necessary wearing apparel, limited to 150 pounds in weight; that sample baggage, of not more than 150 pounds, will be checked free for one person, regardless of the number or kind of tickets presented. Rule 4 reads as follows: "Small cases or trunks containing merchandise will be carried as an accommodation to commercial travelers, and may be checked when release of liability, Form 220, is signed in consideration of its transportation on passenger trains as baggage. In case personal baggage and samples are contained in same trunk, a release must be signed for samples, and agents will refuse to check the same unless this is done." The release referred to absolves the company from all liability for loss, detention, or damage to the trunk or its contents. It is urged on behalf of the defendant that rule 4 limited the authority of the baggageman, and that he was unauthorized to check a sample trunk without exacting the release. This court has held that the baggage agent stands in the place of the railroad company. *Talcott v. Wabash R. Co.* 159 N. Y. 471, 54 N. E. 1. And the record in the case before us shows that no release was exacted, nor was plaintiff's agent aware of the rule. The plaintiff's agent testified that he had on a number of occasions signed this release when he desired to stop at several stations between Rochester and New York, as he could settle for excess of bag-

gage through to New York for less than to pay this excess from each station at which he stopped. On cross-examination he was asked:

Q. I ask you if you did not know the fact that when the baggagemaster knew that your trunk contained samples, or any other traveling man's trunk contained samples, that this release of liability was executed?

A. No, sir; I had no knowledge of that. I knew that I had from time to time executed those releases on my sample baggage.

On re-direct examination he was asked:

Q. When you say that you had executed those releases, you refer to the releases which you described before, in order to save paying excess of baggage from each place when you departed?

A. Yes, sir; no release was presented to me, nor did I sign any release, nor was I asked to, when I checked this trunk in controversy.

The defendant's checkman or baggagemaster does not deny this statement.

This case presents the question whether the baggageman of the defendant, who checked the lost trunk and collected excess of baggage thereon, knew that it was a commercial traveler's trunk, from surrounding facts and circumstances, and defendant was thus chargeable with notice. This court has held that notice may be given to the common carrier by other means than the direct statement of the owner that he is a commercial traveler, and that his trunk contains samples. In *Sloman v. Great Western R. Co.* 67 N. Y. 208, plaintiff's son, a lad of eighteen years of age, was employed by him as traveling agent to sell goods by sample. He had two large trunks containing the samples, different from ordinary traveling trunks, and had a valise for his personal baggage. He delivered the trunks to a baggagemaster at a railroad depot, and, when asked to which station he wished them checked, replied that he did not then know, as he had sent a despatch to a customer at a certain place to know if he wanted any goods. If not, he desired them to go to a certain other place, where he expected to meet customers. Soon after he checked his baggage, and paid \$2 for extra weight. Judge Rapallo, in his opinion, said: "It does not appear that it was stated, in terms, to the baggagemaster what the trunks contained, but the jury had the right to consider the surrounding circumstances, the appearance of the passenger and of the articles, the conversation between the passenger and the baggagemaster, and the dealing between them, and, if they indicated that the trunks were not ordinary baggage, or received or treated as such, the jury had the right to draw the inference of notice, and that they were received as freight." In *Talcott v. Wabash R. Co.* 159 N. Y. 461, 54 N. E. 1, it appeared that when weighing the trunks the agent of the com-

pany observed "they weighed light," and the traveler replied, "Yes; they contain samples of underwear." Judge Vann, referring to this incident in the opinion of the court, at page 471, 159 N. Y., and page 4, 54 N. E., said: "The number and appearance of the trunks was some evidence that they contained merchandise, and the agent was expressly told that they contained samples. In view of the custom proved, that commercial travelers generally carry samples belonging to their employers in their trunks, this warranted the inference that the baggage agent knew the exact facts." In the case at bar there were facts warranting the submission of the question to the jury, or the trial judge, as to whether defendant was charged with knowledge of the character of the trunk, through its agent; the external appearance of a regular sample trunk; the readiness with which it was recognized as such by the official "number taker;" the fact that defendant was constantly checking sample trunks on all of its passenger trains except the Empire State Express; the further fact that for about twelve years plaintiff's agent had been traveling on defendant's road with a sample trunk, and leaving Rochester six or eight times a year; the fact that sample trunks were checked for the same compensation as ordinary baggage,—these and any other relevant facts were properly considered when the verdict was directed, and the facts warranted by the evidence stand conclusively established in favor of the plaintiff. While it is doubtless the better practice, as suggested by defendant's counsel, that a traveler in charge of a sample trunk should state to the baggage agent the fact when he seeks to check it, yet, in the haste of transacting such business, or where, by many repetitions of the act, much is taken for granted, this is not done, it would be a harsh and unreasonable rule that precluded the plaintiff from submitting to the jury the facts surrounding the transaction. The recovery in this case was not on the contract of passage entered into when the plaintiff's agent purchased his ticket, but on an independent agreement for the transportation of the sample trunk as freight. In *Sloman v. Great Western R. Co.* 67 N. Y. at page 214, Judge Rapallo said: "From all the circumstances, the jury were, we think, authorized to draw the inference that the baggagemaster understood that the agent was traveling for the purpose of selling goods, and that these trunks contained his wares; that he was not entitled to have them carried as his ordinary baggage, and therefore, the extra charge was made, and they were carried as freight." In *Talcott v. Wabash R. Co.* 159 N. Y., at page 470, 54 N. E. 3, this case was cited and followed. The *Sloman Case* also authorizes a recovery by a plaintiff where this independent contract is made by his salesman as agent. 67 N. Y. 212.

There remains to be considered one other question. The learned appellate division in its opinion stated, in substance, that, as neither counsel raised the point that there were

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questions of fact to be submitted to the jury, the effect was to establish the facts, if there were, in favor of the plaintiff. As correctness of the practice at the trial is engaged, we will consider the question. The conclusion of the evidence the defendant's counsel moved for a nonsuit upon various grounds stated by him, which motion was denied. He then asked the court, "What question will your honor submit to the jury?" To this the court inquired, "What question do you desire to submit to the jury?" To which the defendant's counsel answered, "I do not desire to have any question submitted to the jury." Thereupon the plaintiff's counsel stated that he was willing to leave it to the court, to which the defendant's counsel answered, "I stand on my motion for a nonsuit, of course." The plaintiff's counsel then asked for a direction a verdict, which was objected to by the defendant's counsel, but was granted by the court. A verdict was directed, and an exception taken by the defendant. Neither party asked to have any question of fact submitted to the jury. In the case of *Adams v. Roscoe Lumber Co.* 159 N. Y. 176, 53 N. E. 805, O'Brien, J., in delivering the opinion of the court, says: "The court directed a verdict in favor of the plaintiffs for the value of the lumber, with damages for its detention, and the defendant excepted. The request by both parties for the direction of a verdict amounted to a submission of the whole case to the trial judge, and his decision upon the facts has the same effect as if the jury had found a verdict in the plaintiff's favor after submitting the case to them. Under these circumstances, the judgment is conclusive with respect to the two facts upon which the right of action depended." To the same effect are the cases of *Smith v. Weston*, 150 N. Y. 194, 54 N. E. 38; *Thompson v. Simpson*, 128 N. Y. 270, 283, 28 N. E. 627; *Koehler v. Adler*, 78 N. Y. 287.

It is contended, however, that as the defendant asked for a nonsuit, instead of a directed verdict, the foregoing cases have no application. It must be borne in mind that in this case, after the denial of his motion for a nonsuit, the defendant's counsel asked the court what question his honor would submit to the jury, and that the court then inquired of him what question he wanted submitted, and he answered that he did not desire any question submitted to the jury. In the case of *Barnes v. Perine*, 12 N. Y. 18, after the evidence had closed, the counsel for the defendant moved for a nonsuit. The motion was denied, and the defendant excepted. The court thereupon, at the request of the plaintiff, directed a verdict in his favor. Allen, J., in delivering the opinion of the court, said: "If the defendant supposed that there was a disputed question of fact, material to the issue between the parties, he should have made a distinct request that it should be submitted to the jury. But having treated the questions as purely legal, and acquiesced in the disposal of them by the court as such, he cannot now be heard to ob-

ject that facts were involved which should have been decided by the jury." In *Witz v. Hicks*, 18 N. Y. 558, the motion was for a nonsuit at the conclusion of the defence, which was denied, and a verdict directed in favor of the plaintiff. In that case it was held that the defendant, moving a conclusion of the evidence for a nonsuit which is denied, if he desires that questions of fact be submitted to the jury, must distinctly request it, and cannot upon a make the point under a general exception to the judge's direction of a verdict. In the case of *O'Neill v. James*, 43 N. Y. 84, was a motion for a nonsuit, which was denied and the jury directed to find a verdict in favor of the plaintiff for the amount of damages sustained. It was held that a party, upon the trial, rests his case in certain positions which he calls upon the court to rule in his favor as questions arising upon undisputed facts, if he alleges that any question of fact in the case submitted to the jury, he must make a motion to that effect. In the absence of his mere exception to the ruling of the court, that there is no question for the jury is not availing. See also *Ormes v. Dauchy*, 1 Y. 443, 37 Am. Rep. 583; *Dillon v. Cook*, 90 N. Y. 649. In the case of *Stone v. Felt*, 47 N. Y. 566, the trial court directed the jury to find a verdict for the defendant. The plaintiff, however, had not waived his right to have the questions of fact involved in the case submitted to the jury by any motion. His part for such a direction, and it was that he was entitled to have his exception taken to the direction of a verdict reviewed. Grover, J., in delivering the opinion of the court, refers with approval to *Barnes v. Perine*, *Winchell v. Hicks*, and *O'Neill v. James*, above cited, and distinguishes the case under consideration by him from the rule adopted in those cases. In *Clemens v. Auburn*, 66 N. Y. 334, and in *Pratt v. Irving House Mut. F. Ins. Co.* 130 N. Y. 21, 12 N. E. 117, relied upon as supporting a general rule, there was no waiver by the plaintiff, by motion to direct a verdict or a nonsuit. The cases cited, of *Dwight v. Manhattan L. Ins. Co.* 103 N. Y. 341, 57 Am. 729, 8 N. E. 654; *Bagley v. Boue*, 105 N. Y. 171, 59 Am. Rep. 488, 11 N. E. 386, and *Ger v. Rosa*, 119 N. Y. 459, 24 N. E. 8, have no application to the case at bar. Here the proceedings at the close of the trial were, in legal effect, a request by both parties for a directed verdict.

The judgment and order appealed should be affirmed, with costs.

Haight, Martin, and Vann, JJ., cc

O'Brien, J., dissenting:

This was an action by the assignee of a commercial firm for the loss of a trunk which was carried by the traveling salesman of the firm, and was lost by the defendant. The trunk contained sample merchandise of the character in which the firm dealt, and was put upon one of the defendant's trains in the direction of the salesman, who was a pa-

ger from Rochester to New York, on the 23d day of October, 1897. The salesman purchased a passage ticket on the defendant's road from Rochester to New York, which contained the following limitation: "In consideration of extended time within which journey may be begun, holder hereof releases R. R. 'Co. from all liability as to baggage, except for wearing apparel, not exceeding in value one hundred dollars." The salesman procured the trunk to be delivered at the railroad station, and checked as baggage, paying 85 cents for excessive weight. By the defendant's rules a passenger is entitled to have carried free 150 pounds of personal baggage, and by this rule baggage consists only of wearing apparel and such personal effects as may be necessary for the use and comfort of the passenger while traveling. Baggage in excess of that amount was to be paid for. The rule also provides that sample cases or trunks containing merchandise will be carried as an accommodation to commercial travelers, and may be checked when a release from liability is signed in consideration of its transportation on passenger trains as baggage; and, in case personal baggage and samples of merchandise are contained in the same trunk, a release must be signed for the samples, and agents are directed to refuse to check the same unless this is done. The baggagemen by this rule are directed to refuse to check baggage that does not consist strictly of personal effects unless this release is properly filled out and signed by the owner, or the agent of the owner. The form of this release appears in this case, and by its terms the company is discharged from all liability for baggage, whether the same arises from carelessness or negligence, however gross, on the part of the company, or its agents or servants, or from any cause whatever. It appears that the salesman who had the trunk in question had on previous occasions signed these releases, though he stated that he never read them, but that there was no release signed on the occasion of the delivery of the trunk in question, nor did he make known to any of the servants of the company its contents; and there is no evidence in the case to show that the defendant, or any of its servants, on this or any other occasion knew the fact that the trunk carried by this salesman contained merchandise, except as that fact was to be inferred from its appearance. It appears that the salesman had been in the employ of the firm for about twelve years, and during that time had been a passenger upon the defendant's road, but whether the trunk in question had ever been seen prior to the occasion in question by any of the defendant's agents or servants at Rochester does not appear. The claim for damages for the loss of the trunk was assigned by the firm to the plaintiff. These are the undisputed facts that appear in the record, and the question is whether the plaintiff was entitled to recover.

At the close of the proofs the defendant's counsel made a motion for a nonsuit on the 48 L. R. A.

ground, among others, that there was no evidence that the defendant had any knowledge that the trunk contained merchandise, and that there was no proof of a contract to carry a trunk containing merchandise on a passenger train, and that, inasmuch as the trunk did not contain baggage, there could be no recovery. The motion was denied, and the defendant excepted. The defendant's counsel then asked the court what question he proposed to submit to the jury. The court then asked the defendant's counsel what question he desired to submit to the jury, and the counsel replied that he did not desire to have any question submitted. The plaintiff's counsel then stated that he proposed to leave the case to the court, if the defendant's counsel was willing. The defendant's counsel did not accept this offer, but stated explicitly that he proposed to stand on his motion for a nonsuit. The plaintiff's counsel then asked the court to direct a verdict in his favor for the value of the trunk and contents, being \$542.10, and \$35 interest. The defendant's counsel objected to the direction of a verdict for the plaintiff, and made a special objection to the allowance of interest, but these objections were overruled. The court then directed a verdict in favor of the plaintiff for \$577.10, and to this direction the defendant's counsel excepted. The questions of law presented by the record are therefore before this court for review.

The plaintiff cannot recover in this case unless he established a contract, express or implied, on the part of the defendant to carry merchandise for the salesman on a passenger train. It is not, and cannot be, claimed that there was any express contract creating the relations of a common carrier of goods between the salesman and the defendant. The only express contract made is represented by the passenger ticket sold to the salesman, and that was a contract to carry him as a passenger, with his personal baggage. But it turned out that what he had in the trunk was goods, and not baggage, which, under the defendant's rules, it did not carry on passenger trains, except in cases where the owner or passenger signed a release for any claim for damages in case of loss from any cause whatever. So that the salesman caused the trunk in question to be placed on a passenger train without any express contract on the part of the defendant to carry or be responsible for it. Moreover, the defendant contends that the salesman caused the trunk to be placed upon the defendant's passenger train, against its rules, as baggage, when in fact it was not baggage, but goods. There is but one ground upon which the defendant can lawfully be required to respond for the loss of the trunk and its contents, and that is in case it received and checked the same upon the train with knowledge of the fact that it contained goods instead of baggage. When a passenger who desires to have goods carried with him on a passenger train gives notice of that fact to the carrier, and the latter has notice of the fact in any way, and

then receives and checks the trunk containing the goods, the relation of carrier and shipper is created by the transaction, with all its duties and responsibilities. *Sloman v. Great Western R. Co.* 67 N. Y. 208; *Stonemas v. Erie R. Co.* 52 N. Y. 429. But, in the absence of proof showing or tending to show knowledge of the contents of the trunk or package by the carrier in such cases, there can be no recovery, and such knowledge cannot be inferred from the appearance of the trunk or package containing the goods. *Humphreys v. Perry*, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711; *Gurney v. Grand Trunk R. Co.* 37 N. Y. S. R. 155, 14 N. Y. Supp. 321. Affirmed on opinion below in 138 N. Y. 638, 34 N. E. 512; *Cahill v. London & N. W. R. Co.* 10 C. B. N. S. 154. Affirmed in 13 C. B. N. S. 818; *Blumantel v. Fitchburg R. Co.* 127 Mass. 322, 34 Am. Rep. 376; *Alling v. Boston & A. R. Co.* 126 Mass. 121. 30 Am. Rep. 667.

The case, therefore, is solved by a very simple inquiry, and that is whether there is in the record anything showing or tending to show that the defendant had knowledge of the contents of the trunk in question when it received and checked it upon the train on the 23d of October, 1897, other than the appearance of the same, which, it is held, is no evidence of knowledge at all. I confess I am unable to find any. It is said that the salesman was traveling as such for twelve years, but it does not appear that at any time he notified the defendant of the contents of the trunk, or that the defendant at any time acquired the knowledge in any other way, so that the case stands upon the transaction when the trunk was shipped for the last time. A fact or circumstance that in itself proves nothing is not made any stronger when multiplied by twelve or any larger number. In my opinion, there was no proof in the case to warrant a finding that the defendant had notice or any knowledge of the fact that the trunk in question contained goods instead of baggage. But the learned trial judge evidently thought otherwise, and it distinctly appears from the opinion of the learned court below that reviewed the case on appeal that it held that whether the defendant had or had not such notice or knowledge was a disputed question of fact. Grant, for the sake of the argument, that this view is correct, still the disputed fact was not found by the jury, and the action was one at law, triable by jury. Either party had the constitutional right to have the facts determined by the jury. The learned court below held that the disputed fact necessary to support the plaintiff's case was found by the court without the aid of the jury, and that it had the right to take the question from the jury and decide it itself. This is an obvious error, since the doctrine upon which it is based would go far to destroy the right of trial by jury altogether. If sustained by this court, all that will be necessary hereafter, when the plaintiff in an action at law has given proof of some fact or circumstance which no one claims is conclusive in support

of an issue of fact, is to request the trial judge to direct a verdict in his favor; and, if such a direction is given against the defendant's objection and exception, still the disputed and necessary fact is to be deemed found by the court. The defendant could not be deprived of the right of a jury trial without its consent. It gave no such consent, nor did its counsel in any way waive the right. He moved for a nonsuit, and excepted to the denial of his motion. He told the court that he had no question to submit to the jury, and obviously he had none, from his view of the case, since he had just contended in his motion for a nonsuit that there was no case for the jury, as there was no proof that the defendant had knowledge of the contents of the trunk. He told the court that he stood upon his motion for a nonsuit, and objected and excepted to the direction. How, under such circumstances, he consented to have the facts found by the court, or waived his rights to have them found by the jury, it is impossible to conceive. The defendant's counsel did not need any finding, and did not want any finding. All he asked was that his client should be left alone. When his motion for a nonsuit was denied, and he concluded to stand upon that, he had no interest in anything else that took place. But it was quite different with the plaintiff. Before he could have judgment in his favor, it was necessary that the important fact in dispute should be found in his favor, and it was his business to procure the finding in the proper way. The defendant's counsel could remain silent, and let the plaintiff try his side of the case. The plaintiff's counsel should then have gone to the jury, and asked them to find the disputed fact, which was an essential part of his case, and which the other side was not interested in at all. When he asked and accepted the direction of a verdict in his favor by the court, he asked and accepted what he was not entitled to. The learned counsel for the plaintiff cites two cases to show that this practice is correct. *Smith v. Weston*, 159 N. Y. 104, 54 N. E. 38; *Adams v. Roscoe Lumber Co.* 159 N. Y. 178, 53 N. E. 805. They have no application to the question here, since it appears that they are cases where both sides asked the court to direct a verdict. All the parties may by such a request clothe the court with power to decide all the questions in the case, but it has never been held that one party could do it against the protest of the other. It is safe to say that no authority can be found to justify the practice followed in this case, and it has been often condemned in this court. The rule that governs the question has been thus stated in this court more than once: "In a case triable by a jury, the direction of a verdict is only justified where the evidence conclusively establishes the right of the party in whose favor it is made." *Bulger v. Rosa*, 119 N. Y. 459, 24 N. E. 853; *Bagley v. Bowe*, 105 N. Y. 171, 59 Am. Rep. 488, 11 N. E. 836; *Dwight v. Germania L. Ins. Co.* 103 N. Y. 341, 57 Am. Rep. 729, 8 N. E. 654. It is not necessary for the party

against whom a verdict is directed upon evidence not conclusive to show that he requested to have the case sent to the jury. *Stone v. Flower*, 47 N. Y. 566; *Clemence v. Auburn*, 66 N. Y. 334; *Pratt v. Dwelling House Mut. F. Ins. Co.* 130 N. Y. 212, 29 N. E. 117. It would indeed be a rule of practice bordering on the absurd that would require a defendant in a case where a fact is in dispute, in order to preserve his right to have the fact found by the jury, to assert by such a request that there is evidence tending to prove the plaintiff's case, when, upon a motion for a nonsuit just denied, he contended that there was no evidence whatever. He may preserve his rights by an exception to the direction of a verdict, and without taking two positions before the court so manifestly inconsistent. It is only necessary to add that, if there is in this record any evidence at all of knowledge by the defendant of the contents of the trunk, no one ventures to assert that it was conclusive. The judgment should be reversed, and a new trial granted; costs to abide the event.

Parker, Ch. J., concurs.

Landon, J., dissents upon the ground that defendant having, notwithstanding the denial of its motion for a nonsuit, objected to a direction of a verdict, the court should have submitted the facts to the jury.

Miles M. O'BRIEN *et al.*, Receivers of Madison Square Bank, *Repts.*,

v.

EAST RIVER BRIDGE COMPANY, *Appt.*

(161 N. Y. 539.)

1. A statement in an order of the appellate division, that it reverses the judgment of the trial court "upon the law and the facts," will not prevent a review by the court of appeals if the only question is whether the transaction as disclosed by the facts was forbidden by a statute.
2. A withdrawal of the funds of a corporation from a bank that is about to fail, upon a check signed by the president of the corporation, although he was also a director of the bank and his knowledge of its condition was acquired by him as such director, does not violate the stock corporation law, § 48, which prohibits any transfer of assets or payment by the bank or any officer, director, or stockholder thereof, with intent to prefer any creditor, when the bank is insolvent or its insolvency imminent.
3. A communication by a director of a bank of his knowledge that it is about to fail, though made to a depositor which is a corporation of which he is president, does not violate the stock corporation

NOTE.—For exceptions to the prohibition of preferences by insolvent national bank, see *Elmira Sav. Bank v. Davis* (N. Y.) 25 L. R. A. 546.

For unlawful preference by insolvent banks, see also *Yardley v. Philler* (C. C. A. 3d C.) 23 L. R. A. 824, Reversed in 42 L. ed. U. S. 192; and *O'Brien v. Grant* (N. Y.) 28 L. R. A. 361, 48 L. R. A.

law, § 48, which prohibits a bank which is insolvent, or the insolvency of which is imminent, or any officer or director thereof, from giving a preference to any particular creditor by transfer of assets, payment, suffering judgment, the creation of a lien, or the giving of security.

(*Bartlett, Haight, and Vann, JJ., dissent.*)

(February 6, 1900.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, reversing a judgment entered in the office of the clerk of New York County upon the report of the referee in its favor in an action brought to compel repayment of money withdrawn from a bank upon the eve of its insolvency. *Reversed.*

The facts are stated in the opinion.

Messrs. Edward Lanterbach and Eugene Treadwell, for appellant:

There was no transfer by anyone prohibited by the statute.

The act forbidden must be by an officer, director, or stockholder acting in the interest of, on the part of, or for, the insolvent corporation, and no disability is imposed upon action in any other capacity by the coincidence of holding one of such positions.

The statute only restricted Mr. Uhlman's action as director for the bank, and did not impose any disability upon his performance of his duty as president of the bridge company.

Varnum v. Hart, 119 N. Y. 101, 23 N. E. 183; *French v. Andrews*, 145 N. Y. 444, 40 N. E. 214; *Milbank v. De Riesthal*, 82 Hun, 537, 31 N. Y. Supp. 522; *Cummings v. American Gear & Spring Co.* 87 Hun, 598, 34 N. Y. Supp. 541; *Ridgway v. Symons*, 4 App. Div. 98, 38 N. Y. Supp. 895; *Spellman v. Looschen*, 31 App. Div. 96, 52 N. Y. Supp. 543; *Dickson v. Mayer*, 26 Abb. N. C. 257, 12 N. Y. Supp. 651; *Dickson v. Mayer*, 58 Hun, 609, 12 N. Y. Supp. 359.

The check was drawn by the defendant corporation for its own benefit.

Under such circumstances it is immaterial that the president of the defendant corporation was a director in the Madison Square Bank.

Kingsley v. First Nat. Bank, 31 Hun, 329.

A director is not prohibited from transferring his own claim, even where it results in the transferee collecting from the insolvent company.

Jefferson County Nat. Bank v. Townley, 159 N. Y. 490, 54 N. E. 74.

In the absence of clear provision, the prohibition will not be extended by construction so as to affect or disable the creditor.

Tompkins v. Hunter, 149 N. Y. 117, 43 N. E. 532; *Blakey v. Booneville Nat. Bank*, 95 Fed. Rep. 267.

The defendant was not restricted by knowledge of the insolvency of the Madison Square Bank.

Uhlman was responsible to the defendant company for the same degree of care and

prudence that men prompted by self-interest ordinarily exercise in their own affairs.

Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546.

If Uhlman had had a personal-deposit account with the bank, he could have transferred it for value to an assignee who might have collected the same exactly as the East River Bridge Company's check was collected.

Jefferson County Nat. Bank v. Townley, 159 N. Y. 490, 54 N. E. 74.

No payment with intent to prefer was shown.

Dutcher v. Importers & T. Nat. Bank, 59 N. Y. 5; *Paulding v. Chrome Steel Co.* 94 N. Y. 334.

Constructive payment, or payment by ratification, though sufficient to support an ordinary action on contract, is not the payment prohibited by the statute.

The officers of the corporation are not bound to oppose affirmative action to a just claim.

Farnum v. Hart, 119 N. Y. 101, 23 N. E. 183; *French v. Andrews*, 145 N. Y. 444, 40 N. E. 214; *Milbank v. De Riesthal*, 82 Hun, 537, 31 N. Y. Supp. 522; *Cummings v. American Gear & Spring Co.* 87 Hun, 598, 34 N. Y. Supp. 541; *Ridgway v. Symons*, 4 App. Div. 98, 38 N. Y. Supp. 895; *Spellman v. Looschen*, 31 App. Div. 96, 52 N. Y. Supp. 543.

Messrs. Samuel Untermyer and Louis Marshall, for respondents:

The payment to the East River Bridge Company of the proceeds of the \$50,000 check drawn by Uhlman,—a director of the Madison Square Bank, at a time when he knew that the bank was insolvent, was under the conceded facts a violation of § 48 of the stock corporation law.

Effect must be given to every part and phrase of a statute; the legislature is not to be deemed to have spoken in vain, and its language is not to be arbitrarily declared to be meaningless and unnecessary.

Ex parte New York & B. Bridge Co. 72 N. Y. 527; *People ex rel. Frelich v. Matsell*, 94 N. Y. 170.

Remedial acts are to be liberally interpreted, and not strictly.

Hudler v. Golden, 36 N. Y. 446; *Sharp v. New York*, 31 Barb. 572.

Where there is a concurrence of these elements (a) any form of transfer of corporate property, (b) by any agency, (c) corporate insolvency or its imminence, (d) the intent of giving a preference,—the courts will intervene to set aside the transfer.

Whatever knowledge Uhlman acquired on the evening of August 8 as a director of the Madison Square Bank, relative to its condition, he also had on that evening as the representative of the East River Bridge Company. The knowledge which he possessed came to him while engaged in the very transaction which resulted in the preference to the corporation of which he was the president.

Holden v. New York & E. Bank, 72 N. Y. 286; *Craigie v. Hadley*, 99 N. Y. 131, 1 N. E. 537; *Bank of United States v. Davis*, 2 Hill, 451.

48 L. R. A.

O'Brien, J., delivered the opinion of the court:

The plaintiffs, as receivers of the Madison Square Bank, brought this action to compel the defendant to account and pay over to them \$50,000 which the defendant had deposited in the bank, but drew out by check on the day the bank closed. The cause was tried before a referee, who dismissed the complaint, but this judgment has been reversed by the appellate division. The facts upon which the judgment depends are undisputed. They are fully stated in the learned opinion below, and that statement can be very safely adopted as it there appears: "On the 8th of August, 1893, the defendant was a depositor in the Madison Square Bank, and it had standing to its credit on the books of the bank on that day the sum of \$50,000. As to that amount, the ordinary relation of debtor and creditor, and no other, existed between the bank and the depositor. On the night of the 8th of August, 1893, it became known to Frederick Uhlman, a director of the Madison Square Bank, and also the president of the East River Bridge Company, that the bank was insolvent, or in imminent danger of insolvency, and that it would be closed the following day. Frederick Uhlman also knew that the St. Nicholas Bank was the agent at the clearing house of the Madison Square Bank, and that on the 8th of August, 1893, the St. Nicholas Bank had in its possession a large amount of securities belonging to the Madison Square Bank, and that it held such securities as collateral for any and all obligations as agent of the Madison Square Bank. He also knew that the St. Nicholas Bank had notified the clearing house that it would cease to act for the Madison Square Bank, and that the St. Nicholas Bank, by the rules and regulations of the clearing house, was responsible for all checks of the Madison Square Bank that would be presented at the clearing house in the exchanges on the morning of the 9th of August. All this knowledge was acquired by Frederick Uhlman as a director of the Madison Square Bank. On the night of August 8, Simon Uhlman, who was largely interested in the stock of the East River Bridge Company, learned of the imminence of insolvency of the Madison Square Bank, and that it would probably be closed the following morning. Thereupon he caused a check to be filled up, drawn upon the Madison Square Bank, for \$50,000, and took it to the treasurer of the defendant at Brooklyn, where it was signed by such treasurer at about eleven o'clock at night. That being done, Simon Uhlman returned to New York city with the check, and handed it to Frederick Uhlman, who also signed it, as president of the East River Bridge Company, and retained it in his possession over night. Early on the morning of the 9th of August, Frederick Uhlman took the check to the Hanover National Bank, and instructed the authorities of that bank to have it presented at the clearing house that morning, so that it might be paid by the St. Nicholas Bank in the exchanges of that morning, and thus be credited to the East River Bridge Company,

and a withdrawal effected of so much from the funds and moneys or securities of the Madison Square Bank under the control of the St. Nicholas Bank. The check was presented at, and passed through, the clearing house. The East River Bridge Company received a credit with the Hanover Bank, and thus the transfer of the \$50,000 was completely made from the Madison Square Bank to the defendant. The Madison Square Bank was closed on the morning of the 9th of August, or, more properly speaking, was never opened for business after the 8th, and went into insolvency."

There is no dispute about these facts, nor are they open to different inferences. The only question is with respect to the law, or, in other words, whether the transaction was forbidden by the statute. Hence the judgment is reviewable in this court, notwithstanding the statement in the order that the reversal was upon the law and the facts.

The only authority claimed in behalf of the plaintiffs to sustain the judgment is § 48 of the stock corporation law, which reads as follows: "No corporation which shall have refused to pay any of its notes or other obligations when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors, or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. No conveyance, assignment, or transfer of any property of any such corporation by it or by any officer, director, or stockholder thereof, nor any payment made, judgment suffered, lien created, or security given by it or by any officer, director, or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid. Every person receiving by means of any such prohibited act or deed any property of the corporation shall be bound to account therefor to its creditors or stockholders or other trustees. No stockholder of any such corporation shall make any transfer or assignment of his stock therein to any person in contemplation of its insolvency. Every transfer or assignment or other act done in violation of the foregoing provisions of this section shall be void." It will be seen that the money drawn from the failing bank belonged to the defendant, and the check drawn against the deposit was the check of the defendant. The defendant's president, being also a director in the failing bank, owed certain duties to the defendant and its shareholders and creditors, as well as to the bank, its shareholders and creditors. It is obvious that the judgment of reversal cannot be sustained without holding that the two following propositions are law: (1) That the statute quoted forbids a director in a bank, who has knowledge of its insolvency, from communicating this knowledge to a depositor, even though the depositor happens to be a corporation in which the director is interested, and of which he is president; (2) that

the statute forbids a corporation having money on deposit in a bank about to fail from drawing its check against the deposits, on learning that the bank was about to fail, from a director of the bank, who was also president of the corporation and communicated the knowledge to the latter with the intent that it should draw out the money. The language of the statute does not support either of these propositions, and it would be judicial legislation, simply, to hold that they are within the intention and purpose of the law. We must not only produce by judicial construction a new law, but a law which could not have been within the intention of the legislature. The statute is in derogation of the common law, and should not be construed so as to include cases not fairly within its terms. We do not mean to say that it is one of those statutes that must receive a very strict construction, but, when given a fair construction, the plaintiffs can claim nothing more. No one can safely assert that there is any law that requires a director of an insolvent bank, or a bank about to become insolvent, to conceal the fact from anyone. No one can claim that there is any law that forbids a director of such a bank from disclosing the fact to a depositor, even though the depositor should be a corporation in which the bank director is interested, and of which he is president. So long as he confines himself to the truth with respect to the condition of the bank, he violates no law, and is guilty of no moral wrong. Indeed, it is not very difficult to conceive of cases where, in the forum of morals, at least, he would be bound to speak. A bank director, with such knowledge, who would look on and see his neighbors depositing their money where it would be likely to be lost, without giving to them any hint or warning of the danger, might very well be rated as a man whose moral standing was not very high. We may go further, and look at the actual transaction in this case. The defendant's president was a director of the bank. The defendant was dealing with the bank, making deposits of money in large sums, and had then to its credit the entire sum which the plaintiffs seek to recover. Assume that the director of the bank and president of the defendant advised the board of directors of the latter to make no more deposits, as the bank was about to fail; he would not violate any law, but, on the contrary, would be performing a duty which he owed to the defendant, to save it from loss. Such a suggestion would, no doubt, result in a withdrawal of the moneys already deposited, which is all that the plaintiffs complain of; but it would be difficult, if not impossible, to show that under such circumstances any law was violated, or any wrong done. In the present case we must assume that the defendant's president not only advised the withdrawal of the deposit, but signed the check for that purpose, and had it deposited to the defendant's credit in another bank, for the very purpose of having it paid by the bank that was the clearing-house agent of the bank on which it was drawn,

and in which he was a director, knowing all the time that it was about to fail. What the statute forbids is that the director shall not, under such circumstances, draw out his own money. The case has been decided in the court below precisely as if such was the fact. Suppose the director of the bank, knowing all about its condition, concealed it from his associate officers and directors in the defendant, and by this course the \$50,000 was lost; it might then be difficult to show that the president of the defendant had discharged the duty imposed upon him by his trust to its creditors or shareholders. If the law had not placed some injunction of secrecy upon him with respect to the real condition of the bank, it is very difficult to see how he could be guilty of any legal or moral wrong in participating with the other officers and directors of the defendant in saving it from a great pecuniary loss.

There is no law that forbids a depositor in a bank, who is not an officer or director, from drawing a check against the deposit whenever the money is needed, or even when it is thought the bank is liable to fail. The act by means of which the money was withdrawn in this case was the corporate act of the defendant, and not the individual act of the president. The money on deposit belonged to the defendant, and it was subject to check. The circumstance that the defendant in its corporate capacity was induced to exercise its right by information of the condition of the bank communicated by the president, who was also a director of the bank, cannot change the case, so long as the right to withdraw the money existed. The defendant cannot be compelled to restore the money simply because it made use of knowledge possessed by one of its own officers. In the care and management of its finances, a corporation is entitled to the benefit of all the knowledge upon that subject that any of its officers may possess, and to their best judgment. The act by which the deposit was transferred from the failing bank to the defendant was not in any proper sense the act of the bank or any of its officers or directors. It was not a transfer prohibited by any law. It is true that one of the bank directors participated in it, but not as such director or as an individual, but as an officer of the defendant, acting in its interest. Whatever he did to withdraw the moneys is to be imputed to the defendant, and, of course, is imputed to it by the judgment below. But the question is, Did the defendant, in drawing its check against the deposit, violate any law or perpetrate any wrong? If it did not, then the participation of one of the bank directors in the transaction cannot change the situation. It would, I think, be an unwarranted construction of the statute to hold that a depositor in a bank, who has withdrawn the deposit on learning that the bank was about to close, is liable to be sued for the money, whenever it can be shown that he acted upon information given to him by a director of the bank; and yet the judgment now under review cannot very well be

sustained without such a construction, or that in substance.

The learned court below has, I think, recast the statute, and applied it to a state of facts not fairly within it, and to which it was never applied before. The language of the statute is not very concise or clear, and the phraseology is somewhat involved. When carefully read, however, the things that are prohibited may be stated in very few words: (1) It prohibits officers and directors of an insolvent corporation, or of one about to become insolvent, from using their knowledge of its condition, and their dominant position, for their individual benefit, in collecting their own claims, either through a voluntary payment, or through collusive and preferential liens, to the prejudice of other creditors not so favorably situated; (2) it prohibits a preferential general assignment by a corporation, though it does not forbid assignments without preferences; (3) it prohibits a transfer of any of the corporate assets to an officer, director, or stockholder upon any other consideration than the payment of the full value of the property in cash. When we attempt to carry the statute beyond these restrictions, we must rely largely upon speculation with respect to some intent on the part of the lawmakers which is not expressed. It is quite clear, I think, that the statute does not forbid any act disclosed by the facts of this case. The trend of recent decisions of this court has not been in the direction of extending this statute to cases that do not come fairly within its terms. It will be quite sufficient now to refer to two of them. In *Jefferson County Nat. Bank v. Townley*, 159 N. Y. 490, 54 N. E. 74, we held that an officer or director of an insolvent corporation, while forbidden by the statute from enforcing his claim, as it was in that case, could assign it, and the assignee could enforce it in the same way as any other creditor, and the fact that the assignee was the wife of the officer did not change the case, so long as the assignment was in good faith, and not merely colorable. Much of the reasoning in that case applies to this. In *French v. Andrews*, 145 N. Y. 441, 40 N. E. 214, a creditor of an insolvent corporation had a large note, not due, and was permitted by the officers of the company to surrender it and take in its place eleven small ones, payable on demand, for the purpose of enabling him to bring suit upon them in a local court. The suits were brought, and judgments recovered by default, and the receiver brought suit to set aside the lien; but this court held that there was no violation of the statute. The defendant in this case was neither an officer, director, nor stockholder of the bank. It was a depositor, merely, and did nothing except withdraw the deposit in order to save itself from loss. The fact that it was moved to do this by a director of the bank, who happened to be its own president, does not bring the case within the statute. The statute, in terms, seems to apply only to corporations "which shall have refused to pay any of its notes or other obligations when

due, in lawful money of the United States." It is not claimed that prior to the presentation of the check for the \$50,000 at another bank, and its payment, the bank which the plaintiffs represent had refused to pay any of its notes or obligations. There is much difficulty, without such a finding, in applying this statute even to a case where the payment was made to an officer or director, but we prefer to rest our decision upon the larger question already discussed. Neither the bank nor any of its officers or directors made any transfer of the assets to the defendant with a view to give a preference, or in violation of the statute.

The judgment appealed from should be reversed, and that entered on the report of the referee affirmed, with costs.

Parker, Ch. J., and Gray and Martin, JJ., concur.

Bartlett, Haight, and Vann, JJ., dissent.

Re Final Judicial Settlement of Annual Accounts of Samuel N. HOYT *et al.*, *Respts.*, As Trustees for Mary Irene HOYT, *Appt.*, Under the Will of Jesse Hoyt, Deceased.

(100 N. Y. 607.)

1. A premium on bonds paid on investing trust funds the income of which, under a will, is to be paid to testator's daughter for life, with remainder to certain nephews and nieces, cannot be charged to the daughter and the amount thereof deducted from her income, so as to restore the principal of the trust fund in order that it may be turned over unimpaired at the termination of the life estate, where testator has expressly declared his intention to provide for his daughter in the "most bounteous and liberal manner as to expenditure," and obviously intended to devote to her use the entire income of the fund, making the disposition of the principal after her death a secondary consideration.
2. Failure of a life tenant to challenge a deduction of interest, on an annual accounting by a trustee, from her income, does not prevent her from raising the question thereafter as to the distribution of moneys then in the hands of the trustee.

(Parker, Ch. J., and Gray and Haight, JJ., dissent.)

(November 21, 1899.)

A PPEAL by Mary Irene Hoyt from an order of the Appellate Division of the Supreme Court, First Department, reversing a decree of the New York County Surrogate's Court settling the accounts of the trustees under the will of her deceased father and refusing to permit them to create a sinking fund out of income to provide for the wear-

ing away of the principal by the approach of investment bonds towards maturity. *Reversed.*

Statement by Bartlett, J.:

Appeal from an order of the appellate division of the supreme court in the first judicial department, entered April 23, 1899, reversing a decree of the surrogate's court of the county of New York, finally judicially settling and allowing the annual accounts of the trustees for Mary Irene Hoyt, under the last will and testament of her father, Jesse Hoyt, deceased. The accounts involved cover the period from the 14th day of August, 1894, to 14th day of August, 1895.

On the 14th day of August, 1882, Jesse Hoyt, a resident of the city of New York, died possessed of a large estate. He left a last will and testament, dated the 26th day of June, 1882, the fourth and eleventh subdivisions of which are particularly involved in this controversy. "Fourth. It is my will, and I hereby direct, that the sum of one million two hundred and fifty thousand dollars shall be appropriated and received from my estate, real and personal, wheresoever situated, or from the proceeds thereof, by such of my executors hereinafter named as reside or do business in the state of New York, or to whom letters testamentary on this, my will, shall be granted by any surrogate in said state of New York, and as soon as it can or shall be realized or received by such executors and held in trust by them, and the survivors and survivor of them, and their successor or successors to the trust, to and for the use and benefit of my daughter, Mary Irene Hoyt, for and during her natural life; and in the meantime, during such her life, to invest and reinvest, and keep the same invested, and to collect and receive the interest, dividends, and income therefrom, and from each and every part thereof, and to apply to her use, for and during her natural life, in the most bounteous and liberal manner, as to expenditure, and so as to promote her convenience and comfort, and gratify her reasonable desires, the said interest, dividends, and income so to be collected and received, as the same shall be required for her use and benefit. And it is my further will that the said sum of money hereinabove in this article directed to be appropriated and held in trust for and during the natural life of my daughter, Mary Irene, and for her use, as above herein provided, as to the interest, dividends, and income therefrom, or the securities in which the same shall be invested, and any surplus of income therefrom, if any, which shall not have been applied to her use during her natural life, shall, on the death of my said daughter, go and be distributed to and among my nephews and nieces, children of my brothers Alfred M. Hoyt, Reuben Hoyt, and James H. Hoyt, who shall be living at the time of the decease of my said daughter, in equal portions, if all of them shall be living, or if any of them shall have died without leaving issue living at the time of the decease of my said daughter. If any of my said nephews or nieces shall have died, at or before the decease of my said

NOTE.—As to charging premiums paid for bonds to life tenant, see also *Hite v. Hite* (Ky.) 19 L. R. A. 173.

As to decrease in value of bonds by wearing away of premium, see *McLouth v. Hunt* (N. Y.) 39 L. R. A. 230.

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daughter, leaving a child or children living at the time of the decease of my said daughter, then the division is to be made in equal portions between those who shall be living and the child or children of any such deceased nephew or niece, such child or children taking the portion of its or their deceased parent, and in equal portions thereof, if more than one." "Eleventh. I hereby order or direct my said executors hereinabove appointed, and the survivors and survivor of them, to distribute or retain, without a sale, all such stocks or securities as I may have at the time of my decease, which my said executors shall think it expedient to hold, with a view to and in expectation of appreciation, and to distribute or retain any stocks or securities which I may hold at the time of my decease as an investment, which my executors may think it best to retain as a permanent investment, the choicest, and those having longest to run, to be set apart for my wife's use, as hereinabove directed. But my said executors are not to make any new or other investments, excepting only in the first-mortgage bonds and mortgages on unencumbered real estate held in fee simple, or in the public stocks or bonds of the United States, or state stocks or bonds, first-mortgage railroad bonds, and city bonds, in either of which they may make investments in their discretion, having regard to the best interest of my estate. And I hereby vest all the rights and title, power, authority, control, or direction and discretion conferred upon any of my said executors and trustees in the survivors and survivor of them, and in any administrators and administrator with the will annexed, to whom letters may be granted, or to any trustee or trustees who may be appointed by the competent court on the death of my said executors hereinabove named, and the survivors and survivor of them, or on any other contingency by which my said executors, and the survivors and survivor of them, shall become incapable of acting or cease to act."

The other facts in the case appear in the opinion.

Messrs. William D. Guthrie and William F. Moore, for appellant:

McLouth v. Hunt, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548, must be deemed controlling unless distinguished on some really substantial ground.

In cases of doubt or ambiguity the law presumes in favor of a child, as against the claims of collateral relatives.

As between life tenant and remainderman, any increase in value is wholly for the benefit of the remainderman, and any shrinkage or depreciation must, in turn, be borne by him, and not made good at the expense of the life tenant.

Re Gerry, 103 N. Y. 445, 9 N. E. 235.

When providing for his only daughter, testator intended that the means bequeathed for her support should not be diminished in order to provide a sinking fund for the benefit of the remaindermen.

Johnson v. Brasington, 156 N. Y. 181, 50 N. E. 859.
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People ex rel. Cornell University v. Davenport, 117 N. Y. 549, 23 N. E. 664, is an authority on construction directly in point.

The court decided that under the language used the whole of the interest received should be paid by the comptroller, and no part of it should be set apart for the purpose of making good the charge of the comptroller against the income of the fund.

Re New York Life Ins. & T. Co. 24 Misc. 71, 53 N. Y. Supp. 320.

The weight of decisions in the inferior tribunals is clearly in favor of the life tenant.

Bergen v. Valentine, 63 How. Pr. 221; *Whittemore v. Beekman*, 2 Dem. 275; *Re Pollock*, 3 Redf. 100; *Re Hutchinson*, N. Y. L. J. Feb. 29, 1892; *New York Life Ins. & T. Co. v. Kane*, 17 App. Div. 542, 45 N. Y. Supp. 543; *Re New York Life Ins. & T. Co.* 24 Misc. 71, 53 N. Y. Supp. 382.

Outside of New York the weight of authority is equally in favor of the life tenant.

Hemenway v. Hemenway, 134 Mass. 446; *New England Trust Co. v. Eaton*, 140 Mass. 532, 4 N. E. 69; *Shaw v. Cordis*, 143 Mass. 443, 9 N. E. 794; *Furness's Estate*, 12 Phila. 130; *Hite v. Hite*, 93 Ky. 257, 19 L. R. A. 173, 20 S. W. 778.

Mr. William H. Rand, Jr., with **Messrs. Alexander T. Mason and Henry R. Hoyt**, for respondents:

The actual income derived from a fund invested in securities purchased at a premium is what the fund earns, remaining itself intact, and not the entire interest received annually from the securities.

So much only of the moneys received annually on bonds purchased at a premium must be treated as income, as, according to computations, the investment is found to produce; the residue belongs to the principal.

Farwell v. Tweddle, 10 Abb. N. C. 94; *People ex rel. Cornell University v. Davenport*, 30 Hun. 177; *New York Life Ins. & T. Co. v. Kane*, 17 App. Div. 542, 45 N. Y. Supp. 543; *Wright v. White*, 136 Mass. 470.

It was the intention of Jesse Hoyt to bequeath over to his nephews and nieces, upon the death of Mary Irene Hoyt, the specific sum of \$1,250,000, or its equivalent in securities, and to give his daughter during her life no more than the net income actually earned by that sum.

The usual purpose of a testator in providing for a beneficial interest in a trust estate is that the net income only shall be applicable, and that the corpus or capital of the trust estate shall remain intact until the trust shall have determined.

Re Albertson, 113 N. Y. 434, 21 N. E. 117; *Reynal v. Thebaud*, 54 N. Y. S. R. 144, 23 N. Y. Supp. 615; *New York Life Ins. & T. Co. v. Kane*, 17 App. Div. 542, 45 N. Y. Supp. 543.

The trustees were authorized to establish and maintain the sinking fund, and to make the reservations of interest.

It is the duty of the trustees to keep the corpus of the trust fund intact as far as possible, and for this purpose they have the right to establish and maintain a sinking

fund from that portion of the moneys received by them annually on securities purchased at a premium, which is not annual income earned by the investment, to make good the premiums paid for such securities, and to cover the deficiency in the principal of the trust fund, which will necessarily occur when the securities are paid off at their maturity.

Farwell v. Tweddle, 10 Abb. N. C. 94; *Reynal v. Thebaud*, 54 N. Y. S. R. 144, 23 N. Y. Supp. 615; *New England Trust Co. v. Eaton*, 140 Mass. 532, 4 N. E. 69; *Stevens v. Melcher*, 152 N. Y. 551, 46 N. E. 965; *New York Life Ins. & T. Co. v. Kane*, 17 App. Div. 542, 45 N. Y. Supp. 543.

The appellant is barred and equitably estopped, by the decrees entered upon the several accountings of the trustees heretofore had, from raising or litigating the questions which she has presented upon this accounting as to the right of the accountants to make the reservation of interest moneys.

The decree of a surrogate having jurisdiction, until opened and set aside, has the same conclusive effect as a judgment of any other court.

Re Hood, 90 N. Y. 512.

The judgment or decree of a court possessing competent jurisdiction is final and conclusive upon the same parties, not only as to the subject-matter thereby actually determined, but as to every other matter which the parties might have litigated in the cause, and which they might have had decided.

Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325; *Le Guen v. Gouverneur*, 1 Johns. Cas. 430, 1 Am. Dec. 121; *Blair v. Bartlett*, 75 N. Y. 150, 31 Am. Rep. 455; *Newton v. Hook*, 48 N. Y. 676; *Goebel v. Iffla*, 111 N. Y. 170, 18 N. E. 649.

If the determination of a question is necessarily involved in the judgment, it is immaterial whether it was actually litigated or not.

Lorillard v. Clyde, 122 N. Y. 41, 25 N. E. 292; *Jordan v. Van Epps*, 85 N. Y. 427; *Smith v. Smith*, 79 N. Y. 634; *Freeman*, Judgm. § 248; *Wells*, Res Adjudicata, 249-251.

The estoppel of a former judgment extends to every material matter within the issues, which was expressly litigated and determined, and also to those matters which, although not expressly determined, are comprehended and involved in the thing expressly stated and decided, and whether they were or were not actually litigated or considered.

Pray v. Hegeman, 98 N. Y. 351; *Campbell Printing Press & Mfg. Co. v. Walker*, 114 N. Y. 7, 20 N. E. 625; *Griffin v. Long Island R. Co.* 102 N. Y. 449, 7 N. E. 735.

The general principles of the law of waiver and estoppel apply to the administration of trusts, and control both the beneficiary and the trustee.

27 Am. & Eng. Enc. Law, p. 270; *Graves v. Graves*, 2 Paige, 62; *Jordan v. Van Epps*, 85 N. Y. 427.

Mr. P. Tecumseh Sherman, also for respondents:

The action of the trustees in establishing 48 L. R. A.

and maintaining the sinking fund, and in making the payments thereto as in the account herein set forth, was legal and proper because in accordance with the intention of the testator.

McLouth v. Hunt, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548; *New England Trust Co. v. Eaton*, 140 Mass. 534, 4 N. E. 69.

The life tenant is equitably estopped from claiming the interest and income paid into the sinking fund.

Dezell v. Odell, 3 Hill, 215, 38 Am. Dec. 628; *Welland Canal Co. v. Hathaway*, 8 Wend. 483, 24 Am. Dec. 51; *Plumb v. Cattaraugus County Mut. Ins. Co.* 18 N. Y. 392, 72 Am. Dec. 526.

A false representation, or a concealment of a material fact, or a design to mislead, is not necessary.

Brookhaven v. Smith, 118 N. Y. 640, 7 L. R. A. 755, 23 N. E. 1002; *Continental Nat. Bank v. National Bank*, 50 N. Y. 575; *Blair v. Wait*, 69 N. Y. 113; *New York Rubber Co. v. Rothery*, 107 N. Y. 316, 14 N. E. 269.

Where a party assented to a change or variation from a contract, he must be presumed to have known that the other party or parties relied upon his consent, and he is estopped from withdrawing his consent to their harm or detriment.

Thomson v. Poor, 147 N. Y. 402, 42 N. E. 13.

The life tenant is barred, by the previous decrees of the surrogate's court, from objecting to all payments made into the trust fund prior to the date of objecting.

Re Perkins, 75 Hun, 129, 62 N. Y. Supp. 953, Affirmed in 145 N. Y. 599, 40 N. E. 165; *Garlock v. Vandevort*, 128 N. Y. 374, 28 N. E. 509.

Bartlett, J., delivered the opinion of the court:

The principal question submitted for our determination relates to the premium on bonds in which the trust estate has been invested. It is insisted on behalf of the appellant, Mary Irene Hoyt, that she is entitled to the entire income earned by the trust fund. The trustees claim that there should be deducted from this income a certain sum each year to meet the "wearing away" of the premium as the bonds approach the date of falling due, in order that the remaindermen may be protected, and the principal of the trust fund turned over to them, at the falling in of the life estate, unimpaired. This matter was originally sent to a referee, who decided in favor of the trustees. The surrogate's court of the county of New York reversed this decision, holding in favor of the life tenant. The appellate division reversed the decree of the surrogate's court.

In order to determine the question presented by this appeal, it is necessary to consider the facts surrounding the execution of the will. The testator was a man of very large wealth, estimated at from six to eight millions of dollars, nearly the entire amount of which he bequeathed to his brothers and their children. For some reason that is not disclosed by this record, but which we must

assume was sufficient, the testator made a very peculiar will, so far as his only child and daughter was concerned. By the fourth clause thereof he directed that the sum of \$1,250,000 should be appropriated from his estate and held in trust for the use and benefit of his daughter during her life. The trustees were directed to collect and receive the interest, dividends, and income therefrom, and from each and every part thereof, and to apply to her use, for and during her natural life, in the most bounteous and liberal manner as to expenditure, and so as to promote her convenience and comfort and gratify her reasonable desires. The testator further provided that the principal sum, or the securities in which the same shall be invested, and any surplus of income therefrom, should, upon his daughter's death, go to certain nephews and nieces. It will thus be observed that the daughter, while entitled to receive the interest upon a very considerable sum in order to meet most lavish annual expenses, was not given outright any portion of the millions constituting her father's estate. In the light of these facts, we are called upon to determine the intention of the testator when drafting the fourth clause of his will.

It is insisted by the trustees that it was the intention of Jesse Hoyt to bequeath over to his nephews and nieces, upon the death of Mary Irene Hoyt, the specific sum of \$1,250,000. or its equivalent in securities, and to give his daughter during her life no more than the net income actually earned by that sum. It is urged by the daughter's counsel that not only was it testator's intention to give the entire income, but that, in case of doubt or ambiguity the law presumes in favor of the child as against the claims of collateral relatives; or, in other words, that, if the probabilities and indications are equal on each side as against the other, the just inclination of the courts will favor the child. By the eleventh subdivision of the will, the testator directed his executors to distribute or retain, without a sale, all such stocks or securities as he might have at the time of his decease, which they thought expedient to hold, but that they should not make any new or other investments, excepting only in first-mortgage bonds and mortgages on unencumbered real estate, or in the public stocks or bonds of the United States, or state stocks or bonds, first-mortgage railroad bonds, and city bonds. In creating this trust fund for the daughter, it appears that the trustees decided not to set apart any of the securities held by the testator at the time of his decease, but took the sum of \$1,250,000 in cash, and invested it chiefly in government 4 per cent bonds and railroad bonds at a high premium. This premium in two purchases reached 29 per cent for the government bonds, and 33½ per cent for some of the railroad bonds. The result was that nearly \$245,000 was absorbed by the premium. The trustees decided that the life tenant ought to bear the entire loss thus imposed upon the fund, and, under expert computation, have kept back annually from the in-

come the sum of \$8,039 as a sinking fund to make good the premium that will have worn away when the bonds fall due.

The courts of our own state, of other states, and of England have discussed this question in various phases as to the rights of the life tenant and the remainderman, and some of the decisions are conflicting, and not to be reconciled. This court, in the recent case of *McLouth v. Hunt*, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548, had occasion to examine this question in one aspect of it, Judge O'Brien writing the opinion. Hethen said: "Notwithstanding the conflict of authority to which I have referred, there is one principle or rule applicable to this case, with respect to which the parties are all at agreement, and that is that the questions are not to be determined by any arbitrary rule, but by ascertaining, when that can be done, the meaning and intention of the testatrix, to be derived from the language employed in the creation of the trust, from the relations of the parties to each other, their condition, and all the surrounding facts and circumstances of the case."

In considering the surrounding facts and circumstances in the case at bar, to which we have already alluded, it is reasonable to infer that the testator intended in this sole provision for his daughter that she should receive, as he expressed it in the fourth subdivision of the will, "the interest, dividends, and income therefrom, and from each and every part thereof," referring to the trust fund. He expresses his desire, in clear and unmistakable language, to provide for her in the "most bounteous and liberal manner as to expenditure, and so as to promote her convenience and comfort and gratify her reasonable desires." He directs that upon the death of his daughter all moneys set apart for her use, "or the securities in which the same shall be invested," shall be disposed of in a certain manner.

It seems quite apparent that the testator contemplated that the trust fund, or a portion of it, might be loaned out on bond and mortgage, and thus not lose its identity as a cash sum; while, on the other hand, a part of it might be placed in securities at a premium, in which event the remaindermen were to take the fund as invested. It is fair to assume that the testator, who was a man of rare business sagacity, understood all the details of investing large sums of money, and that, if he had intended to impose upon the income of his daughter's trust fund the burden of the high premium incident to the class of securities to which he restricted his trustees, he would have expressed himself in clear language to that effect. It seems to us very obvious that the testator intended to devote to his daughter's use the entire income of the fund which he set apart for that purpose, if necessary, and that the disposition of the principal after her death was a secondary consideration. The remaindermen, nephews, and nieces were made very wealthy by other provisions of the will. If it proved necessary to promote his daughter's convenience and comfort and gratify

her reasonable desires, the testator seems to have employed language that cannot be misconstrued in this connection, and dedicated the entire income to that purpose. It is true that he has provided that, if there should be any surplus of the income, it, together with the moneys constituting the trust fund, or the securities in which the same shall be invested, are to be disposed of in a certain manner. It seems quite impossible, in giving to the language of the fourth subdivision of the will its plain and ordinary meaning, to spell out an intention on the part of the testator to provide a sinking fund, to be deducted from the income, in order to make good the premium paid in purchasing the securities. The testator evidently regarded a surplus of income as a mere possibility, and, as a matter of precaution, provided for the disposition of the same. He also seemed to anticipate that the principal of the trust fund would pass to the residuary legatees either as money or its equivalent, or in the form of investment then existing. There is no language, fairly construed, that can be considered as imposing upon the trustees the duty of turning over to nephews and nieces the full sum of \$1,250,000 in cash or its equivalent.

The argument of the trustees seems to go to this extent: That if they had seen fit to constitute a trust fund for the daughter out of the investments held by the testator at the time of his death, or to have invested cash in the form of specific mortgage investment on real estate, where it would not lose its identity, the income of the daughter would be subjected to no diminution on account of premium; but if they chose to take the entire trust fund in cash, and invest it, as they actually did, it would be subjected to a loss of \$8,000 and more a year. If we are right in the conclusion reached, that it was the intention of the testator to impose the loss of premium upon the remaindermen, the question of conflict of authority in the cases cited in the briefs here and the opinion below is unimportant.

As we have before pointed out, the decision in the *McLouth Case*, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548, rested wholly upon the intention of the testator, as derived from the face of the will and the surrounding circumstances. We take the same course

in the case before us, and decide it upon the special facts presented. The appellate division placed their decision upon the intention of the testator, and reached a conclusion contrary to that which has been arrived at by this court. In the case at bar the loss involved in the payment of this heavy premium is necessarily apportioned between the life tenant and the remaindermen to this extent: The life tenant, for a long series of years, receives interest on a largely reduced principal sum, and the remainderman at the end of that period loses the amount of the premium paid. This loss of the remainderman may, however, be reduced if the life estate falls in before the bonds mature, and while they are still quoted at a large premium. The manner in which the loss shall be borne, occasioned by the payment of premiums on investing the principal of a trust fund, in the absence of any expressed intention of the testator, is a question not presented by this record, and we refrain from discussing it.

An additional point is taken by the respondents to the effect that, in several annual accountings prior to the one now before the court, the testator's daughter allowed the reservation of a portion of the interest money by the trustees to make good the amount paid from the principal trust fund for premium to pass unchallenged, and consequently the decrees therein are *res judicata* in this proceeding, and prevent her from raising the question at this time. We are of opinion that this point is not well taken. The decrees in the former accountings are binding upon the daughter of the testator as to the amounts therein involved, and will not be affected by our decision herein, but this does not prevent her from raising the question now as to the distribution of the money in the hands of the trustees. *Bourditch v. Ayrault*, 138 N. Y. 222, 231, 34 N. E. 514.

The order of the Appellate Division appealed from should be reversed, and the decree of the surrogate's court of the county of New York affirmed, with costs to the appellant in all the courts.

All concur, except **Parker, Ch. J.**, and **Gray and Haight, JJ.**, dissenting.

TENNESSEE SUPREME COURT.

Hugh MARTIN *et al.*, Appts.,

v.

William H. STOVALL, Exr., etc., of Ferreba
A. Hall, Deceased.

(.....Tenn.....)

1. The probate in common form of a will under statutes making it an exercise

NOTE.—Effect of probate of a will in another state.

- I. As to personal property.
- II. Wills of real estate.
- III. Presumption.
- 48 L. R. A.

of judicial power, and the judgment conclusive as to all matters properly cognizant in the probate proceedings, and as to the property covered by the will, is, so far as regards personality, within the provision of the United States Constitution requiring full faith and credit to be given in each state to the judicial proceedings of every other state.

- IV. As to full faith and credit.

- V. Conclusiveness of decree of probate from another state.

a. Generally.

b. After filing for record.

- VI. Classification by states.

even as against persons not made parties to the proceeding.

2. Courts will not refuse to give effect to statutes providing for the recording of foreign wills, and giving them the same effect as if made and proved in the state, because such effect is not given to foreign wills by the state from which the record comes.

3. That promissory notes bequeathed by will are secured by mortgage on real estate does not deprive them of the character of personal property so as to prevent their passing by a foreign will duly probated at testator's domicile, and recorded in the state where the land is situated, as provided by the laws of the latter state.

(April Term, 1899.)

APPEAL by contestants from a decree of the Probate Court for Shelby County refusing to certify to the Circuit Court pro-

ceedings resulting in the filing of the will of Ferreba A. Hall, which had been probated in the state of Mississippi, in order to give petitioners an opportunity to contest the will.

Affirmed.

The facts are stated in the opinion.

Messrs. Pierson & Ewing for appellants.
Mr. J. M. Gregory for appellee.

McFarland, Special Judge, delivered the opinion of the court:

This case involves the question whether a will executed and probated in another state, where the testatrix was domiciled, and afterwards certified under the act of Congress, and filed and recorded in this state, is subject to the contest here, under our statute. Mrs. Ferreba A. Hall died during the month of August, 1898, in Coahoma county, Mississippi, where she was domiciled, leaving what

I. As to personal property.

In **MARTIN V. STOVALL**, where a testator was domiciled in Mississippi, and his will was duly probated there, and an authenticated copy of the proceedings recorded in Tennessee, and an heir brought an action to contest the same in Tennessee, the petition was dismissed. It was held that the action of the probate court in Mississippi was final and conclusive as to personal property, and was a judicial proceeding under U. S. Const. art. 4, § 1, providing that full faith and credit, etc. Miss. Const. § 159, giving chancery courts jurisdiction of matters testamentary, and Miss. Code, § 1813, providing for probating wills in the chancery court in the county in which the testator resided, have been construed to the effect that the probate of a will is an exercise of the judicial power. Miss. Code 1892, § 1821, provides that all parties interested shall be made parties, and those made parties will be concluded, and § 1822 provides that if not contested within two years the probate will be conclusive. The court said: "Again, probate proceedings are proceedings *in rem*, and the judgments bind all persons, whether parties in the record or not;" and that the probate could not be opened under Shannon's Tenn. Code, §§ 3916-3918, providing for recording wills upon authenticated copies.

This decision is in accord with the general rule that a decree of probate from another state where the testator was domiciled is conclusive in regard to personal property. As to "full faith and credit," etc., see that subdivision.

A will of personal property must be valid by the law of the testator's domicile, to be effective. *Varner v. Bevil*, 17 Ala. 286; *Brock v. Frank*, 51 Ala. 85; *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *St. James's Church v. Walker*, 1 Del. Ch. 284; *Latine v. Clements*, 3 Ga. 426; *Knight v. Wheeldon*, 104 Ga. 309, 30 S. E. 794; *Alexander's Will*, 1 Tucker, 114 (see N. Y. Code, subd. *Classification by States—New York*); *Manuel v. Manuel*, 18 Ohio St. 458; *Holman v. Hopkins*, 27 Tex. 38; *Ford v. Ford*, 70 Wis. 19, 33 N. W. 188.

So, a decree of probate from another state is of no force as to personality if the testator's domicile is here. *Sturdivant v. Neill*, 27 Miss. 157; *Wells v. Wells*, 35 Miss. 638; *Wallace v. Wallace*, 3 N. J. Eq. 618.

And such decree is of no effect if the will is not made according to the law of this state, and the domicile is here. *Nat. v. Coons*, 10 Mo. 543; *Stewart v. Pettus*, 10 Mo. 755.

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And a decree of probate in another state is not effective until filed and recorded in the proper court of this state. *Olney v. Angell*, 5 R. I. 108, 73 Am. Dec. 62.

In *Varner v. Bevil*, 17 Ala. 286, it was said: "Our statute, which provides for the probate in our courts of authenticated copies of foreign wills which have been proved according to the laws of any of the United States, or of any country out of the limits of the United States, was not designed to deny to our courts jurisdiction over the probate of the original will made in a foreign country, but disposing of property situated here. It but enlarges the jurisdiction of the court, enabling the parties to make the contest upon an authenticated copy of a foreign will, proved according to the law of the domicile, in the same manner they might have done upon the original."

In *Brock v. Frank*, 51 Ala. 85, it was said that Ala. Stat. 1806, Clay's Dig. 598, § 12, providing for the probate in this state of wills proved in other states, and providing that such wills shall be liable to be contested and controverted in the same manner as the original might have been, was construed in *Varner v. Bevil*, 17 Ala. 286, as enlarging the jurisdiction of Alabama courts of probate so as to contest a will of a testator domiciled abroad; but this provision was omitted from the Code although providing for its probate.

A will of personal property, made in Pennsylvania, although the property may be in Delaware, must operate according to the laws of Pennsylvania. But the probate of a nuncupative will in Pennsylvania is not sufficient to give it any effect in Delaware, and until probate is made in that state the will cannot be considered to pass any property there. *St. James's Church v. Walker*, 1 Del. Ch. 284. In this case the court said that upon the principle that personal property must follow the domicile of the testator, if this will was made according to the laws of the state in which the testator was domiciled at his decease, even though all the formalities required by our act of assembly were not observed, it is sufficient to pass personal estate; but in order to give it effect, the probate must be made in New Castle county where such property is situated, not, indeed, according to the requisites of our statute, but according to the proof required by the law of the domicile of the testator.

Where a testator domiciled in Ohio made a will of personality in the olographic form in Louisiana, valid in that state, while he was there for business purposes, and died in Ohio,

purported to be a last will and testament, which was duly probated in common form as such on the 22d day of August, 1898, in the chancery court of Coalhoma county, Mississippi. The defendant, William H. Stovall, was named as the executor of said will, and on September 7, 1898, he filed the same in the probate court of Shelby county, Tennessee, for record, and the same was ordered filed, and letters of administration were by said court ordered to be issued to him as executor. On October 19, 1898, Hugh Martin and wife, Sallie C. Martin, R. J. Cook, a minor, suing by his next friend, Hugh Martin, Paul Cook, Walter Cotter, and his wife Mary Cotter, filed their original petition in said probate court of Shelby county, Tennessee, in which they set out the facts hereinbefore stated in reference to the alleged will of Mrs. Ferreba A. Hall, and further stated that they

were the only heirs at law and distributees of the said Mrs. Hall, and, as such, entitled, in the absence of a will, to the whole of her estate, under the laws of the states of Tennessee and Mississippi. It further alleged that the paper purporting to be the last will and testament as aforesaid was not valid, because Mrs. Hall, at the time of the alleged execution thereof, was insane, and, by reason of said insanity, incapable of making a will, and that she was unduly influenced to make said will by the said William H. Stovall, who is named as executor therein, and by Mary Ann Sparks and her husband, J. H. Sparks, acting in collusion with said William H. Stovall. The petition prayed that the said paper alleged to be the last will and testament of Mrs. Hall be certified, as by law provided, to the circuit court of Shelby county, where the same might be contested as the law

an authenticated copy of the will and probate in Louisiana should not have been admitted to record in Ohio as a will of personalty. In order to be valid, it should have been executed according to the laws of the testator's domicile at the time of his death. It was held that Ohio act 1840, § 28, providing that authenticated copies of wills executed and proved according to the laws of any state relative to any property in this state may be admitted to record in any county where any property is situated, and authenticated copies so recorded shall have the same validity as wills made in this state in conformity to the laws thereof are declared to have, did not authorize the record of such will. *Manuel v. Manuel*, 13 Ohio St. 458.

And the validity of a bequest or disposition of personal property by last will and testament must be governed by the law of the testator's domicile at the time of his death, and this includes, not only the form and mode of the execution of the will, but also the lawful power and authority of the testator to make such disposition. *Ford v. Ford*, 70 Wis. 19, 33 N. W. 188.

And under N. J. act March 6, 1828, Harrison, 195, authorizing the granting of letters testamentary, on certificate of probate of foreign wills, and giving them the same effect as if the will had been proved by the subscribing witnesses in the usual manner under the laws of this state, a will made in New Jersey, where the testator lived at the time of his death, cannot be probated here on a probate made in Pennsylvania, as the act has reference to foreign wills only. *Wallace v. Wallace*, 3 N. J. Eq. 618. In this case the court said: "If the will were a will of personalty, where would be the opportunity of contesting it or examining into the sanity of the testator? And, even if it were a will of lands, the privilege of contestation in the civil-law courts would be taken away. It is no answer to say that cases of fraud or collusion might be inquired into."

And a testamentary disposition of movable property must, to be valid anywhere, be made according to the local law of the testator's domicile at the time of his death. *Barnes v. Brashers*, 2 B. Mon. 380.

In *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13, it was said that Clay's (Ala.) Dig. 598, § 12, which was the law prior to 1852, providing that the validity of a will probated in other states was subject to be contested and controverted as the original might have been, manifestly modified the general principle of law applicable to the probate of wills of personal

property, that the sentence of a tribunal of competent jurisdiction is binding and conclusive everywhere.

A decree of probate from another state is not open to contest where a will of personal property is probated at the domicile. *MARTIN v. STOVALL*; *Williams v. Saunders*, 5 Coldw. 60; *Nelson v. Potter*, 50 N. J. L. 324, 15 Atl. 375; *Alexander's Will*, 1 Tucker, 114; *Dickey v. Vann*, 81 Ala. 425, 8 So. 195; *Helme v. Sanders*, 10 N. C. (3 Hawks) 508.

And where the court in another state had jurisdiction of the probate of a will of real or personal property, such probate is a judgment *in rem*, and, in the absence of statutory provisions, is conclusive in Alabama as to the capacity of the testator and the due execution and validity of the will. *Brock v. Frank*, 51 Ala. 89.

So in regard to personal property. *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13.

Where a duly certified copy of a will probated in Pennsylvania is offered for record in the county court of Tennessee, it is not necessary to prove the same as an original will in the state of Tennessee as a will of personal property, and it is error to refuse to admit the certified copy to record. *Williams v. Saunders*, 5 Coldw. 60.

This is on the ground that Tenn. Code, §§ 2182-2185, providing that where any foreign will has been proved according to the laws of this state in a court of the United States, any person interested may present a copy duly authenticated to the county court of any county in the state where the land or estate disposed of by will is situated, and thereupon such court may order the same to be filed and recorded, and said copy, when so recorded, shall have the same force and effect as if the original had been executed, proved, and allowed in this state; and § 2190, providing that persons interested to contest the validity of such will may do so in the same manner as though it had been originally presented for probate in said court,—were construed to mean that so far as the will disposes of personal property the probate court of the domicile of the testatrix has the exclusive jurisdiction to decide upon the validity or invalidity as a will of personal property, and as such it is not open for contest in the courts of Tennessee. The right to contest the validity of wills probated in a foreign state is limited to wills of real or immovable property. It is further held that where the county judge in Tennessee found all the facts necessary to a judgment or decree, that the entering up of the judgment ordering the probate to record was mis-

directa. William H. Stovall, the executor named in said will, appeared by his attorney, and moved to dismiss the said petition, assigning as the ground thereof, stated in various forms, that it was not shown in said petition that the alleged testatrix died seised and possessed of any real estate in the state of Tennessee, and that the probate of the will in the place of the domicile of the testatrix was valid, binding, and conclusive upon all parties until set aside in the court where the original probate was had. Thereupon the original petitioners, having obtained leave of the court, on December 20, 1898, filed their amended petition, wherein they repeat the allegation of the original petition; and further set forth that the said Mrs. Ferreba A. Hall, at the time of her death, was the owner of mortgages upon real estate situated in Shelby county, Tennessee, for the sum

of \$5,000, said mortgages having been originally made to her husband James S. Hall, and having been devised by him to his said widow, and that by her said alleged will Mrs. Hall attempted to dispose of the said mortgages and the title to the said real estate. The executor moved to dismiss the amended petition upon the same ground as that for dismissing the original petition, and upon the additional ground that, said will of Mrs. Hall having been probated in the chancery court of Coahoma county, Mississippi, the place of the domicile of the testatrix, said action of the court in so admitting said will to probate was final and conclusive, under § 1 of art. 4 of the Constitution of the United States, which declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." The court

sterial, and a mandamus should be granted. *Ibid.*

So, if a will bequeathing personalty is executed according to the laws of the state where the testator resided, it is a sufficient bequest of such personalty, although it may not conform to the laws of the state where the personalty is situated. *Knight v. Wheedon*, 104 Ga. 309, 80 S. E. 794.

In *Montgomery v. Millikin*, 5 Smedes & M. 151, 43 Am. Dec. 507, a will was made and probated in Kentucky, and proved and certified to the proper court in Louisiana, where the testator was domiciled, and it was held in Mississippi that the probate was valid under La. Civ. Code, art. 1589, providing that a will is valid if executed according to the laws of the place where it was made.

In *Morris v. Morris*, 27 Miss. 847, it was said that in the case of *Montgomery v. Millikin*, 5 Smedes & M. 151, 43 Am. Dec. 507, the law of Louisiana provided that the will should be valid if it conformed to the law of the place where it was made, and that this law was an exception to the general rule, and the only question necessary to be decided was whether the will was valid and had been so established by the proper court in Louisiana. "The judgment of the court in that state would be conclusive on that subject, and was all that our courts would require in regard to the personal estate." And the court said that the question in that case, in regard to the sale of lots in Mississippi, received no other consideration than that the sale by the administrator with the will annexed was valid.

A contest on probate as to domicile of testator concludes the parties thereto when the record is offered in another state to obtain revocation of letters of administration. *Thomas v. Morrisett*, 76 Ga. 384.

II. Wills of real estate.

The general rule is that a will, in order to affect real estate, must conform, in its execution and proof of the same, to the law of the place where the land is situated. *Robertson v. Pickrell*, 109 U. S. 608, 27 L. ed. 1049, 3 Sup. Ct. Rep. 407; *Blount v. Walker*, 134 U. S. 607, 33 L. ed. 1036, 10 Sup. Ct. Rep. 608; *Varnor v. Bevil*, 17 Ala. 286; *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Dickey v. Vann*, 81 Ala. 425, 8 So. 195; *Croly v. Clark*, 20 Fla. 849; *Latine v. Clements*, 3 Ga. 426; *Knight v. Wheedon*, 104 Ga. 309, 80 S. E. 794; *Key v. Harlan*, 45 L. R. A.

52 Ga. 476; *Evansville Ice & Cold Storage Co. v. Winsor*, 148 Ind. 682, 48 N. E. 592; *Sneed v. Ewing*, 5 J. J. Marsh. 460, 22 Am. Dec. 41; *Cornellison v. Browning*, 10 B. Mon. 425; *Williams v. Jones*, 14 Bush, 418; *Dupoyster v. Gagliani*, 84 Ky. 403, 1 S. W. 652; *Brock v. Frank*, 51 Ala. 85; *Keith v. Keith*, 97 Mo. 224, 10 S. W. 597; *Nelson v. Potter*, 50 N. J. L. 324, 15 Atl. 375; *Lindley v. O'Reilly*, 50 N. J. L. 636, 1 L. R. A. 79, 15 Atl. 379; *Re Langbein*, 1 Dem. 448; *Lockwood v. Lockwood*, 51 Hun. 337, 2 L. R. A. 425, 3 N. Y. Supp. 887; *Shearer's Estate*, 1 N. Y. Civ. Proc. Rep. 455; *Roscoe v. John L. Roper Lumber Co.* 124 N. C. 42, 32 S. E. 389; *Jones v. Robinson*, 17 Ohio St. 171; *Bailey v. Bailey*, 8 Ohio, 239; *Meese v. Keefe*, 10 Ohio, 362; *Hulman v. Hopkins*, 27 Tex. 38; *Es parte Povall*, 3 Leigh, 816; *Thrasher v. Ballard*, 33 W. Va. 285, 10 S. E. 411; *Ford v. Ford*, 70 Wis. 19, 33 N. W. 188.

In the absence of statute, some cases hold that a decree of another state admitting a will to probate is of no effect as to real estate. *Robertson v. Pickrell*, 109 U. S. 608, 27 L. ed. 1049, 3 Sup. Ct. Rep. 407; *McCormick v. Sullivant*, 19 Wheat. 192, 6 L. ed. 300; *Darby v. Mayer*, 10 Wheat. 465, 6 L. ed. 367; *Apperson v. Bolton*, 29 Ark. 418; *Smith v. Shackelford*, 9 Dana, 452; *Budd v. Brooke*, 3 Gill, 198, 43 Am. Dec. 321.

And the will has no effect until proved and allowed in this state. *Pott v. Pennington*, 16 Minn. 509, Gil. 460.

The probate from another state is of no effect if the will is revoked by the birth of a child. *Sneed v. Ewing*, 5 J. J. Marsh. 460, 22 Am. Dec. 41.

And such probate is of no effect if the will is not proved according to the law of the place where the real estate is situated. *Cornellison v. Browning*, 10 B. Mon. 425; *Knight v. Wheedon*, 104 Ga. 309, 80 S. E. 794; *Nelson v. Potter*, 50 N. J. L. 324, 15 Atl. 375; *Shearer's Estate*, 1 N. Y. Civ. Proc. Rep. 455; *Re Langbein*, 1 Dem. 448; *Lindley v. O'Reilly*, 50 N. J. L. 636, 1 L. R. A. 79, 15 Atl. 379; *Keith v. Keith*, 97 Mo. 224, 10 S. W. 597; *Lockwood v. Lockwood*, 51 Hun. 337, 2 L. R. A. 425, 3 N. Y. Supp. 887.

And is of no effect until proved or allowed for record. *Graves v. Ewart*, 99 Mo. 13, 11 S. W. 971; *Van Syckel v. Beam*, 110 Mo. 589, 19 S. W. 946.

In order that a will probated in one state may be probated in another as to real estate, it must be shown that its execution complies with the laws of the state where the land is situated. *Dublin v. Chadbourne*, 16 Mass. 433; *Key v. Harlan*, 52 Ga. 476; *Williams v. Jones*, 14

dismissed the original and amended petitions at the cost of the petitioners, and denied to said petitioners any relief. Said petitioners have sued out a writ of error from this court to said probate court of Shelby county, Tennessee, to review and reverse the said decree of the probate court of Shelby county dismissing their petition.

The first question presented by the contention of the executor is that the action of the chancery court of Coahoma county, Mississippi, was final and conclusive, under § 1, art. 4, of the Constitution of the United States, which decrees that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." It is submitted, in support of this contention, that the Constitution of the state of Mississippi gives the chancery court jurisdiction of all matters

testamentary and of administration, under § 159, Miss. Const.; that § 482 of the Annotated Code of Mississippi carries that constitutional provision into effect; and that, by § 1813, of the Code of Mississippi, wills shall be probated in, and letters testamentary granted by, the chancery court of the county in which the testator had fixed his place of residence. In the construction of these sections of the Code, it has been held that a probate of will is the exercise of a judicial power, and the testament cannot be admitted of record until probated. *Fotherree v. Lawrence*, 30 Miss. 416. Section 1821, Miss. Code 1892, provides that all parties interested may be made parties, and those made parties are concluded. Section 1822 gives two years to contest probate, and, if not contested within that time, it is conclusive. *Schlottman v. Hoffman*, 73 Miss. 188, 18 So.

Bush, 418; *Bailey v. Bailey*, 8 Ohio, 239; *Jones v. Robinson*, 17 Ohio St. 171; *Ex parte Povall*, 3 Leigh, 816; *Thrasher v. Ballard*, 33 W. Va. 285, 10 S. E. 411.

And the validity of a will may be contested where the land is situated, although probated in another state. *Pennel v. Weyant*, 2 Harr. (Del.) 501.

And an action may be maintained to set aside the probate of a will coming from another state if invalid as to real estate. *Lynch v. Miller*, 54 Iowa, 518, 6 N. W. 740.

The same was said to be the rule in *Otto v. Doty*, 61 Iowa, 23, 15 N. W. 578.

Where a will probated in another state is presented for record to the probate court in the state in which realty is situated, and such court upon the evidence finds that the authentication of the copy is sufficient, its adjudication cannot be collaterally attacked. *Calloway v. Cooley*, 50 Kan. 743, 32 Pac. 372.

Where a will probated in another state is admitted to probate as a will of real estate by a county court upon a copy and a certificate of probate, the order of the county court is conclusive, except as to the jurisdiction of the court, until the same is superseded, reversed, or annulled, the same as in case of a domestic will; and the fact that the copy does not show upon what proof the will was admitted to probate by the foreign court does not render the order of the county court void. *Whalen v. Nisbet*, 95 Ky. 464, 26 S. W. 188. In this case it was proved that the statute where the will was probated prescribed the same requisites of a valid will as are prescribed in Kentucky for a will of realty.

A will made in New York and probated there, and attested by two witnesses, will be a valid disposition of real property in Maine if the proceedings are recorded there, under Me. Rev. Stat. chap. 64, § 12, providing that a will executed in another state, according to the laws thereof, may be presented for probate in this state, and § 13, providing that a will proved and allowed in another state, according to the laws thereof, may be allowed and recorded in this state, and a copy of the will and the probate duly authenticated shall be produced by the executor to the judge of probate in any county in which there is estate, real or personal, and, after hearing, the judge may order the copy to be filed and recorded, and § 14, providing that such will shall then have the same force and effect as if originally proved and allowed in the same court. *Lyon v. Ogden*, 85 Me. 374, 27 Atl. 258. In this case the will, 48 L. R. A.

if made and probated in Maine, would not have been valid, as three subscribing witnesses are required in Maine.

It was the intention to give all wills executed out of the state, according to the formalities required by the law of the place where executed, and whether of real or personal estate, the force and effect of domestic wills to pass all property situate in this state, under Conn. Stat. of Wills 1856, chap. 44, act of 1863, chap. 7, providing that wills devising real estate executed out of this state, according to the laws of the state where executed, shall be as effectual to pass property as though executed according to the laws of this state. *Irwin's Appeal*, 33 Conn. 128.

And a decree of the probate court in New Hampshire allowing and proving a will, and a subsequent decree of the probate court of Massachusetts allowing a copy of the will with the probate thereof in New Hampshire to be filed and recorded, operate as final and conclusive upon all persons as to all questions of the validity, including that of the capacity of a married woman to make a will. *Parker v. Parker*, 11 Cush. 519. In this case it was held that the decree of the court of probate approving the will of a married woman is conclusive upon the heirs, and they cannot, in a court of common law, deny the legal capacity of the testatrix. The opinion does not clearly show whether the decree referred to was the decree of the original probate or the decree of the Massachusetts court admitting such record to probate.

Where an executor presented two wills for probate in New York, where the testatrix died, having real estate in Massachusetts, and the earlier will was allowed and the other rejected, the probate court of Massachusetts had no authority to require the executor to produce the rejected will. *Loring v. Oakley*, 98 Mass. 267. In this case the court said: "There is much difficulty in determining whether the will sustained and probated in the domicile of the testatrix can be here set aside in favor of one of later date already disallowed there; and whether the latter will, if admissible to probate here for any purpose, should be allowed to operate upon real estate in Massachusetts only, or also upon personalty in this jurisdiction."

In *Crusoe v. Butler*, 36 Miss. 150, it was held that the will of one domiciled in Alabama, and purporting to have been attested by three witnesses, and which had been duly proved in Alabama, was properly admitted to probate in Mississippi, and was effectual as to lands lying in this state, although the authenticated copy

893. Section 1924: If after probate an issue of devisavit is made on trial the probate is good. In the probate of a will in Mississippi, some direct proof that the testator was of sound and disposing mind must be given on the probate of a will even in common form. *Martin v. Perkins*, 56 Miss. 204. Where a writing has been probated in common form as a will, it must be treated as the established will of deceased, and in full force and effect, until overthrown in a direct proceeding. *Tucker v. Whitehead*, 58 Miss. 762. It is also held that, where a chancery court is given special jurisdiction as in probate proceedings, the manner of exercising this jurisdiction does not affect its conclusiveness. 1 Pom. Eq. Jur. pt. 1, chap. 1.

It would seem, therefore, that, under these constitutional and Code provisions, the admission to probate of a will in Mississippi

is the exercise of a judicial power, and its judgment thereon conclusive in Mississippi as to all matters properly cognizant in the probate proceedings and as against all parties properly before the court in the proceedings, and also, as a proceeding *in rem*, conclusive as to the property covered by the will itself. The question, then, is, When this will is offered and probated in the state of Tennessee, and the personal property actually and constructively in Mississippi, what effect shall be given to this judicial proceeding in the state of Mississippi? The transmission of property by will is in many important particulars different from the transmission of title by deed or other proceedings. The power to dispose of property by will, says Judge Gray in *Brettun v. Fox*, 100 Mass. 234, is not a natural nor constitutional right, but depends wholly upon the statute, and may be

from Alabama showed that the will had been proved there by but one of the three subscribing witnesses. This decision was placed on two grounds: (1) As the record stated that the will was duly proved by one witness and was admitted to probate, and it did not affirmatively appear that that witness proved only the attestation by himself and execution in his presence, it will be presumed that he testified to every fact necessary to due execution; (2) the copy of the will had been ordered to be admitted to probate and recorded in the probate court of L. county, and that act was unassailable collaterally.

And an exemplified copy of a will made and probated in another state and proofs thereof, when recorded, are equivalent to the proof of a will under N. Y. Laws 1864, chap. 311, amended by Laws 1872, chap. 680, providing that when any real estate within this state shall be devised by any person residing within any other state, and a will shall have been admitted to probate in this state and recorded where admitted to probate, an exemplified copy may be recorded in the surrogate's office in this state, where the real estate is situated, which record, or a copy thereof, shall be presumptive evidence of said will, and of the due execution thereof. *Bromley v. Miller*, 2 Thomp. & C. 575.

The probate of a will was held sufficient to pass the title to real property where it was probated in Mississippi and an authenticated copy filed and recorded in North Carolina, and the record of the Mississippi court was properly certified, and showed that the will was subscribed by two witnesses; that the witnesses subscribed in the presence of the testator and at his request; that the testator at the time of signing the will was of sound and disposing memory; and that he was over twenty-one years of age; although the examination of witnesses to the will was signed and certified by the clerk separately from the certificate of probate made by the clerk. It was held that this complied sufficiently with N. C. Code, § 2149, providing that the certificate of probate shall embody the substance of proof and examination. *Roscoe v. John L. Roper Lumber Co.* 124 N. C. 42, 32 S. E. 339.

And a foreign will proved according to the laws of Tennessee, as required by Tenn. Code, § 2182, is sufficient to pass lands and other estate in Tennessee, under Tenn. Code, § 2185. *Smith v. Neilson*, 13 Lea. 461.

And a will duly probated in another state, and executed according to the law of Tennessee, is operative as a conveyance of lands without

registration there. *Beldorn v. Pilot Mountain Coal & Min. Co.* 89 Tenn. 166, 15 S. W. 737.

The courts of Virginia are not restrained from probating a will by which lands lying in that state are devised, so far as the title of lands may be affected, although the same will may have been declared void by a court in North Carolina, on account of incapacity of the testator, or for any cause whatever. *Rice v. Jones*, 4 Call. (Va.) 80.

In *Swift v. Wiley*, 1 B. Mon. 114, a will was made and probated in Missouri affecting land in Kentucky, and a suit was filed in the chancery court of Kentucky where the real estate was situated, charging fraud in the execution, and denying that it was published according to the laws of that state, and prayed for a partition and distribution of the realty, and after the institution of the suit the document was recorded in the clerk's office of the court of appeals according to the provisions of Ky. act 1820 (Statute Laws, 1848). It was held that the attestation of the will was sufficient under the laws of Kentucky, and there was no proof of fraud in the execution.

The distinction is usually made, in regard to domicile, that the term is used in regard to wills of personal property, and they must be executed according to the law of the domicile, and wills in regard to real estate, in the absence of statute, must be executed in compliance with the law of the state where the land is situated. But, in Mississippi, while this distinction in some cases is noted, the decisions are on the theory that if the domicile is in Mississippi the will must be probated there, either of personality or realty, and not upon the usual ground that the will must be proved according to the law of the place where the real estate is situated. So, in *Bate v. Incisa*, 59 Miss. 513, it was held that a certificate of probate from Tennessee of a will whose maker was domiciled in Mississippi could not be probated in that state, although the testatrix died in the other state having property there. In this case the property in contest was real estate, and it was held that Miss. Code 1871, § 1105, providing that authenticated copies of wills proved according to the law of the states may be admitted to probate in Mississippi, did not apply to wills made by citizens domiciled in this state.

The same was held in *Sturdivant v. Neill*, 27 Miss. 157, and *Morris v. Morris*, 27 Miss. 847.

In *Wells v. Wells*, 35 Miss. 638, it was held that the probate in Louisiana of the will of a testator who died there, and whose domicile was

conferred, taken away, or limited and regulated, in whole or in part, by legislature; "and whatever theory we adopt," says the American edition of Jarman on Wills, "as to the origin of wills, and of the law that governs them, they have become, as regards their execution and probate wholly, and as regards their construction largely, the creations of statutory law." 3 Jarman, Wills, 721. What law governs where there is a conflict of laws, as between the statutory provisions of the several states, is the prime question always to be determined. As to the testamentary capacity and form and manner of execution, in case of personality, the law of the testator's domicile governs. Story, Conf. L. § 51, 61, 465; Wharton, Conf. L. § 569; Roberts, Wills, p. 525; Jacob, Domicil, § 45. As to real property, it is claimed by many that the same rule applies, under the civil

law, as to personality, but by the common law it is governed by the *lex loci rei sitæ*. Story, Conf. L. § 431; Wharton, Conf. L. § 469. This court in the case of *Williams v. Saunders*, 5 Coldw. 60, which will be referred to hereafter, says: "It may be therefore said, as a rule of law alike applicable in this country and in England, that the *lex loci rei sitæ* governs in cases of immovable or real property, and the *lex domicilii* in cases of movable or personal property." The reason for this rule seems to be that, as to personal property, it follows the person of the owner wherever situated,—is to be governed by the laws of the domicile of the owner; and this rule applies to all questions of disposition by will as well as other means of disposition. Again, probate proceedings "are proceedings *in rem*," and the judgments bind all persons, whether parties in the record or not. *Pat-*

in Mississippi, was valid as to his property situated in Louisiana.

In *Crusoe v. Butler*, 36 Miss. 150, it was held that a will of one domiciled in Alabama, and purporting to have been attested by three witnesses and duly proved in Alabama, was properly admitted to probate in Mississippi, and was effectual as to land there, although the copy from Alabama showed that the will was proved there by but one of the witnesses. This decision was on the ground that, as it did not affirmatively appear that the witness proved only the attestation by himself, it will be presumed that he testified to every fact necessary, and second, that as the copy had been admitted to probate and recorded in this state, that act is not assailable collaterally.

III. Presumption.

The decree of another state probating a will is presumed to be correct, and it will be presumed that the court had jurisdiction. *Houze v. Houze*, 16 Tex. 598.

And such decree is presumed to be regular. *Otto v. Doty*, 61 Iowa, 23, 15 N. W. 578.

And the decree will be presumed to have been properly allowed. *Crusoe v. Butler*, 36 Miss. 150.

If a decree of another state probating a will is allowed for record on insufficient evidence, it will be presumed to have been probated for personality only. *Dupoyster v. Gaganl*, 84 Ky. 403, 1 S. W. 652.

So, a decree probating a will in another state is presumed valid as a will of personality. (Stat.) *Williams v. Jones*, 14 Bush, 418.

In *Bowen v. Johnson*, 5 R. I. 112, 73 Am. Dec. 49, it was held that a decree of another state was only prima facie evidence of the validity of a will.

IV. As to full faith and credit.

There seems to be a conflict of authority as to the effect on a probate of a will in another state in regard to U. S. Const. art. 4, § 1, and act of Congress, May 19, 1790, providing that full faith and credit shall be given in each state to the records and judicial proceedings of every other state, some cases holding that a probate of a will is a judicial proceeding entitled to full faith, etc., in other states. Some cases deny the effect on real estate on the ground that the court of original probate had no jurisdiction over real estate in another state.

A proceeding to probate a will is not such as falls within U. S. Const. art. 6 (4), § 1, provided 48 L. R. A.

ing full faith and credit, etc. *Williams v. Jones*, 14 Bush, 418.

United States Const. art. 4, § 1, does not extend the operation of a decree of probate in another state to property which was in the state at the time of the death of the testator; and such decree is only prima facie evidence of its validity. *Bowen v. Johnson*, 5 R. I. 112, 73 Am. Dec. 49.

And the United States Constitution does not extend the operation of the probate of a will as a judicial act of a state beyond its own territory. *Olney v. Angell*, 5 R. I. 198, 73 Am. Dec. 62.

Notwithstanding the constitutional clause a decree probating a will in another state does not affect real property where the will is offered in Georgia, and attested by only two witnesses. *Key v. Harlan*, 52 Ga. 476.

In *Kobertson v. Pickrell*, 109 U. S. 606, 27 L. ed. 1049, 3 Sup. Ct. Rep. 407, it was said that the act of Congress declaring the effect to be given to the records and judicial proceedings of the several states, does not require that they shall have any greater force in other courts than in the courts of the state from which they are taken. In this case it was held that the probate of a will in one state does not establish the validity of the will as a will devising real estate in another state, unless the laws of the latter state permit it.

In *Darby v. Mayer*, 10 Wheat. 465, 6 L. ed. 367, it was said that as to whether full faith and credit should be given a probate from Maryland in Tennessee under U. S. Const., "the rule could not be applied to this case, since the laws of Maryland do not make the probate here offered evidence in a land cause in the courts of that state."

Full faith and credit were not decided in *Blount v. Walker*, 134 U. S. 607, 33 L. ed. 1036, 10 Sup. Ct. Rep. 606.

But where the court of another state had jurisdiction, and the will was duly probated there, it cannot be contested on an application to record such probate proceeding in Vermont, and the parties cannot show the incapacity of the testatrix, or undue influence, under U. S. Const. art. 4, § 1. *Ives v. Salisbury*, 56 Vt. 565.

Under the Constitution a will cannot be contested on offering for filing and recording. *Harris v. Harris*, 61 Ind. 117. (But so far as this refers to realty, it is overruled in *Evansville Ice & Cold Storage Co. v. Winsor*, 148 Ind. 682, 48 N. E. 592.)

And faith and credit must be given to a decree of another state as against parties resist-

ton v. Allison, 7 Humph. 328; *St. John's Lodge No. 1 v. Callender*, 26 N. C. (4 Ired. L.) 335; *Saucy v. Dozier*, 27 N. C. (5 Ired. L.) 97; *Enloe v. Sherrill*, 28 N. C. (6 Ired. L.) 212. In *Pinson v. Ivy*, 1 Yerg. 349, this court says: "Proceedings are had in the nature of proceedings *in rem*, and without notice, in courts admitting wills to probate and granting administration, and the expectancy of heirs and distributees swept away, when the weakness of infancy or residence in a foreign land should seemingly protect them, because of the permanent political consideration that the rights of property thus situated should be speedily settled by a legal ascertainment of them. All of which adjudications are directed by public policy and necessity, regardless, to some extent, of private rights." And in *Fry v. Taylor*, 1 Head, 595, held to be a proceeding

in rem, and binding upon all interested, whether parties or not. The proof of a will has been held to be a proceeding *in rem*, because it determines the status of the subject-matter (*Woodruff v. Taylor*, 20 Vt. 65), and is conclusive and effectual for all purposes (*Crippen v. Dexter*, 13 Gray, 330). Wells, *Res Adjudicata*, § 576.

In this case now under examination, this record does not disclose the fact that in the proceedings, in the state of Mississippi, the parties now seeking to contest the validity of those proceedings were served with any notice or voluntarily appeared in those proceedings, and whatever faith and credit shall be given now in this court to these acts and judicial proceedings of the court of the state of Mississippi must be given, by reason of the injunction of the Federal Constitution, as a proceeding *in rem*, and, under the prin-

ing original probate. *Thomas v. Morrisett*, 76 Ga. 384.

The probate is a judicial act, and authenticates the right of the executor to sue in another state under the Federal Constitution and act of Congress. *Stephens v. Smart*, 4 N. C. (1 Car. Law Repos.) 471; *Lancaster v. McBryde*, 27 N. C. (5 Ired. L.) 421.

And the same was said to be the rule in *Hyman v. Gaskins*, 27 N. C. (5 Ired. L.) 267.

In *Crippen v. Dexter*, 13 Gray, 330, it was held that a decree of a probate court of another state, admitting to probate a will within its jurisdiction, is conclusive evidence, if duly authenticated, of the validity of the will upon an application to prove it in this state; even when no notice of the offer of the will for probate was given, if by the law of that state no such notice was required. In this case it was said: "But as to all those facts which are necessary to the establishment of a will, in whichever form the case is entertained, and as to the regularity of the proceedings and their conformity to the law of the state or country where they are had, the judgment itself must be held conclusive; it is required by the rule of the Constitution of the United States, which requires that the acts and judicial proceedings in one state shall be respected in the courts and tribunals of others; and by the rule of the common law, giving effect to judgments of other states, where they have a peculiar jurisdiction in case of proceedings *in rem*, and have custody of the subject-matter."

The same faith and credit are given to the record that it had in the state from whence it came. *Balfour v. Chew*, 5 Mart. N. S. 517.

A decree authenticated under the act of Congress, and the proceedings are presumed to have been by competent authority and in conformity to the local laws, and the records are evidence, not only of the acts of the court, but of its jurisdiction. *House v. House*, 16 Tex. 598.

Under the Constitution and act of Congress the record of a probate of a will in another state imports absolute verity for the purpose of evidence. *Balfour v. Chew*, 5 Mart. N. S. 517; *Halle v. Hill*, 13 Mo. 612; *Lewis v. St. Louis*, 69 Mo. 595, Affirmed 3 Mo. App. 582; *Bradstreet v. Kinsella*, 76 Mo. 63; *Newman v. Willetts*, 52 Ill. 98.

V. Conclusiveness of decree of probate from another state.

a. Generally.

There is some conflict of authority as to the 48 L. R. A.

conclusive effect of a decree from another state probating a will. This is due in some cases to the construction placed on statutory provisions, and in some cases to the question of domicile, and in others to the kind of property affected.

Some cases hold that the decree from another state is not conclusive, and that the will is open to contest, as in *Kerr v. Moon*, 9 Wheat. 565, 6 L. ed. 161.

And the decree probating a will as to land is open to contest. *Williams v. Saunders*, 5 Coldw. 60.

And has no effect as to land. *M'Cormick v. Sullivan*, 10 Wheat. 102, 6 L. ed. 300; *Budd v. Brooke*, 3 Gill, 198, 43 Am. Dec. 321.

And a decree of probate from another state is not conclusive in an action of ejectment. *Darby v. Mayer*, 10 Wheat. 465, 6 L. ed. 387; *Pennel v. Weyant*, 2 Harr. (Del.) 501.

And such a decree may be contested on offering it for record. *Varner v. Bevil*, 17 Ala. 250; *Ives v. Allyn*, 12 Vt. 589; *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13 (prior to 1852); *Ex parte Povall*, 3 Leigh, 816; *Markwell v. Thorn*, 28 Wis. 548; *Re Barr*, 30 Ohio L. J. 388; *Evansville Ice & Cold Storage Co. v. Winsor*, 148 Ind. 682, 48 N. E. 592, Overruling *Harris v. Harris*, 61 Ind. 117. As to real estate, see subd. VI., *Indiana*.

And in *Roberts v. Flanagan*, 21 Neb. 503, 82 N. W. 563, it was said that such a decree may be attacked by a direct proceeding.

And a decree of another state is only prima facie evidence of the validity of the will. *Bowen v. Johnson*, 5 R. I. 112, 73 Am. Dec. 49.

And a decree from another state is of no effect if the court had no jurisdiction, or if the probate is obtained by fraud. *Allaire v. Allaire*, 37 N. J. L. 312.

A decree from another state rejecting a will for incapacity of the testator has no effect on probate here. *Rice v. Jones*, 4 Call (Va.) 89.

And a decree of probate in another state rejecting a will is not conclusive as to personal property in New York. *Re Gaines*, 84 Hun, 520, 32 N. Y. Supp. 398, Affirmed in 154 N. Y. 747, 49 N. E. 1097.

And such a decree has only the effect of a proceeding *in rem*. *Ibid*.

And a decree from another state has no effect as to personalty in Rhode Island until filed and recorded. *Olney v. Angell*, 5 R. I. 198, 73 Am. Dec. 62.

And a decree from another state has no effect as to land until allowed and admitted to record.

ciples of the common law discussed above, statutes have been passed in our state with reference to the probate of wills in the foreign state, and are as follows: Section 3916, Shannon's Code Tennessee, provides for the recording of a will in Tennessee upon presenting a copy thereof, duly authenticated, and says that when so recorded it shall have the same force and effect as if the original had been executed in this state, and proved and allowed by the courts of this state. Section 3917 provides that such will, if proved according to the laws of this state, shall be sufficient to pass land and other estate. Section 3918 provides for the authentication of the same under the act of Congress. Section 3921 provides that, when there shall be goods and chattels in this state to be administered under such sale, the executors, or some one of them, may qualify as

such, and shall give bond, with surety, as required in cases where the will was made within the limits of this state, and be subject to be proceeded against as in other cases. Section 3922 provides that any person interested in contesting the validity of such will may do so in the same manner as though it had been originally presented and probated in said court. All of these provisions are taken from the act of 1823.

This court in the case of *Williams v. Saunders*, 5 Coldw. 60, has passed upon this act of 1823, brought into these sections of the Code. Says Judge Milligan: "The question involves the consideration of the effect of a foreign probate, and especially the effect of the probate of the will in question before the 'register of wills' in the state of Pennsylvania. As a general rule of law, the judgment of a probate court allowing proof of a will, and

Apperson v. Bolton, 20 Ark. 418; *Pott v. Pennington*, 16 Minn. 509, Gil. 460.

Such a decree has no effect until allowed and recorded. *Slayton v. Singleton*, 72 Tex. 209, 9 S. W. 876; *Walton v. Hall*, 66 Vt. 455, 29 Atl. 803.

In *Robertson v. Pickrell*, 109 U. S. 608, 27 L. ed. 1049, 3 Sup. Ct. Rep. 407, it was said that the decree of probate from another state has no greater effect than in the state where probate was allowed.

If a will probated in another state affects real and personal property, and is not executed so as to pass real property, it cannot be allowed as to personalty only. *Dublin v. Chadbourne*, 16 Mass. 433.

And a decree from another state is not extra-territorial. *Thrasher v. Ballard*, 33 W. Va. 285, 10 S. E. 411.

As to whether such a decree can be set aside is not decided. *Loring v. Oakey*, 98 Mass. 267.

As to whether a foreign probate is effective where the will is not in accord with the laws of this state, is not decided. *Harrison v. Weatherby*, 180 Ill. 418, 54 N. E. 237.

The probate of a will in the state of Pennsylvania gave it no validity whatever in respect to lands in Virginia or Ohio, where the will was not probated in such states, as it is an acknowledged principle of law that the title and disposition of real property are exclusively settled by the laws of the country where it is situated. *McCormick v. Sullivant*, 10 Wheat. 192, 6 L. ed. 300.

And in regard to wills of land in Maryland, courts of that state are only authorized to take probate, and if title to land is claimed under such a will the validity of the will must be proved by other evidence than a mere exemplified copy of its probate in the state of Virginia. *Budd v. Brooke*, 3 Gill, 198, 43 Am. Dec. 321.

The Maryland rule controls in the District of Columbia. *Robertson v. Pickrell*, 109 U. S. 608, 27 L. ed. 1049, 3 Sup. Ct. Rep. 407.

Maryland act 1798, chap. 2, art. 3, providing that an attested copy of a will recorded in any office authorized to record the same shall be admitted in evidence in any court of law or equity, provided that the execution of the original will shall be subject to be contested until a probate has been had according to this act.—does not extend to a will of lands so as to make the probate conclusive evidence in an action of ejectment, in Tennessee. *Darby v. Mayer*, 10 Wheat. 465, 6 L. ed. 367.

The testamentary disposition of immovable property must conform to the law of the place 48 L. R. A.

where the property is situated, both as respects the power and capacity of the testator, and the forms and solemnities required to give the will effect. *Varner v. Bevil*, 17 Ala. 286. (The statute which allowed this contest of probate from another state was omitted from the Code in 1852.)

Under Va. Rev. Code, chap. 104, § 16, p. 378, providing that authenticated copies of wills proved according to the laws of any of the United States, and relative to any estate within this commonwealth, may be offered for probate in the general court, and "the proof to be made by the witnesses shall be conformed to the nature of the case. But such will shall be liable to be contested and controverted in the same manner as the original might have been,"—if the authenticated copy shows that the will has been so proved in another state as that, if proved in like manner by witnesses here, it could only be admitted as a will of personalty. It will be so admitted here; but if the evidence taken in the foreign court be such that if taken in this court it would be sufficient to establish it as a will of lands, it will be admitted to probate here also as a will of lands. *Ex parte Poval*, 3 Leigh, 816.

And in proceedings to admit to record authenticated copies of a foreign probate it is competent for the court to admit persons to appear in such proceedings to take adverse steps. *Re Barr*, 30 Ohio L. J. 386. In this case the court said: "The circuit court, in passing upon a similar application of this same will, expressed the opinion that the offer for record is an *ex parte* proceeding only."

Where a foreign will devising land in Indiana is admitted to probate on authentication of the probate from another state, any person interested in the estate may contest the same within the time prescribed under Burns's (Ind.) Rev. Stat. 1897, § 2770, providing that when a foreign will has been admitted to probate, or may be offered for record, any person interested in the estate may contest such will within the time, in the manner, and for any cause prescribed by laws of Indiana in cases of domestic wills. (*Harris v. Harris*, 61 Ind. 117, so far as it refers to realty, was overruled.) *Evansville Ice & Cold Storage Co. v. Winsor*, 148 Ind. 682, 48 N. E. 592.

Where a will probated in Michigan was probated upon a certified copy in Nebraska, and subsequently a party claimed that the will was not legally probated, and asked that an administration with the will annexed be granted to W., and claimed that there had been no evidence of

admitting it to probate, is in the nature of a proceeding *in rem*—that is, an adjudication pronounced . . . upon the status of a particular subject-matter by a tribunal having competent authority for that purpose, and therefore binding and conclusive upon the rights of all persons interested in the property to be administered, though they are not named as parties." Redf. Wills, pt. 2, pp. 55, 56, and numerous authorities cited: *Crippen v. Dexter*, 13 Gray, 330; 2 Smith, Lead. Cas. 490; *Patton v. Allison*, 7 Humph. 320. And again says: "Now, what is the effect of the judgment of probate in the state of Pennsylvania, when certified according to act of Congress, in this state? Under our statutes, is it to be disregarded, and open in the courts of Tennessee to reprobate and contestation? We think clearly not. It is established be-

yond all controversy, both in this country and in England, that, the jurisdiction of probate courts being exclusive in regard to all matters pertaining to the settlement of estates of deceased persons, the decrees of such courts upon the probate of wills and issuing letters testamentary, as well as of administration, are absolutely unimpeachable and conclusive in all other courts, both in law and equity. 'And such decrees, says Mr. Redfield on Wills, part 2, p. 47, 'cannot be impeached, even by showing fraud, except by a petition to the court rendering the decree, who may annul or modify the same.' " The conclusion of the learned judge, after a review of this whole question, is that, as to movable or personal property, the probate of a will in another state, duly certified to in this state under act of Congress, is conclusive. This conclusion is evidently arrived

the execution of the will or of the testamentary capacity of the deceased, the court said: "If this was a direct proceeding to set aside the probate of the will, and all the evidence upon which such probate was made was before the court, we might hold that the proof was insufficient: in this collateral proceeding, however, we cannot so hold. Jurisdiction being established, all presumptions are in favor of the judgment of the probate court." *Roberts v. Flanagan*, 21 Neb. 503, 32 N. W. 563.

The surrogate, in admitting a foreign will probated in another state to be recorded, acts judicially. He is to assign time and place for hearing, and to give notice. "He is not required to admit the will to record and issue letters thereon, if the foreign probate shall be duly exemplified. He has a judicial discretion to refuse the probate, if sufficient cause appear to the contrary. If it shall appear that the court in which the foreign probate was obtained had no jurisdiction, or that the probate was obtained by fraud, or that it has been reversed on appeal, or that an appeal is pending, or if any other legal grounds of objection are made to appear which in his judgment are good cause for withholding the probate, he may do so," under *Nix. (N. J.) Dig. 1033 (1846)*, authorizing an exemplification of probate of a will in another state to be admitted to record. *Allaire v. Allaire*, 37 N. J. L. 312.

Where a holographic will made in Louisiana was refused probate there as false, fraudulent, and forged, and the decree there affirmed by the supreme court, it was held that the rejected will, not having been executed according to the laws of New York, could be proved there only as a will of personal property. As to whether the decree of the Louisiana court is conclusive against a party to such decree, it was held that the decree established the fact that the rejected instrument was not the will of the testatrix so far as administration in Louisiana is concerned; "but we doubt whether it had any greater efficacy than this. Apart from any statute, all administrations of estates in different countries are independent so far as the matter of strict right of jurisdiction is concerned: it is only as a matter of comity that administration in one jurisdiction respects those in other jurisdictions." *Re Gaines*, 84 Hun, 520, 32 N. Y. Supp. 393. Affirmed in 154 N. Y. 747, 49 N. E. 1007. In this case the court said that it is questionable whether the courts of Louisiana have any further jurisdiction than to make a decree binding assets within that state; and while the judgment itself cannot be impeached, it does

not follow that it establishes conclusively between the parties the facts and grounds on which it proceeds, as would be the case ordinarily with domestic judgments.

The probate of a will in another state is only prima facie evidence of its validity, on an application to a probate court in Rhode Island to allow a copy of the same to be filed and recorded. *Bowen v. Johnson*, 5 R. I. 112, 73 Am. Dec. 49. It was further held that U. S. Const. art. 4, § 1, does not extend the operation of such a decree to property which was in this state at the time of the death of the testator.

In the above case it was said that R. I. Rev. Stat. chap. 153, §§ 5-10 (see *infra*), did not proceed upon the supposition that a foreign probate, or the probate of a will in another state, which are placed upon the same footing, is conclusive as to the validity of the will here as a will either of real or personal estate, but, on the contrary, supposes that neither is of any force to operate upon property here except so far as the statute accords it to them, and therefore the statute makes extraterritorial probate prima facie evidence only of the due execution of the extraterritorial will when proper proceedings are instituted here for its allowance and record, leaving it for those who, upon notice issued, appear to object to the will, to show cause, if any they have, against the filing and recording of the same.

A decree of probate in another state is a decree *in rem*, and necessarily in great part upon constructive notice, and whatever other operation is allowed to it is a mere matter of comity, and the legislation of nearly all the states proceeds upon the supposition that such is the limited operation of the probate of a will in another state, and provides some mode by which conclusive operation may be given to such a will within the state, full notice being given to all persons interested. In order that they may appear and contest the validity of the same. United States Const. art. 4, § 1, does not extend the operation of the probate of a will as a judicial act of a state beyond its own territory. *Olney v. Angell*, 5 R. I. 198, 73 Am. Dec. 62. In this case the court said: Our conclusion is that we cannot give effect to the Wisconsin probate of the will as evidence of its validity in order to allow the will to operate upon personal property in Rhode Island before it is filed and recorded in the proper probate court, in pursuance to R. I. Rev. Stat. chap. 153, §§ 5-10, providing that when a copy of a will which has been proved in any of the United States shall be directed to be filed and recorded in the pro-

at by considering what the law was before this statute, and then determining that the statute did not, in terms, so clearly change the common law as to establish a new rule as to movables.

Independent of this statute, and independent of the "full faith and credit" requirements of the Federal Constitution, the common-law rule is, as we have shown, *supra*, that movables or personal property is governed by the *lex domicilii*; that proceedings of probate are proceedings *in rem*, and bind every man interested, whether a party or not. These two propositions have been approved by this court in the cases of *Pinson v. Ivey*, 1 Yerg. 349, and *Fry v. Taylor*, 1 Head, 595, cited *supra*. And that the comity of states and sound public policy require that these rules of common law should be applied to the probate proceedings of other

states, is approved in this case of *Williams v. Saunders*, 5 Coldw. 60. This case has been the law of this court for many years, and, although not strictly a rule of property, having force only as to personalty, we think it should be now adhered to. Until some step is taken to set aside the probate made at the domicile of the testator, it is, as we have shown above, an adjudication binding as to this property within its jurisdiction.

It is contended upon the part of petitioners in this case, however, that inasmuch as the question, independent of the Federal Constitution, of what faith shall be given to the judicial proceedings of another state, is one of comity, and that inasmuch as, under the laws of Mississippi, no faith and credit is given in that state to the probate of a will in a foreign state, therefore this court should, under the same rule, give no faith or

probate court in this state, it shall then be of the same force and effect as filing an original will proved in said court; but nothing shall make valid a will that is not executed according to the law of this state.

In an action by an executrix on a will probated in another state to recover for trespass for cutting timber in this state, it was held that if the will purported to devise real estate it could not affect the land until it was proved and allowed in this state, and the executor had no standing in the court. *Pott v. Pennington*, 16 Minn. 500, Gil. 460.

The foreign probate of a will gives no validity to such will until certified to and registered in some county within the state under Tex. act March 23, 1887, § 1, providing that when any will disposing of land in this state has been duly probated according to the laws of any of the United States or territories, a copy thereof and its probate authenticated may be filed and recorded in the register of deeds; and § 3, providing that every such will and its probate which shall be delivered to be recorded shall take effect and be valid as a deed of conveyance. *Slayton v. Singleton*, 72 Tex. 200, 9 S. W. 876.

A will probated in another state directed the making of an allotment and division of the property and its conveyance to the devisees, and this was done before the probate of the will in Texas, where the land was situated. It was held that, although the will could not be used as evidence in the courts of this state until probated here, yet that such conveyance was valid, since the devisees took by force of the devise of the will, and not through the conveyance of title. *Welder v. McComb*, 10 Tex. Civ. App. 85, 30 S. W. 822.

Where the testator died domiciled in Vermont, leaving a will made when he was domiciled in Illinois, and owned real estate and notes there, and the will was duly probated in Illinois but not in Vermont, it was held that full faith and credit are given to the probate in Illinois, when it is permitted to make the will effective to pass property having its situs there; but *Vt. Rev. Laws*, § 2049, providing that no will shall pass either real or personal estate unless proved and allowed in the probate court or on appeal in the county or supreme court, refers to property in Vermont, and, not having been proved and allowed in Vermont, cannot pass property in such state. *Walton v. Hall*, 66 Vt. 455, 29 Atl. 803.

In *Kerr v. Moon*, 9 Wheat. 565, 6 L. ed. 161, it was said that under Ohio act January 25, 1816, providing that authenticated copies of 48 L. R. A.

wills proved according to the laws of any state or territory relating to any estate within this state are allowed to be proved in the court of the county where such estate shall be, and when so proved and admitted to record are declared to be good and valid as wills made in that state, but subject to be contested as the original might have been, if a copy of a will probated in Kentucky was offered for probate in Ohio it might have been contested, and the sentence of the court of probate might have been not to admit it in evidence.

And a will probated in Virginia must be deemed conclusive so far as that state is concerned, and the will held sufficient to pass all property which can be there transferred by a valid instrument of that kind; but such probate has no effect by the laws of Maryland, which govern the District of Columbia, in regard to real estate, and the probate is not evidence of its execution, but that must be shown by the production of the instrument itself and proof by the subscribing witnesses, or, if they be not living, by proof of their handwriting. *Robertson v. Pickrell*, 109 U. S. 608, 27 L. ed. 1049, 3 Sup. Ct. Rep. 407. (See also *Darby v. Mayer*, 10 Wheat. 463, 6 L. ed. 307.)

In *Robertson v. Pickrell*, 109 U. S. 608, 27 L. ed. 1049, 3 Sup. Ct. Rep. 407, it was said: "Its probate must therefore be deemed conclusive so far as that state is concerned, and the will held sufficient to pass all property which can be there transferred by a valid instrument of that kind. But no greater effect can be given out of Virginia to the proceedings in the Hustings court. The probate establishes nothing beyond the validity of the will there. It does not take the place of provisions necessary to its validity as a will of real property in other states if they are wanting. Its validity as such will in other states depends on its execution in conformity with their laws; and if probate there be also required, such probate must be had before it can be received as evidence."

In *Dubin v. Chadbourne*, 16 Mass. 433, it was said that "if a will probated in another state is not attested and subscribed in the manner provided by our laws, objection may be made in the probate court of Massachusetts, and will be sufficient to prevent the filing and recording of the will, under the Massachusetts statute, providing that nothing in this act shall be construed to make valid any will or codicil that is not attested and subscribed in the manner the laws of this commonwealth direct."

In *Thrasher v. Ballard*, 33 W. Va. 285, 10 S. E. 411, it was said that *W. Va. Code*, chap. 77,

credit to its judicial proceedings. This suggestion we do not think should weigh in the construction of our own state statutes, as we think that the statutes of each state should be considered with reference to its own internal polity, rather than a *lex talionis* to the statute of other states. *Mahorner v. Hooe*, 9 Smedes & M. 247.

The remaining question, then, to be determined, is, What is the character of the property that is in controversy under this will? The amended petition, evidently filed by the petitioners to avoid the effect of this case of *Williams v. Saunders*, states that J. S. Hall, and the husband of said Ferreba A. Hall, at the time of his death, was the owner of a mortgage on real estate situated in Shelby county, Tennessee, and that, by will executed according to the laws of Mississippi and Tennessee, the said J. S. Hall devised

said mortgage, and his title to the said property, in the said county of Shelby and state of Tennessee, to his wife, the said Ferreba A. Hall. They further state that, by her will herein filed and recorded, the said Ferreba A. Hall undertook to dispose of the said property and legal title to said real estate. The said mortgages were made and executed by D. O. Branch, and his wife, Mary Branch, and are recorded in the register's office, Shelby county, Tennessee. It will be noticed that nothing is said in this petition as to the indebtedness these mortgages secure. By reference, however, to the will of the said Ferreba A. Hall, which is a part of the record in this case and the will under contest, it will be noticed that she sets out in detail the debts which are secured by these mortgages. In item 8 of this will, there is bequeathed to Mary Branch, the wife of D. O. Branch,

§ 23, makes provision for the probate of wills made elsewhere, relative to estates here, by production in this state of a copy of the will and foreign probate, and provides that the same shall be admitted as a will of personal estate only, or real estate also, according to what is shown by the probate abroad. "If the foreign probate were conclusive and effective without this statute, why this statute?" The court says such acts "were enacted because of the general principle that judicial proceedings in one state have no extraterritorial force as to estate beyond the state which is governed by the laws of the place of its situation."

In *Harrison v. Weatherby*, 180 Ill. 418, 54 N. E. 237, as to whether it was intended to confer any validity upon a foreign will that would be invalid under our laws by *Starr & C.* (Ill.) Stat. 2d ed. 4040, § 9, providing that wills made and proved out of this state are only good and available in law in like manner as wills made and executed in this state when authenticated according to the laws of the United States, was not decided.

The decree is only conclusive as to property which can be transferred at the place of probate. *Robertson v. Pickrell*, 109 U. S. 608, 27 L. ed. 1049, 3 Sup. Ct. Rep. 407.

But in *Ward v. Oates*, 43 Ala. 515, it was held that the decree has the same effect as the state of probate gives to decrees from this state.

In *Brock v. Frank*, 51 Ala. 85, the decree from another state was held conclusive in the absence of statute. (The statute was changed since the decision of *Varner v. Bevil*, 17 Ala. 288, *contra*.)

And is conclusive as to personality if probated at the domicil. *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13.

And is conclusive as to validity of will. (Stat.) *Babcock v. Collins*, 60 Minn. 73, 61 N. W. 1020.

And a will of personal property cannot be contested as to incapacity or undue influence on an application to record the same, although the domicil was in Vermont, but assets were in Indiana where probated. (Rev. Laws, § 2057.) *Ives v. Salisbury*, 56 Vt. 565.

And the decree is conclusive if duly authenticated. *Crippen v. Dexter*, 13 Gray, 330.

And a decree of another state in a proceeding contradictorily taken between the executor and the next of kin, establishing an instrument as a last will, must be taken as fixed by the judgment. *Gaines's Succession*, 45 La. Ann. 1237, 14 So. 233.

And the decree from another state will be
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held valid as to property in the other state. *Wells v. Wells*, 35 Miss. 638; *Montgomery v. Millikin*, 5 Smedes & M. 151, 43 Am. Dec. 507; *Bate v. Incisa*, 59 Miss. 513.

In *Re Hudson*, 5 Redf. 333, and *Sturdivant v. Neill*, 27 Miss. 157, it was said that the decree probating a will in another state will be held valid if the court had jurisdiction.

And the decree will be held valid if the will is executed and proved according to Ohio laws. *Carpenter v. Denoon*, 29 Ohio St. 379.

And the decree is valid if the will is made according to the laws of the other state, under N. H. Laws, chap. 194, § 12; *Kennard v. Kennard*, 63 N. H. 303.

And the decree is conclusive as to executor's right to sue. (Full faith, etc.) *Stephens v. Smart*, 4 N. C. (1 Car. Law Repos.) 471; *Lancaster v. McBryde*, 27 N. C. (5 Ired. L.) 421.

In *Corrigan v. Jones*, 14 Colo. 314, 23 Pac. 913, and *Hyman v. Gaskins*, 27 N. C. (5 Ired. L.) 267, the same was said to be the rule.

If the decree from another state shows that the will was duly proved at probating, it must be admitted to probate. *State v. Iberville* Probate Ct. Judge, 8 Mart. N. S. 586.

And the decree must be admitted for record if certified according to the act of Congress. *Lytle's Succession*, 1 Rob. (La.) 268.

So, when the decree from another state is offered for record the execution of the will need not be proved. *Paschal v. Acklin*, 27 Tex. 192.

An exemplified copy must be recorded, or else the will must be probated here. *Keith v. Keith*, 97 Mo. 224, 10 S. W. 597; *Graves v. Ewart*, 99 Mo. 13, 11 S. W. 971; *Van Syckel v. Beam*, 110 Mo. 589, 10 S. W. 946.

In *Hall v. Ashby*, 9 Ohio 96, 34 Am. Dec. 424, it was said that the purpose of recording a copy from foreign probate is to allow a copy to be used in evidence.

b. After filing for record.

After the decree from another state is allowed for record it is conclusive in regard to real estate in a collateral proceeding. *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13.

And after allowance for record the decree cannot be collaterally attacked. *Dickey v. Vann*, 81 Ala. 425, 8 So. 195; *Townsend v. Downer*, 32 Vt. 183; *Acklin v. Paschal*, 48 Tex. 147; *Calloway v. Cooley*, 50 Kan. 743, 32 Pac. 372; *Stanley v. Morse*, 26 Iowa, 454; *Macklin's Estate*, 14 Phila. 323; *Lovett v. Mathews*, 24 Pa. 330; *Ward v. Hearne*, 44 N. C. (Busbee, L.) 184.

"three thousand dollars, to be credited upon the two notes which I hold, executed by said D. O. Branch and his wife, Mary Branch, for twenty-five hundred dollars each, one of which is dated January 12, 1892, and due five years after date, and bears interest from date at 6 per cent per annum; and the other is dated January 11, 1892, and due four years after date, and bears interest from date at the rate of 6 per cent per annum." It is evident, therefore, that the property in controversy in this cause is these two notes, amounting to \$5,000, secured by mortgage upon the property of the husband, D. O. Branch. It is well settled in Tennessee that the mortgage is but an incident of the debt itself, however evidenced. It is equally well settled that promissory notes, although secured by mortgage, are personal property, and go to the administrator for the payment

of debts, or, if no debts, then for distribution to the distributees of the deceased. This being so, then this case is brought clearly under the decision of *Williams v. Saunders*, 5 Coldw. 60, and the principles discussed therein. *McGan v. Marshall*, 7 Humph. 127; *Ferguson v. Coward*, 12 Heisk. 572; *Vaughn v. Vaughn*, 100 Tenn. 284, 45 S. W. 677; *Lecoh v. Hillsman*, 8 Lea, 747; *Clark v. Jones*, 93 Tenn. 641, 27 S. W. 1009.

The decree of the court below is affirmed, and the petition is dismissed, with costs.

Wilkes, J., dissenting:

With all due deference for the very able opinion of the majority, I am unable to agree with their holding, and with the construction given to our statutes, and the effect accorded by that opinion to the foreign probate of a will. It appears that this probate

And the decree is conclusive if probated here. *Roberts v. Flanagan*, 21 Neb. 503, 32 N. W. 563; *Applegate v. Smith*, 31 Mo. 166; *Parker v. Parker*, 11 Cush. 519; *Dublin v. Chadbourn*, 16 Mass. 433.

And, when recorded, is conclusive as to due execution of the will. *Vance v. Anderson*, 39 Iowa, 426.

And the decree of probate from another state is valid if admitted to probate in this state. *Crusoe v. Butler*, 36 Miss. 150.

If the decree of another state probating a will is admitted to record it cannot be shown that foreign probate was not in accordance with the law of that state. *Jones v. Hunter*, 6 Rob. (La.) 235.

And if the decree from another state is recorded, it has the same effect as a domestic will if it is made according to the laws of the other state, although not made according to this. (Stat.) *Lyon v. Ogden*, 85 Me. 374, 27 Atl. 258.

After allowance and record of a decree from another state, the decree probating a will has the same effect as if probated in this state. *Simms v. Hodges*, 65 Miss. 211, 3 So. 457; *Re Southard*, 48 Minn. 37, 50 N. W. 932; *Putnam v. Pitney*, 45 Minn. 242, 11 L. R. A. 41, 47 N. W. 790; *Bromley v. Miller*, 2 Thomp. & C. 575.

If the decree is allowed and recorded, it has the same effect as a domestic will. *Hayes v. Lienlokken*, 48 Wis. 509, 4 N. W. 584; *Markwell v. Thorn*, 28 Wis. 548.

But if allowed for record here it has no more effect than a domestic will. *Frazier v. Boggs*, 37 Fla. 307, 20 So. 245.

In *Whalen v. Nisbet*, 95 Ky. 464, 26 S. W. 188, it was held that a decree from another state allowed for record in this state is conclusive as to real estate, except as to the jurisdiction of the court, until superseded, reversed, or annulled.

And a decree allowed for record for realty and personality is conclusive until superseded or reversed. *Dupoyster v. Gaganl*, 84 Ky. 403, 1 S. W. 652.

But if the decree is admitted to record it has no effect as to land in Kentucky, if the will is revoked by the subsequent birth of a child. *Sneed v. Ewing*, 5 J. J. Marsh. 460, 22 Am. Dec. 41.

And a decree allowed may be set aside by direct proceedings if not valid as to real estate. *Lynch v. Miller*, 54 Iowa, 516, 6 N. W. 740.

And in *Otto v. Doty*, 61 Iowa, 23, 15 N. W. 578, the same was said to be the rule.

And a decree from another state probating a 48 L. R. A.

will admitted to probate here may be contested. (Stat.) *Evansville Ice & Cold Storage Co. v. Winsor*, 148 Ind. 682, 48 N. E. 592, overruling *Harris v. Harris*, 61 Ind. 117, as to real estate.

And after probate in this state, whether the decree is conclusive in ejectment as to capacity or undue influence, was not determined. *Otto v. Doty*, 61 Iowa, 23, 15 N. W. 578.

VI. Classification by states.

Federal cases.

The probate of a will of one state does not establish the validity of a will as a will devising real estate in another state, unless the laws of the latter state permit it. But the validity of the will, or of the probate, may be determined by the laws of the state in which the property is situated. *Robertson v. Pickrell*, 109 U. S. 608, 27 L. ed. 1049, 8 Sup. Ct. Rep. 407.

In the above case it was said that the case of *McCormick v. Sullivant*, 10 Wheat. 192, 6 L. ed. 300 (as to land in Ohio), shows that the probate of a will of real property in one state is of no force in establishing the validity of the will in another state. "That must be determined by the law of the state where the property is situated." It was further said that the case of *Darby v. Mayer*, 10 Wheat. 465, 6 L. ed. 367, shows that the proof of a devise of land in ejectment in Maryland must be made by the production of the will in court and evidence of its execution by the subscribing witness, or, if the will be lost or cannot be proved, proof must be made of secondary evidence of its execution and contents.

Where a will was executed in South Carolina, conferring the power on the donee to be exercised by her last will and testament duly executed, and the donee died in North Carolina and made a will probated there, and an exemplified copy was recorded in South Carolina under the statute, and it was contended that the probate in North Carolina was conclusive as to this being the last will and testament duly executed, and that full force and credit must be given this in South Carolina, it was conceded that the probate in North Carolina established that the will was her last will and testament duly executed; but in neither of the states would a will as such dispose of property that did not belong to the testatrix. *Blount v. Walker*, 134 U. S. 607, 33 L. ed. 1036, 10 Sup. Ct. Rep. 606.

Alabama.

The probate of a will, whether of personality or realty, or of personality and realty, when the

in Mississippi was in common form. I am of opinion that, while the probate of a will in common form made in Mississippi is binding and conclusive until set aside (as it is in Tennessee), still such probate in common form in Mississippi, as well as in any other foreign state in which the practice prevails, leaves the will subject to contest in Tennessee, under § 3922, Shannon's Code, to the same extent and in the same manner as if the probate in common form had been made in Tennessee originally. To hold differently would be to give to a probate in common form in another state, upon its mere certification and registration here, the force and effect of a probate in solemn form, which is a greater effect than is accorded it at home. To use the present will probated in common form in Mississippi as an illustration: By the statutes and decisions of that state, pro-

bate in common form is held to be merely an incipient step to give the court jurisdiction of the matter, and is not conclusive upon the parties interested, but may be opened and set aside in the courts of that state upon sufficient legal grounds. *Hamberlin v. Terry*, Smedes & M. Ch. 589; *Cowden v. Dobyns*, 5 Smedes & M. 82; *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147. And such proceeding in common form cannot be pleaded as *res judicata* in a direct proceeding to determine the validity of the will (*Martin v. Perkins*, 56 Miss. 204); and a probate in common form may be set aside upon petition filed, and sufficient legal grounds shown, without any issue of *devisavit vel non* being made up and tried by a jury (*Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147). This being the full force, effect, and extent of a probate in common form in the state of Mississippi, it

court decreeing it has jurisdiction, is a decree or a judgment *in rem* having all the force and effect peculiar to such a judgment or decree. The decree is not only evidence, but it is conclusive and final, and no other tribunal will re-examine or permit to be drawn in litigation the validity or invalidity of the will, and, in the absence of statutory provisions in regulation of the subject, the sentence of probate in the proper tribunal of the domicile of the testator is conclusive everywhere as to the capacity of the testator, the due execution and validity of the will, and no question can arise of ancillary probate except as to the validity and authentication of the original probate. *Brock v. Frank*, 51 Ala. 85.

And the same is held in regard to personality. *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13.

In *Brock v. Frank*, 51 Ala. 85, it was said: "The statute of 1806 (Clay's Dig. 598, § 12) provided for the probate in this state of authenticated copies of wills, proved according to the laws of any of the United States touching or concerning estates within this state, but declared, 'such will shall be liable to be contested and controverted in the same manner as the original might have been.' In *Varner v. Bevil*, 17 Ala. 286, this statute was construed as enlarging the jurisdiction of our courts of probate, in so far as it provided for a contestation here of the will of a testator having his domicile abroad. The Code, generally re-enacting substantially pre-existing statutes, and its framers and the legislature adopting it having knowledge of the construction these statutes had received from the courts, omitted all provisions for the contestation here of a foreign will, though making express provision for its probate. The just conclusion is, that it was not intended to confer on our courts of probate jurisdiction of such a controversy."

The same force and effect are to be given to a transcript of a foreign probate of a will as would be given to the original proceeding in the state of Texas, where a will has been admitted to probate and record out of the state, but within the United States, and all that is necessary is the production here of said will, or a copy of the same, and the probate thereof certified by the clerk of the court in which the will has been proved, and the certificate of the judge of such court that the attestation is genuine and by the proper officer. *Ward v. Oates*, 43 Ala. 515.

The probate of a will in Alabama on an authentication of a probate in Tennessee cannot 48 L. R. A.

be collaterally attacked, although the judgment of the probate court of Alabama may have been erroneous for lack of proof in failing to show that each of the three witnesses attested the instrument in the presence of the testator, and the proof of execution and the probate here were made without giving notice to the widow or next of kin, as this was not required by statute. *Dickey v. Vann*, 81 Ala. 425, 8 So. 193.

Arkansas.

Where a will was probated in Tennessee, and letters testamentary granted, the will was authority to sell lands, and not the letters. They were merely evidence of his authority to execute the power conferred upon him by the will; but the executor could not sell lands in Arkansas under the power conferred upon him by the will, until the will was properly admitted to probate under the Arkansas law. *Apperson v. Bolton*, 29 Ark. 418.

Colorado.

In *Corrigan v. Jones*, 14 Colo. 314, 23 Pac. 913, it was said that the probate of a will in Missouri, and the record thereof, can only be questioned by some appellate or direct proceeding, and, having been duly admitted to probate in Missouri, should, on presentation of duly certified record, have been admitted to probate and record in this state according to Colo. Gen. Stat. chap. 115.

Connecticut.

Under Connecticut statutes wills executed out of this state have all the force and effect of domestic wills. *Irwin's Appeal*, 38 Conn. 128.

Delaware.

The validity of a will of land situated in Delaware, made by a nonresident and not proved here, may be tried in ejectment if the will be given in evidence by one claiming under it in an action by the heir, and where such will of land in Delaware has been proved abroad, the foreign probate is not conclusive here, but may be controverted. *Pennel v. Weyant*, 2 Harr. (Del.) 501.

And a nuncupative will probated in another state has no effect until probate is made in this state. *St. James's Church v. Walker*, 1 Del. Ch. 284.

Florida.

Under Fla. act November 20, 1828, § 59, providing for admitting to record probate of wills granted in any other states providing they shall have conformed to the laws of Florida in the form and manner of probate, a will in another state, executed by an insufficient number of witnesses, is of no effect in Florida. *Crolley v. Clark*, 20 Fla. 849.

would be an anomaly if the mere certification of such probate to this state, and registration here, should give the probate any greater weight or greater sanctity or more binding force than it possessed in the jurisdiction where the proceeding was had. The Constitution of the United States provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and leaves it to Congress to declare the effect thereof. The act of Congress provides that judicial proceedings, properly authenticated, shall have such faith and credit given them in every court in the United States as they have, by law or usage, in the courts of the state whence the said records are or shall be taken. See Shannon's Code, p. 112. Nor can the proceedings be given any greater weight or effect because of any spirit of com-

ity supposed to exist towards our sister state. The statute of Mississippi provides that personal property situated in that state shall be governed and controlled in the distribution thereof by the laws of that state, without regard to the domicile of the owner, and without regard to the domicile of the persons entitled to receive the same. Miss. Code 1892, § 1542; Miss. Code 1871, § 1950; *Carroll v. McPike*, 53 Miss. 569. And by § 1829 of that Code it is provided that a will executed and probated in another state, and filed for record in Mississippi, is there subject to contest in the same manner as if it had originally been probated in that state. It will be observed that these statutes reserve rights, not only in favor of citizens, but extend them also to all persons, whether the heirs or persons entitled to distribution be

And, if recorded, has no more effect than a domestic will. *Frazier v. Boggs*, 37 Fla. 307, 20 So. 245.

So, under McLennan's (Fla.) Dig. p. 987, § 8, providing that probate of wills granted in any of the states relating to property in this state shall be admitted to record, and shall have the same force and effect as wills executed in this state, provided they conform to the laws of this state in form and manner of execution, the statute does not give any effect to a will probated in Connecticut passing after-acquired property, although it may have that effect in Connecticut, as the probate comes here if executed as required by our laws, with the same effectiveness as though it had been executed in this state. *Ibid.*

Georgia.

If a will undertakes to devise lands in another state, the law of the state where the lands are located must be strictly followed, or the will does not affect realty. *Knight v. Wheedon*, 104 Ga. 300, 30 S. E. 794.

And a will admitted to probate in Tennessee, attested by only two witnesses, cannot be probated in Georgia so as to affect real property. *Key v. Harian*, 52 Ga. 476. In this case it was said that the United States Constitution did not make judgments of other states domestic judgments to all intents and purposes, but only gave a general credit to them as evidence, and the law of the place where land is situated controls in the matter of forms and solemnities requisite to give effect to a will designed to operate on the same.

In the above case the case of *Doe ex dem. Dooly v. Roe*, 31 Ga. 503, holding that an exemplified copy of a will probated in Maryland may be a good monument of title to real estate in Georgia though not probated or recorded in this state, was distinguished, as in that case no question arose as to the attestation by the number of witnesses.

As to realty, the law of the place where the property is situated governs, and a will of personal or movable property, regularly made according to the forms and solemnities required by the law of the testator's domicile, is sufficient to pass his personal or movable property in every other country in which it is situated. *Lattine v. Clements*, 3 Ga. 426.

So, where a will was probated in Kentucky, a certified copy of the record of probate should be admitted to probate in Georgia as affecting personally, having been executed according to the law of Kentucky. *Knight v. Wheedon*, 104 Ga. 300, 30 S. E. 794.

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And where the probate of a will was resisted in Alabama by all the heirs upon the ground that the court had no jurisdiction as the testatrix was domiciled in Georgia at the time of her death, a judgment admitting the will to probate concludes the same parties and also an administrator appointed in Georgia, and the administration in Georgia should be set aside under U. S. Const. art. 4, § 4, and act of Congress May 19, 1790, providing full faith and credit, etc. *Thomas v. Morrisett*, 76 Ga. 384.

Illinois.

Where a will was offered in evidence, and it was objected that there was not sufficient evidence of its due execution and proof in the state of New York, it was held that the will was sufficiently proved, as the certificate of probate in New York conformed to the statute of Illinois, and it sufficiently appeared that the will was duly executed and proved agreeably to the laws of New York. *Shephard v. Carriel*, 19 Ill. 313.

Where the certificate shows that the will was proved and admitted to record in Louisiana in accordance with the laws of that state, this record imports absolute verity, and, being properly authenticated under act of Congress May 26, 1790, providing for full faith and credit, etc., is evidence in all the courts in Illinois, although not probated in this state. *Newman v. Willets*, 52 Ill. 98.

In *Harrison v. Weatherby*, 180 Ill. 418, 54 N. E. 237, the effect of a probate in another state was not decided.

Indiana.

Indiana act February 1, 1859, 2 Rev. Stat. 1876, p. 579, note 2, providing that in all cases of foreign wills admitted to probate, or which may be offered for record and filing in any county of this state, any person interested in the estate of the testator may contest such will as in cases of contest of domestic wills, applies only where a foreign will is offered for probate or filing; and such act does not in express terms provide for contesting a foreign will when a copy thereof, and of the probate thereof duly certified, may be offered for filing and record. *Harris v. Harris*, 61 Ind. 117. In this case it was said that the constitutionality of the act is at least questionable; but if it provided for contesting in this state a foreign will when a certified copy and the probate thereof were produced here for filing, such a provision would violate U. S. Const. art. 4, § 1, requiring full faith and credit, etc. (This case was overruled, so far as it refers to real property, in *Evans-*

in the state of Mississippi or not, as to all property within its boundaries.

Coming to the consideration of our own statutes, we find all foreign wills put upon this same footing, whether probated in common form in some probate court or before the mayor of a city or corporation; the latter evidently referring to cases where provision for probate is made before such mayor by special law applicable to such locality. Now, what is the status of such foreign will already probated in another state in common form? It is in short that, when authenticated, filed, and registered in the proper place in this state, it is also effectual, as if it had been probated in common form in this state, to pass both realty and personalty, and until that is done it has no effect as a will.

This leads us to inquire what is the effect of a will probated in common form in this

state. Unquestionably, under the authorities, such probate is a proceeding *in rem*, and binding upon all the world, unless set aside in the manner provided by statute. *Reeves v. Hager*, 101 Tenn. 712, 50 S.W.760, and the authorities there cited. So the probate in common form in another state is a proceeding *in rem*, and binding upon all the world, until set aside as provided by law. The evident purpose of our statutes is, in my opinion, to put foreign wills which have been probated in another state, and then registered here, exactly on the same footing that domestic wills probated in common form occupy; that is, each is probated by a proceeding *in rem*, and each is conclusive until set aside in the manner provided by law. The most difficult question that arises is whether the proceeding to set aside the probate in common form must be taken in the forum where

ville Ice & Cold Storage Co. v. Winsor, 148 Ind. 682, 48 N. E. 592.)
Iowa.

Where the county court of Iowa passes upon and adjudicates the sufficiency of the authentication of the probate of a foreign will, and allows the same to be recorded, such adjudication cannot be collaterally questioned, under Iowa Rev. § 2329 (1297), providing that wills shall not be carried into effect unless thus allowed; and such allowance is conclusive as to the due execution of the will unless set aside by an original or appellate proceeding. *Stanley v. Morse*, 26 Iowa, 454.

The allowance for record of a foreign will is conclusive of the due execution of such will, under Iowa Rev. § 2328, providing that wills proved and allowed in any other state shall be allowed and recorded in this state on the production of an authenticated record. *Vance v. Anderson*, 39 Iowa, 426.

An original action may be maintained to set aside the probate of a foreign will on the ground that it is invalid as an instrument of title to real estate, although it may be a valid instrument under the laws of the place where probated, under Iowa Code, § 2351, providing for admitting to probate wills probated in other states, and § 2353, providing that such probate shall be conclusive as to due execution thereof until set aside by an original or appellate proceeding. *Lynch v. Miller*, 54 Iowa, 516, 6 N.W. 740. This will was written by the testator and attested by one witness.

Where a will is probated in a foreign state by proof of one of the subscribing witnesses, the procedure will be presumed to be regular. *Otto v. Doty*, 61 Iowa, 23, 15 N.W. 578. In this case it was said that whether the foreign adjudication of a probate shall be deemed conclusive in respect to the testator's testamentary capacity, or in respect to the absence of undue influence in an action of ejectment where the foreign probate has been recognised by being probated in this state, we need not determine.

It was further said that the probate of a will coming from another state might be set aside, so far as it concerns real estate in this state, if not executed in accordance with the laws of this state, under Iowa Code, § 2353, *supra*.

Proof of probate in another state is insufficient where the certificates of the records do not show the jurisdiction of the court or the order of the court probating the will. *Re Capper*, 85 Iowa, 82, 52 N.W. 6.

Kentucky.

In regard to personalty, in the absence of evidence to the contrary, it will be presumed that the evidence before the court in the other state was sufficient, under Ky. Rev. Stat. chap. 106, § 31, providing for the probate of a will that has been proved in another state, and that on a certified copy the court shall presume, in the absence of evidence to the contrary, that the will was duly executed and probated as a will of personalty, and that if it appears that the will was proved to have been so executed as to be a valid will of lands in this state by the law thereof, such copy may be admitted to probate as a will of real estate. But as to real estate it must be shown that the evidence heard in the foreign court was such as would authorize the probating of a will under our law. It was further held that a proceeding to probate a will is not such as falls within U. S. Const. art. 6 (4), § 1, providing full faith and credit, etc., and when a foreign will is probated here, if the order of the probate shows that it was admitted as a will of personalty or of realty, it will probably be conclusive; but if the order does not show that it was probated as a will of realty, it will be presumed that it was only intended to admit it as a will of personalty. *Williams v. Jones*, 14 Bush, 418.

In *Whalen v. Nisbet*, 95 Ky. 464, 26 S.W. 188, it was said that no reason exists for holding the order of probate conclusive as to domestic wills that does not equally apply to foreign wills when admitted as wills of realty, under Ky. Gen. Stat. chap. 118, § 28, providing that the probate before a county court shall be conclusive except as to the jurisdiction of the court, and § 30, providing that the court, in admitting the will of a nonresident proved without the state, shall presume that the will was duly executed as a will of personalty in the state of the testator's domicile, and if it appears to have been executed as a will of lands, such copy shall be admitted to probate as a will of real property.

A will not recorded in this state nor proved on the trial is not evidence of title to land in this state. *Smith v. Shackelford*, 9 Dana, 452. And an *ex parte* probate of a will in Indiana is not conclusive as to real estate in Kentucky, and is revoked by the birth of a child after the execution of the will. *Sneed v. Ewing*, 5 J.J. Marsh. 460, 22 Am. Dec. 41.

So, the probate of a will in Kentucky on an authenticated copy from Illinois was set aside as a will of realty and established as a will of personalty only, where the authentication was not as required by Ky. Rev. Stat. chap. 35, p. 313, § 18, providing that faith and credit be

it was made in the foreign state, or whether such proceeding can be had in this state, in the proper court, where it is offered for registration. To my mind, our statute is plain and unambiguous that the proceeding may be had in our courts, and not necessarily in the foreign court. No other construction can be given the statute (Shannon's Code, § 3922); for it could not give power to any foreign jurisdiction, nor is this in antagonism to the effect given by the act of Congress to the foreign probate, if that act applies to such probates or to proceedings *in rem* without actual notice. I am not now speaking of a probate in solemn form, with notice, as upon an issue of *devisavit vel non* or similar proceedings, when the probate is by law made final, and not correctable, except by appeal or other proceeding in error. Such was evidently the character of the probate in Pennsylv-

vania of the will in controversy in *Williams v. Saunders*, reported in 5 Coldw. 60. It can be said, however, with much force and plausibility, that §§ 3916-3922, Shannon's Code, do not refer to wills which have been probated in another state, but only to such wills as have been there proven or authenticated, and these sections use the word "proven" instead of "probated" to distinguish between wills authenticated by witnesses and those probated in a court proceeding. It must be noted, however, that virtually all of our statutes in regard to the probate of wills use the word "proven" instead of "probated." Thus, we find the word "proven," in § 3896, Shannon's Code, relating to the probate of holographic wills; and in §§ 3898-3900, relating to nuncupative wills; and in § 3902, relating to the place of probating; and in § 3904, relating to the manner of probate in common

given to records and judicial proceedings in the courts of any other state. *Helm v. Rookesby*, 1 Met. (Ky.) 49.

When a copy of a will is admitted to probate, in the absence of evidence sufficient to authorize a probate in this state under our laws, the presumption is that the authenticated copy was admitted to probate as a will of personality only. *Dupoyster v. Gaganl*, 84 Ky. 403, 1 S. W. 652. This was on the ground that "in order to entitle an authenticated copy of such will to be admitted to probate here as a will of real estate it must appear, from the transcript of the proceedings and judgment of the foreign court of probate, not only that said will was admitted to probate in the said court, but that the evidence heard there was sufficient to authorize our courts of probate to admit such will to record, had the same been offered for probate originally in our courts of probate." The court said that such court may then admit such copy as a will of real estate, and it may be admitted to probate according to the facts appearing in the transcript as a will of personality or as a will of realty, or of both, and when the order admitting the copy to probate does so show, it will probably be conclusive until superseded or reversed.

A will probated in another state, proved by one witness, who does not prove the attestation of the other witness, and recorded in Kentucky, is of no effect as to real estate in Kentucky, under Ky. act 1842, 3 Stat. Law, 585, permitting such will to be recorded in the county where the real estate is, and giving the same effect as if it had been proved and recorded in that county, although it may be taken for granted that the will has been duly proved according to the laws of that state. *Cornellson v. Brown*, 10 B. Mon. 425.

Louisiana.

Where a certified copy of a will with the probate thereof from the county court of Tennessee is presented to the court of probate of Louisiana, and the copy of the will and probate is certified in conformity to the act of Congress May 20, 1790, prescribing the mode in which public records and judicial proceedings in a state shall be authenticated so as to take effect in another, the court of probate of Louisiana must admit the same for record. *Lytle's Succession*, 1 Rob. (La.) 268; *Lally's Succession*, 1 Rob. (La.) 269.

And where a will was made in Maryland and admitted to probate in Alabama, it should be admitted to probate in Louisiana, if the will had been proved and received by any court of

competent jurisdiction, under La. Code, § 1682, providing for the execution of testaments made in other states and foreign countries without any other form than that of registering the testament, if it be established that the testament was duly proved before a competent judge of the place where it was received. *State v. Iberville* Probate Ct. Judge, 8 Mart. N. S. 586. In this case the court said that proof of execution would be required where this sanction has not been bestowed on them.

And in a suit in Louisiana, it was held that admitting a will of personality to probate in North Carolina is a judicial proceeding, and under the act of Congress the same faith and credit it had in the state from whence it came should be given to the record. *Balfour v. Chew*, 5 Mart. N. S. 517. In this case the court said that it lies on the defendant to show that it was improperly admitted to record. This he had not done, and if he had, so long as the judgment of that court by which it was ordered to be recorded stood unreversed, we could not refuse it effect here.

So, where a will was probated in Mississippi, and a copy of the will and of the record and probate thereof were admitted to record in the probate court of Louisiana, it must be taken for granted that the court of probate of Mississippi acted in conformity with the laws of that state, and that its judgment was rendered after due and legal proceedings. *Jones v. Hunter*, 6 Rob. (La.) 235.

And where the surrogate of Kings county, New York, rendered a decree in proceedings contradictorily taken between the executor of the will and next of kin, holding that the instrument purporting to be a last will and testament was purely and legally such, that particular fact must be taken in Louisiana as fixed by the judgment, and given effect to in Louisiana as established. *Gaines's Succession*, 45 La. Ann. 1237, 14 So. 233.

But a will should be refused probate in Louisiana where the certificate does not show in what manner the will was proved in Tennessee, nor what was the order of the court, under La. Code, art. 1682, providing that the order of execution shall be granted without any other form, if it be established that the testament has been duly proved before a competent judge of the place where it was received; otherwise the testament cannot be carried into effect without being first proved before the judge of whom the execution was demanded. *Bowles's Succession*, 3 Rob. (La.) 33. In this case the court said that the probate of a will is a judicial proceed-

form; and in § 3910, relating to manner of probating contested wills; in short, whenever the proceeding is referred to in the statutes, the term used is "proving" the will, instead of "probating" it. The decisions of our court treat the terms as synonymous, and as meaning the process of proving or probating, and not the mere authentication. I am aware of no proceeding to prove a will that is not at the same time a probate of it, except in the case of soldiers' and sailors' wills, under § 3923 of Shannon's Compilation, which provides for the authentication by acknowledgment of the testator or proof by witnesses and a subsequent probate in the place of domicile, and this is the only section where the word "probate" is used instead of "proved." This, we think, then, means that while a will may be proved, as provided in that section, still it must be afterwards prob-

bated in the domicil of the testator; and in such case the authentication is only prima facie evidence in case of contest. I do not think, therefore, that the sections of our statutes refer to wills which have been merely proven or authenticated, but to wills which have been proven in the sense of being probated. To hold differently will be to say that a will may be proven or authenticated in a foreign state, but not probated, and then, upon registration here, have all the effect of a probated will; or, in other words, that such foreign will may be made effective here, though never probated anywhere or in any jurisdiction. I do not think our statutes will bear this construction. If so, then such will need never be probated, but simply its execution proven, and, upon registration, it becomes a perfect will. It is tacitly conceded that a will of

ing, and must be authenticated according to the act of Congress.
Maine.

If a will is executed and proved according to the laws of the other state, it will be valid if recorded here, although only two witnesses attested the will, as *Me. Rev. Stat. chap. 64, § 12*, provides for proving wills executed in another state, and § 13 provides that a will probated in another state may be allowed and recorded here after notice and hearing. *Lyon v. Ogden*, 85 Me. 374, 27 Atl. 258.

Maryland.

A decree of probate from another state in regard to lands in this state is of no effect. *Dodd v. Brooke*, 8 Gill. 198, 43 Am. Dec. 321; *Larby v. Mayer*, 10 Wheat. 465, 6 L. ed. 367.

See also *Robertson v. Pickrell*, 109 U. S. 608, 27 L. ed. 1049, 3 Sup. Ct. Rep. 407, as to District of Columbia, where a transcript from Virginia was offered as conclusive proof of the validity of the will and of all matters involved in its probate, and it was held that proof of a devise in ejectment in Maryland (its law obtains in the District) must be made by the production of the will in court, and evidence of its execution by the subscribing witness.

Massachusetts.

If a will be originally made, proved, and allowed in another state according to the laws thereof, and an authenticated copy of the proceedings be allowed and recorded in the probate court of Massachusetts, it then has the same effect upon any real estate there as if the will had been originally proved and allowed in Massachusetts. *Parker v. Parker*, 11 Cush. 519.

A decree of the probate court of another state, admitting to probate a will within its jurisdiction, is conclusive evidence, if duly authenticated, of the validity of the will, upon an application to prove it in Massachusetts, even when no notice of the offer of the will for probate was given, if by the law of that state no such notice was required, under *Mass. Rev. Stat. chap. 62, §§ 17-20*, providing that a will proved in another state, with a probate thereof duly authenticated, may be presented to the probate court of this state, and after notice and hearing, if it shall appear that it ought to be allowed, it may be received in order to be recorded. *Crippen v. Dexter*, 13 Gray. 330. In this case the court said that this law gives the same force and effect to a foreign as to a domestic will, if made in conformity with the laws of the state where it was executed.

It was also said that when a copy of a will

with an authenticated copy of the probate in another state is offered for probate in this state, the probate court must decide whether the record is duly authenticated, whether the court had jurisdiction to allow the will, and whether there is any estate in his county on which said will may operate; and perhaps it may be open, on inquiry, as to actual fraud in obtaining the probate of the will; but no opinion is expressed as to that. The court further said: "But as to all those facts which are necessary to the establishment of a will in whichever form the case is entertained, and as to the regularity of the proceedings and their conformity to the law of the state or country where they are had, the judgment itself must be held conclusive; it is required by the rule of the Constitution of the United States," and by the rule of common law.

In *Babcock v. Collins*, 60 Minn. 73, 61 N. W. 1020, it was said that the Minnesota statutes in regard to the probate of foreign wills are substantially the same as *Mass. Rev. Stat. 1836*, and that under such statute a Massachusetts court held that a foreign probate was conclusive in *Crippen v. Dexter*, 13 Gray. 332, and the court said: "It is not necessary here to decide whether or not this court would hold, as that court did in that case, that such foreign probate is conclusive, where the law of such foreign domicil required no notice of probate, and none was given."

Where a will is originally proved and allowed in New Hampshire according to the laws of such state, the filing and recording of a will in the probate court of Massachusetts in the manner prescribed by the statute is of the same force and effect as if the original had been proved and allowed here. But it was said that a will purporting to dispose of both real and personal estate, and not so attested and subscribed as to pass real estate, cannot be allowed as a testament of personal estate only. *Dublin v. Chadbourn*, 16 Mass. 433. In this case it was also said that, if a will was not attested as required by the laws of Massachusetts, objection may be made in the probate court of this state, and would have been sufficient to prevent the filing and recording of the will, although it was attested according to the laws of New Hampshire, where it was originally probated, as every objection to the validity of the will should be heard and determined in the course of the proceedings in the probate court of this state.

As to whether a will probated at the domicil of the testatrix in another state can be set aside

real estate, probated in common form in the foreign court, may be contested in this state when it is presented for registration in this state where the land or a part of it lies; but the contention is that wills of personalty stand upon a different basis, inasmuch as the law of the testator's domicile is supposed to affect the latter, but not the former, it being controlled by the law *rei sitæ*. This would lead, as we think, to inconsistent consequences. We will illustrate by a will which disposes of both lands and personal property in both a foreign state and in this state. It has been probated in a foreign state, and brought to this for registration. When offered here, parties interested proposed to contest it, and it is held they may do so as to realty, but not as to personalty. We will suppose the ground of contest to be insanity. For that reason, the will as to the land may be set aside, but not as

to personalty. We will suppose the ground of the contest to be undue influence; the same result will follow. Or the ground may be revocation, and the result might be to set aside a will of realty, but the same act would not suffice to set aside the will of personalty. The true doctrine is that the domicile fixes the personal status of the testator, and controls the disposition of property in that state, but not exclusively the place of probate. The domicile does not even fix the power or capacity to make a will absolutely, for this court has held that a will executed in a foreign state may be valid to pass real estate in this state, while it is invalid and of no force in the forum where it was executed. *Carpenter v. Bell*, 96 Tenn. 294, 34 S. W. 209. For these and other reasons I do not concur in the view of the majority.

in Massachusetts is questioned. *Loring v. Oak-ey*, 98 Mass. 267.

Michigan.

In *Re Mower*, 48 Mich. 441, 12 N. W. 646, it was said that, for the purposes of administration and legal execution, wills probated in other states cannot be taken notice of in this state until they are probated here.

Under the New Jersey statute treating the record of a will with the proof thereof as the probate of the same, a transcript from that state, recorded in Michigan, shows a valid probate of the will, although there was no distinct separate judicial act or decree, as the judgment of the court establishing the will. *Wilt v. Cutler*, 38 Mich. 189.

Where an administrator objected to an executrix prosecuting a claim on the ground that the record of the appointment in this state did not show that the entire record of the Pennsylvania court was before the probate court in this state, and that the proceedings gave the executrix no standing, it was held that the proceedings allowing the will in this state sufficiently authorized her to prosecute the claim. *Feustmann v. Gott*, 65 Mich. 592, 32 N. W. 869.

Minnesota.

A probate in another state is conclusive under Minn. Gen. Stat. 1878, chap. 47, § 18, providing that wills proved and allowed in any of the United States according to the law of such state may be allowed, filed, and recorded in this state, and § 19, providing that the court in this state shall appoint a time and place of hearing, and notice shall be given as in the case of an original will, and § 20, providing that if on the hearing it appears that the instrument ought to be allowed as a last will and testament, the copy shall have the same force and effect as if it had been originally proved. It was also held that, under Minn. Laws 1870, chap. 64, amending § 21, providing for the issue of letters testamentary to a foreign executor, the foreign probate was conclusive, and the right of the foreign executor to appointment here was also conclusive. *Babcock v. Collins*, 60 Minn. 73, 61 N. W. 1020. In this case it was said that it is not necessary to decide whether such probate would be held conclusive if the law of the other state allowed a probate of a will without notice.

In *Re Southard*, 48 Minn. 37, 50 N. W. 932, it was said that Minn. Probate Code, Laws 1889, chap. 46, §§ 32-34, allowing the filing here of wills which have been admitted to probate and established in some other state or country, is intended to make such wills effectual and opera-

tive here, as though they had been originally admitted to probate and established by original proof in our own courts.

But a will probated in another state does not affect land until proved and allowed in this state. *Pott v. Pennington*, 16 Minn. 509, Gil. 460.

With reference to foreign wills executed according to the laws of this state, Minn. Probate Code, chap. 2, § 32, Laws 1889, chap. 46, is merely cumulative as to the mode of proving or making certified copies of it after probate in another state sufficient evidence to establish the will. *Putnam v. Pitney*, 45 Minn. 242, 11 L. R. A. 41, 47 N. W. 790.

Mississippi.

The probate of a will of personal property at the testator's domicile will be held valid in this state. *Montgomery v. Millikin*, 5 Smedes & M. 151, 43 Am. Dec. 507.

The probate of a will in another state is valid as to property in that state. *Wells v. Wells*, 35 Miss. 638.

And where an authenticated copy of a will and probate from Alabama was ordered to be admitted to probate and recorded in Mississippi, it was held that that act was clearly within the jurisdiction of the court, and it cannot be collaterally impeached, even if the court acted erroneously in its judgment as to the sufficiency of the original probate in Alabama. *Crusoe v. Butler*, 36 Miss. 150. In this case it was held to be no objection to the record of a probate in Mississippi on an authenticated copy of a probate from Alabama that the will appeared to have been probated there by but one of three subscribing witnesses. This showed sufficient proof of the will. The court said that if the record states that it was duly proved by one of them, and admitted to probate, and it does not affirmatively appear that the witness proved only the attestation by himself and execution in his presence, it will be presumed that he testified to every fact necessary to the due execution.

In *Melvin v. Lyons*, 10 Smedes & M. 78, where it was held that a copy of a will duly probated in another state was admissible in evidence in Mississippi, it was said that Miss. Stat. H. & H. 388, § 13, providing that authenticated copies of wills proved in other states may be offered for and admitted to probate in this state subject to be contested and controverted as the original might be, was not designed to establish a rule for the admissibility of a copy in evidence, for if so, it would be contrary to the act of Congress.

The probate of a will in Alabama, and of an

authenticated copy thereof afterward in this state, had only such effect here as allowed by our laws. This was sufficient to have enabled the executor, without qualifying as executor in this state, to execute the special power conferred upon him by the will to sell the land; but it was not enough to enable him, as executor, to recover in ejectment, as he must qualify as such in this state before he is entitled to the possession of real estate. *Sims v. Hodges*, 65 Miss. 211, 8 So. 457.

The probate in another state is of no force as to property here if the testator was domiciled here at the time of his death. *Sturdivant v. Neill*, 27 Miss. 157; *Wells v. Wells*, 35 Miss. 638; *Morris v. Morris*, 27 Miss. 847; *Bate v. Inciam*, 59 Miss. 513.

In *Sturdivant v. Neill*, 27 Miss. 157, it was said that Miss. Stat. 1821, Hutch. Code, 605, providing that authenticated copies of wills proved according to the laws of any of the United States, touching estates within this state, may be offered and admitted to probate in this state,—merely permits our courts to receive the authenticated copy as evidence of the due execution of the will, because the question has already been decided by a court having jurisdiction over the subject-matter, and whose judgment was based upon the law of its own country, in determining the validity of the will; and, if it had no jurisdiction or power to make the record, the courts of this state can take no jurisdiction of a copy of such record. Our courts "make but one inquiry, and that is as to the jurisdiction of the foreign tribunal which pronounced the judgment, which, if valid according to the foreign law, will be equally so in this state, unless it be shown that the foreign law so far conflicts with our policy as to relieve our courts from giving to it any operation within the limits of the state." *Missouri*.

The probate of a will in another state is to be regarded as a judicial proceeding, to the record of which full faith and credit are to be given as evidence when certified conformably to the act of Congress of 1790. *Halle v. Hill*, 13 Mo. 612.

And *Wagner's* (Mo.) Stat. p. 1369, § 34, authorizing the record of an authenticated copy of a foreign will and making a copy of such recorded exemplification evidence, does not repeal *Wagner's* Stat. p. 598, § 51, providing that the records and judicial proceedings of the courts of the United States, or any state, when properly authenticated, shall have such faith and credit given to them in this state as they would have at the place whence they came. Full faith and credit are to be given to the probate of a foreign will when certified to in conformity to act of Congress. *Lewis v. St. Louis*, 69 Mo. 595, affirming 3 Mo. App. 582; *Bradstreet v. Kinella*, 70 Mo. 68.

And where a will was executed in Kentucky according to the laws of Missouri, and probated in Kentucky, and an authenticated copy of such record was recorded in Missouri, a copy of this last record was conclusive, and needed no support for proving the will. *Applegate v. Smith*, 31 Mo. 166.

But persons dealing with land located in this state are not charged with constructive notice of a foreign will until it is either proved anew in this state, or until a copy of the will and foreign probate is recorded here as permitted to be done by our statutes. *Graves v. Ewart*, 99 Mo. 13, 11 S. W. 971; *Van Syckle v. Beam*, 110 Mo. 589, 19 S. W. 946.

In regard to constructive notice of an unrecorded will that has been probated in another 48 L. R. A.

state, it was said: "When the Kentucky court admitted this will to probate it adjudged it to be executed according to the laws of that state, and we accept that adjudication as conclusive upon that subject; but it did not undertake to say that the will transmitted the title to the Missouri land. That court did not assume to make any such adjudication. The probate of the will, then, does not have the credit in that state of affecting the title to land in this state, and hence we are not called upon to give it a credit here that it does not have in the courts of the state where the probate is declared." *Keith v. Keith*, 97 Mo. 224, 10 S. W. 597. In this case it was said that a will, to be of any validity as a transfer of title to land, must be executed, attested, and probated in the manner prescribed by the law of the state where the land is located.

And a probate in another state is invalid where the domicile of the testator was in this state at the time of his death. *Nat v. Coons*, 10 Mo. 543; *Stewart v. Pettus*, 10 Mo. 755. *Nebraska*.

It is not necessary that an original will shall be presented to, or filed with, a county court in this state for probate in case of foreign wills, as *Neb. Comp. Stat.* 1891, chap. 23, § 145, provides for presenting a copy of a foreign will and probate duly authenticated, and § 146 provides that if the instrument ought to be allowed, a copy shall be filed and recorded, and the will shall have the same effect as if originally proved in the same court. *Fremont, E. & M. Valley R. Co. v. Setright*, 34 Neb. 253, 51 N. W. 833.

In *Roberts v. Flanagan*, 21 Neb. 503, 32 N. W. 563, it was said that a decree of another state probating a will might be held invalid in a direct attack.

New Hampshire.

A certified probate from another state cannot be filed in the court of probate if the domicile of the deceased was in this state at the time of her death. *Stark v. Parker*, 56 N. H. 481.

A copy of a will executed and proved according to the laws of Pennsylvania may be filed and recorded in the probate court of New Hampshire, although the will is not executed according to the laws of New Hampshire in that the execution was in the presence of only two witnesses, under N. H. Gen. Laws, chap. 194, § 12, permitting the copy of a will with its probate made in another state to be filed, to be executed according to the laws of the state where the probate of the original will has been made. *Kennard v. Kennard*, 63 N. H. 303.

New Jersey.

A probate from another state may be contested where the testator was domiciled here at the time of his death. *Wallace v. Wallace*, 3 N. J. Eq. 618.

And the probate of a will allowed in another state may be refused by the surrogate. *Allaire v. Allaire*, 37 N. J. L. 312.

So, the probate of a will in California not executed by the testator in the presence of subscribing witnesses, that is a valid testamentary disposition of lands under the laws of that state, is of no effect in New Jersey, under N. J. Rev. p. 1247, § 22, requiring all wills to be executed in the presence of two witnesses who should subscribe their names in the presence of the testator; and this defect is not cured by N. J. act 1882, Pub. Laws, 112, and act May 11, 1886, Rev. Supp. 775, authorizing the recording of wills probated in another state. *Nelson v. Potter*, 50 N. J. L. 324, 15 Atl. 375.

When a will is probated in another state, and an exemplified record is used in New Jersey to make title to lands, the record exemplified

from such other state must contain the proofs there made upon the probate, so that it may appear that the will was made and executed with the formalities prescribed by the statute of New Jersey for devises of lands. *Lindley v. O'Reilly*, 50 N. J. L. 636, 1 L. R. A. 79, 15 Atl. 379.

In this case it was said: "The probate of a will is a judicial act to be proved by a sworn or duly certified copy of the record, or at least by the certificate of the officer before whom the probate is made. And where the object of making such a will a record in this state is for the purpose of making title to lands, the record exemplified from another state must contain the proofs taken upon the probate, that it may appear by such proofs that the will was made and executed in the manner and with the formalities prescribed by the statute of this state for devises of lands." *New York*.

Code of Civil Procedure, § 2611, provides that a will of real or personal property executed as prescribed by the law of the state, and a will of personal property executed without the state and within the United States as prescribed by the laws of the state where it is or was executed, or a will of personal property executed by a person not a resident of the state, according to the laws of the testator's residence, may be proved as prescribed in this article. The validity of its execution is not affected by a change of the testator's residence made since the execution of the will, and applies only to wills made after April 11, 1876.

Section 2694 provides that the validity of a will of real property in this state is regulated by the laws of the state without regard to the residence of the decedent.

Section 2695 provides that where a will of personal property, made by a person who resided out of the state at the time of its execution or at the time of his death, has been admitted to probate within the state where it was executed and where the testator resided at the time of his death, the surrogate must record the will and issue ancillary letters.

Section 2703 provides that where real property in this state is devised or made subject to a power of disposition by a will duly executed in conformity with the laws of this state, of a person who was, at the time of his death, a resident elsewhere within the United States, and such will has been admitted to probate within any state of the United States, and is filed and recorded in the proper office of that state, a copy of such will, or the record, and of the proofs or of the record thereof, or, if the proofs are not on file or recorded, of any statement on file or recorded of the substance of the proofs authenticated, or, if no proofs be on file, a copy of such will or the record authenticated, etc., may be recorded in the office of the surrogate of any county where such real property is situated, and such record shall be presumptive evidence of such will and of the execution thereof in any action relating to such real property.

In order to justify the recording of a will of real property, the proof taken on the foreign probate must show that the will was executed according to the laws of this state, under N. Y. Code Civ. Proc. § 2703; *Re Langbein*, 1 Dem. 448; *Shearer's Estate*, 1 N. Y. Civ. Proc. Rep. 455.

So under N. Y. Laws 1864, chap. 311, as amended by Laws 1872, chap. 680, providing as Code Civ. Proc. § 2703, *supra*, the exemplified record of the probate of a foreign will is only presumptive evidence of the will and of its due execution, and if the will has not been executed

so as to comply with the laws of this state in reference to the transmission of real estate, the presumption is overcome and no longer exists. *Lockwood v. Lockwood*, 51 Hun, 337, 2 L. R. A. 425, 3 N. Y. Supp. 887, *Affirming* 2 N. Y. Supp. 224.

When a certified copy of a probate in another state is recorded in this state, it is of the same effect as a domestic will. *Bromley v. Miller*, 2 Thomp. & C. 75.

In *Taylor v. Syme*, 17 App. Div. 517, 45 N. Y. Supp. 707, where the deceased at the time of her death resided in Alabama, and the will executed in Alabama was duly probated in Louisiana, where the deceased left real estate, and upon this letters were issued in New York, it was contended that under Code Civ. Proc. § 2695, ancillary letters can only be granted upon a foreign will, where such will has been admitted to probate within a foreign country or within the state or territory of the United States where it was executed, or where the testator resided at the time of his death. It was held that the action of the surrogate in New York could not be attacked in an action brought by the executor on notes due the estate.

And a decree of another state refusing the probate of a will is not conclusive in this state. *Re Gaines*, 84 Hun, 520, 32 N. Y. Supp. 398, *Affirmed* in 154 N. Y. 747.

Where a will was probated in California, and ancillary letters granted in New York, and subsequently the letters were revoked in California on a contest, and the executor removed, the surrogate in New York should also have revoked the ancillary letters and granted new ancillary letters to the administrator with the will annexed, without notice to the executor. *Re Gillenran*, 50 Hun, 399, 3 N. Y. Supp. 145.

On an application by an executor from another state to set aside letters of administration and to obtain ancillary letters testamentary, it was held that if the next of kin were not parties to the proceedings to admit the will to probate in New Jersey, the letters of administration would not be disturbed until proceedings were instituted in this state to admit the letters to probate, if the testatrix resided in this state at the time of her death or of the execution of the will, under N. Y. Code Civ. Proc. § 2695; *Gavin's Estate*, 15 N. Y. Civ. Proc. Rep. 390, 2 N. Y. Supp. 670.

Where an application was made for ancillary letters under a will proved in the court of another state by whose laws wills are admitted by the oral direction of the court without any written "judgment, decree, or orders," such laws must be shown. *Re Hudson*, 5 Redf. 833.

In *Pollock v. Hooley*, 67 Hun, 370, 22 N. Y. Supp. 215, it was said that under Code Civ. Proc. § 2703, there is no provision for issuing letters testamentary upon a will of realty; but it was the intention of the legislature that the existence of a power to sell should be evidenced by the record here, and whether the donee had qualified himself to exercise it is to be determined by what had been done at the place of the probate of the will.

In *Clark v. Poor*, 73 Hun, 143, 25 N. Y. Supp. 908, a will had been probated in Connecticut, where the testator resided, having real and personal property there and also in New York, and the executor brought an action to have the will probated in New York. It was held that his complaint stated no cause of action, as it alleged that the will had been duly probated in Connecticut where the testator resided and died. Such probate had not been questioned, and N. Y. Code Civ. Proc. § 1861, providing for proving a will, does not apply to wills that have been

proved in another state. The court said that Code Civ. Proc. art. 7, title 3, chap. 18 (§§ 2695-2704), provide for establishing and giving effect in this state to a will duly probated in other states.

In *Alexander's Will*, 1 Tucker, 114, it was held that an exemplified copy of a will, executed conformably to the *lex loci*, by a citizen of this state temporarily absent therefrom, cannot be received by the surrogate. The original will is required. The court said: "It is true that it results, from this construction of our law, that a valid will of personality within our state may be made by a noncitizen wherever he may chance to be, by executing it according to the law of his state, and that such a will may be proved here by producing a copy; while the will of a citizen of our state, made abroad, can only be proved by producing the original; but I have nothing to do with the wisdom or justice of the law, being confined to the duty of declaring it."

New York Code Civ. Proc. § 2611, changes the law in regard to wills executed out of this state.

North Carolina.

A will probated in another state, and executed according to the laws of this state, and properly certified, is valid. *Roscoe v. John L. Roper* Lumber Co. 124 N. C. 42, 32 S. E. 389.

In *Ward v. Hearne*, 44 N. C. (Busbee, L.) 184, it was said that under N. C. act 1844, chap. 88, § 6, providing that when any will made by a citizen of another state shall have been duly proved or allowed in such state according to the laws thereof, a copy or exemplification of such will, duly authenticated when produced before the court of pleas and quarter sessions of any county of the state where any property is situated, shall be by said court allowed and recorded, and the like effect be given to said will as if the original had been produced and allowed: the county court before whom the copy is exhibited are the judge of its authentication, and when they allow it, it is their judgment, and, if not appealed from, that judgment is conclusive upon all other tribunals until properly reversed.

When the probate of a will has been obtained in another state and is authenticated as the law of the United States directs, it supercedes the necessity of a probate in the courts of this state, so that the executor may maintain a suit thereon in this state. *Stephens v. Smart*; 4 N. C. (1 Car. Law Repos.) 471; *Lancaster v. McBryde*, 27 N. C. (5 Ired. L.) 421.

And the same was said to be the rule in *Hyman v. Gaskins*, 27 N. C. (5 Ired. L.) 267. Ohio.

A decree of probate from another state as to personality is invalid if the will is not executed according to the law of this state, and if the testator was domiciled here at the time of his death. *Manuel v. Manuel*, 13 Ohio St. 458.

A will attested by witnesses, which was valid in Virginia and probated there, was improperly admitted to record in Ohio, where two witnesses were required in order to affect real property, under Ohio act February 18, 1831, § 14, providing that authenticated copies of wills proved according to the laws of any state or territory within the United States relative to any property within this state may be admitted to record by the court aforesaid in the county where such property shall be, and such authenticated copies shall be good and valid in law in like manner as wills made in this state are declared to be. *Bailey v. Bailey*, 8 Ohio, 239.

Under this statute a will was improperly admitted to record although valid in Pennsylvania, where there was no subscribing witness. The 48 L. R. A.

order of probate was annulled. *Meese v. Keefe*, 10 Ohio, 362.

Where an alleged will relating to lands in Ohio, without witnesses, and inoperative to affect property in Ohio, was probated in Virginia, and an authenticated copy of its probate in Virginia admitted to record in Ohio, it could be impeached in a suit regularly instituted for that purpose. *Jones v. Robinson*, 17 Ohio St. 171.

In a proceeding to record a decree of probate from another state adverse steps may be taken. *Ex Barr*, 30 Ohio L. J. 386.

Where a transcript of a probate of a will in Virginia was admitted to record in Ohio, and the attestation clause on the face of the will was "signed, sealed, and attested in the presence," and the record showed that the writing was proved by oaths of two of the subscribing witnesses to be the last will of the deceased, the import of this attestation clause is that the testator and witnesses signed the instrument in the presence of each other and independent of the record of probate, which affords a presumption that all the signatures were affixed at the same time and place. *Carpenter v. De-noon*, 29 Ohio St. 379.

In *Hall v. Ashby*, 9 Ohio, 96, 84 Am. Dec. 424, it was said that the record of a foreign will is not intended to give publicity to the proof of it, nor to give notice of the title acquired under it. It is to permit a copy to be given in evidence when it would be difficult or impossible to produce the original. In Ohio the probate relates to both realty and personality, and the record which is consequent upon the probate enables a copy to be given in evidence whenever a controversy arises concerning property devised.

Pennsylvania.

After a register pronounces a foreign will approved he does a judicial act, and it cannot be attacked collaterally. *Lovett v. Mathews*, 24 Pa. 330.

So, where a will was duly admitted to probate in New Jersey, and the executor obtained ancillary letters from the register in Pennsylvania, the testator having property within this commonwealth, it was held that the court in Pennsylvania had no jurisdiction to determine the validity of the will, and that the petitioner should seek her remedy in the courts of the domicile. *Mackin's Estate*, 14 Phila. 328.

Rhode Island.

The probate of a will in another state is only *prima facie* evidence of its validity. *Bowen v. Johnson*, 5 R. I. 112, 73 Am. Dec. 49.

Where a legatee brought an action in Rhode Island, under a will probated in Wisconsin, it was held that the effect of a decree proving a will, like that of a decree granting administration, is confined *de jure* to the territory, and things within the territory, of the state setting up the court, and such decrees are decrees *in rem*, passed by courts deriving all their authority from the state which institutes them, and necessarily, in great part, upon constructive notice only to those interested in the decrees; and it is difficult to see how a wider operation could be allowed to them, consistently with a just attention to the claims to the property of the decedent, of citizens of other states in which the property was at the time of his death. Whatever operation is allowed to them is a mere matter of comity. *Olney v. Angell*, 5 R. I. 108, 73 Am. Dec. 62.

Tennessee.

If a will of personal property is probated at the testator's domicile, it cannot be contested here. *MARTIN v. STOVALL*; *Williams v. Saunders*, 5 Coldw. 60.

And a will probated in another state, executed according to the laws of this state, is valid for the purpose of passing land. *Bleldorn v. Pilot Mountain Coal & Min. Co.* 89 Tenn. 166, 15 S. W. 737; *Smith v. Neilson*, 13 Lea, 461.

Texas.

The probate from another state has no validity until recorded. *Slayton v. Singleton*, 72 Tex. 209, 9 S. W. 876; *Welder v. McComb*, 10 Tex. Civ. App. 85, 80 S. W. 822; *Mills v. Hernndon*, 60 Tex. 353.

In *Poole v. Jackson*, 66 Tex. 380, 1 S. W. 75, it was said that "our laws do not leave open to contest a will which has been probated in another state. The question of its execution is *res judicata*. The proof of its execution is not preserved in our courts. That it has been admitted to probate by a court having jurisdiction of the subject-matter is all that we require. Hence a copy of the will and its probate abroad is all that is to be recorded."

It is not necessary, in offering for record a will probated in another state, to prove that it was legally probated in such other state. *Houze v. Houze*, 16 Tex. 598.

In this case the court said that proceedings of foreign courts of probate are judicial proceedings which may be authenticated under the act of Congress, and the proceedings thus authenticated are presumed to have been by competent authority and in conformity to the local law, and the records are evidence, not only of the acts of the court, but of its jurisdiction.

In *Paschal v. Acklin*, 27 Tex. 192, it was said that on an application for the probate of a will here that has been probated in another state, its execution need not be proved; and the only order that the court can make with reference to it is that it should be "filed and recorded." *Hart's Dig.* art. 1114.

In *Acklin v. Paschal*, 48 Tex. 147, it was said: "When this case was formerly before this court it was held that under the admissions of the parties the will was before the court as if properly probated (and we understand this to mean probated in this state), and the opinion was expressed that to question its validity in this suit would be to attack the will in a collateral proceeding. We are satisfied with these conclusions. . . . The action of the courts of another state in setting aside the will as to real estate and slaves in that state because in violation of their statutes was not designed to affect, and certainly could not affect, the validity of the will as to real estate in Texas, the will standing as having been probated here."

In *Holman v. Hopkins*, 27 Tex. 38, it is said that it is well settled that the law of the place of the actual domicile is to govern testator's testamentary disposition of his personal property, wherever it may be situated. But as to real property the law of the place where land is situated governs, not only as to the capacity of the testator and the extent of his power to dispose of the property, but also as to the forms and solemnities necessary to give to the will its due attestation and effect.

Vermont.

A will of personal property, made in Indiana, cannot be contested in Vermont on offering an authenticated copy for record on the ground of incapacity or undue influence, if the will is executed according to the laws of Indiana, under Vt. Rev. Laws, § 2057, providing that a will made out of the state, which might be proved and allowed by the laws of the state in which it was made, may be proved, allowed, and recorded in this state, and shall then have the same effect as if executed according to the laws of this state. *Ives v. Salisbury*, 56 Vt. 565.

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And a decree of the probate court of Vermont admitting a will to probate on an authenticated record of probate in New York cannot be assailed in Vermont in a collateral manner. *Townsend v. Downer*, 32 Vt. 183.

But a will probated in another state cannot affect property in this state until proved and allowed. *Walton v. Hall*, 66 Vt. 455, 29 Atl. 803.

In *Ives v. Allyn*, 12 Vt. 589, it was said that notice is to be given to all persons concerned, to appear and contest the probate or filing and recording, and when recorded the copy thus proved and allowed in another state, recorded here, has the same effect as the probate of an original will, under Vt. Stat. 1797, providing that a will executed, proved, and allowed in any probate court of the United States may, after due notice, be filed and recorded in a probate court in this state, and then have the same effect as the probate of an original will, and act 1804 and act 1821, requiring such copies to be recorded in the probate office and in the town clerk's office.

Virginia.

A decree of probate from another state may be contested here. *Ex parte Povall*, 3 Leigh, 816.

And a will may be probated in this state notwithstanding the refusal of probate in another state on account of incapacity of the testator. *Rice v. Jones*, 4 Call (Va.) 89.

West Virginia.

A probate from another state is not conclusive. *Thrasher v. Ballard*, 33 W. Va. 285, 10 S. E. 411.

Wisconsin.

The validity of every devise or disposition of real estate by will must be governed by the law of the place where the land is situated, and this includes, not only the form and mode of the execution of the will, but also the lawful power and authority of the testator to make such disposition. *Ford v. Ford*, 70 Wis. 19, 33 N. W. 188.

An exemplified record of the probate of a will in New York, presented to the county court in Wisconsin on due notice given, as in the case of an original will presented for probate, and the instrument allowed by judgment in due form and a copy duly recorded, has the same effect as though it had been originally proved and allowed in Wisconsin, under Wis. Rev. Stat. chap. 97, §§ 22-24, providing that wills duly proved and allowed in any other state according to the laws of such state may be allowed, filed, and recorded in the county court of any county in which the testator shall have real or personal estate, on notice to be given of time and place of hearing; and if it shall appear that the instrument ought to be allowed in this state, a copy shall be filed and recorded, and shall have the same effect as if the will had been originally proved and allowed in the same court. *Markwell v. Thorn*, 28 Wis. 548.

In *Hayes v. Lienlokken*, 48 Wis. 509, 4 N. W. 584, it was said that Wis. Rev. Stat. § 2295, providing as above, supersedes the necessity of proving anew a foreign will by making the record of a duly certified copy operate as an original probate. But that where a mortgage has been foreclosed by a foreign executor in this state, such record is not sufficient to show the death of the testator and the official character of the person who assumed the right to foreclose the mortgage upon advertisement in this state.

In conclusion it may be said that, in the absence of statutory provisions respecting wills probated in other states, such probate is conclusive as to personal property if probated at the domicile of the testator; that in regard to

real estate the will must be executed and proved according to the place where the real estate is situated, in order to have any effect. The general presumption is that the decree is valid, and that the court had jurisdiction. In a contest on offering a will for record probated in another state, or in regard to real estate, where it has not been recorded, the Federal Constitution, providing full faith and credit, etc., is generally held not to apply to probate of wills except in matters of evidence, and does not conclude questions as to jurisdiction, or that a will of real estate has not been executed in accordance

with the law of the place where the real estate is situated. These general observations are largely affected, however, by local statutes which must be looked into in order to ascertain the law of the state.

Cases in regard to authentication of wills, or in regard to mere matters of evidence, or as to the construction of wills, are not intended to be included in this note.

Reference is made to the case of *Sly v. Hunt* (Mass.) 21 L. R. A. 680, note, as to "*Conclusion of probate as res judicata.*" I. T.

OREGON SUPREME COURT.

Re Conrad YOUNG.

(.....Or.....)

A state statute making it an offense to solicit a seaman to desert from any vessel within the jurisdiction of the state is not in violation of U. S. Const. art. 1, § 8, subd. 3, as a regulation of foreign or interstate commerce, in the absence of any act of Congress repugnant thereto.

(January 15, 1900.)

APPEAL by the state from a judgment of the Circuit Court for Multnomah County discharging petitioner from the custody of William Frazier, sheriff, to which he had been committed under an indictment charging him with enticing a seaman from his vessel. *Reversed.*

Statement by Moore, J.:

This is a special proceeding by Conrad Young against William Frazier, as sheriff of Multnomah county, to have the cause of his imprisonment inquired into, and to be relieved therefrom. The transcript shows that Young was indicted by the grand jury of said county for the crime of enticing one William Schrike, a seaman employed on the German ship Peru, to desert therefrom, and upon being arraigned was allowed until the next day to plead, whereupon he immediately sued out, in another department of said court, a writ of habeas corpus, which was served upon the defendant, who, for his return, certified that he held plaintiff, by virtue of an order of said court, to answer the indictment returned against him. Upon this issue a trial was had, resulting in Young's discharge, and the state appeals.

Messrs. C. M. Idleman and Charles F. Lord, for appellant:

It appearing that the defendant was held by virtue of a commitment duly issued upon an indictment regularly returned into court, it was the duty of the judge to remand the prisoner.

Oregon Code, § 621, subd. 2, § 608, subd. 2; *Re Winder*, 2 Cliff. 89, Fed. Cas. No. 17,867.

NOTE.—On the question of the liability of a third party for inducing a breach of contract, see *Boysen v. Thorn* (Cal.) 21 L. R. A. 233, and note; *Raycroft v. Tayntor* (Vt.) 33 L. R. A. 48 L. R. A.

One department of a court will not interfere with business pending before another department of that court.

Re Strickland, 41 La. Ann. 324, 6 So. 577.

One court will not issue a writ of habeas corpus to admit the prisoner to bail, where the application for bail is pending in another court.

Ex parte Kittrel, 20 Ark. 499.

Where the commitment is regular upon its face, the presumption is in favor of the legality of such imprisonment.

Merriman v. Morgan, 7 Or. 68.

Section 1952 as passed and amended is not in contravention of the Constitution of the United States.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091.

The grant of commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject-matter. If they are excluded it must be because the nature of the power thus granted to Congress requires that a similar authority should not exist in the states.

Cooley v. Philadelphia Port Wardens, 12 How. 299, 13 L. ed. 996; *Cardwell v. American Bridge Co.* 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423; 11 Am. & Eng. Enc. Law, pp. 545, 546, and notes; *Grant v. United States*, 15 U. S. App. 243, 58 Fed. Rep. 695, 7 C. C. A. 436.

Mr. D. R. N. Blackburn, also for appellant:

Even if Congress had been authorized to prescribe a punishment for this offense, and had actually done so, this would not take away the right of the state to create this offense and provide a punishment.

So far as crimes and their punishment on water are concerned, the power of Congress seems to be limited to "piracies and felonies on the high seas, and offenses against the law of nations."

Hill's Code, p. 15.

This does not include navigable rivers,

225; *Glencoe Sand & Gravel Co. v. Hudson Bros. Commission Co.* (Mo.) 36 L. R. A. 805; *Gore v. Condon* (Md.) 40 L. R. A. 382; and *Doremus v. Hennessy* (Ill.) 43 L. R. A. 797.

even where the tide regularly ebbs and flows; nor does it include misdemeanors.

16 Am. & Eng. Enc. Law, p. 257.

Whether a stream is navigable is a question of fact, and the ebb and flow of the tide therein does not govern.

Weise v. Smith, 3 Or. 445.

The Federal courts have no jurisdiction in criminal cases, except such as is expressly conferred upon them by the Constitution and the acts of Congress, and they can try no offenses except such as are permitted by said Constitution and acts.

1 Garland & R. Fed. Pr. § 139.

The one act may be an offense against the laws of the United States and of the state.

Territory v. Coleman, 1 Or. 191.

The interstate commerce clause of the Constitution of the United States does not directly or indirectly prohibit the state from passing any law for the protection of ships which are at anchor wholly within the territorial limits of the state.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091.

Mr. Henry E. McGinn for respondent.

Moore, J., delivered the opinion of the court:

The question presented by this appeal is whether the statute under which Young was indicted is violative of subdiv. 3, art. 1, § 8, of the Constitution of the United States, as being an attempt on the part of the legislative assembly to regulate commerce with foreign nations. The act under consideration reads as follows: "If any person or persons shall entice, persuade, or by any means attempt to persuade, any seaman to desert from, or, without permission of the officer then in command thereof, to leave or depart therefrom, either temporarily or otherwise, any ship or steamer or other vessel while such ship, steamer, or other vessel is within the waters under the jurisdiction of this state or within the waters of the concurrent jurisdiction of this state and the territory of Washington, such person or persons shall, upon conviction thereof before any justice of the peace, or before a circuit court of this state, be punished," etc. *Hill's Anno. Laws (Or.)* § 1952. Notwithstanding Congress possesses power to regulate commerce with foreign nations and among the several states, each state has retained a sufficient measure of power to enable it to enforce its internal police regulations, in the exercise of which it can establish and regulate ferries across its navigable rivers, control the moving of vessels in harbors within its borders, and enact health and inspection laws, which, by quarantine or otherwise, may operate on persons brought within its jurisdiction in the course of commercial operation. 22 Am. & Eng. Enc. Law, p. 712; *King v. American Transp. Co.* 1 Flipp. 1, Fed. Cas. No. 7,787. Thus, a vessel owned by a citizen of Pennsylvania, and licensed under the laws of the United

States to be employed in the coasting and fishing trade, was seized and condemned under a statute of Maryland making it unlawful to take oysters within the waters of the latter state with a scoop or drag, and prescribing as a penalty for a violation thereof the forfeiture of the vessel so offending; and it was held that the act in question was a proper exercise of the internal police power of a state, which was not repugnant to the commerce clause of the Constitution of the United States. *Smith v. Maryland*, 18 How. 71, 15 L. ed. 269. It is only when a statute of a state conflicts with an act of Congress regulating foreign or interstate commerce, or contravenes the general policy of the government, that it must yield. As was said by Mr. Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23: "The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with or are contrary to the laws of Congress made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case the act of Congress or the treaty is supreme, and the law of the state, though enacted in the exercise of powers not controverted, must yield to it." Congress has prescribed a punishment for any person who shall harbor or secrete a seaman belonging to any vessel, knowing him to belong thereto. U. S. Rev. Stat. § 4601. In construing this section it has been repeatedly held, however, that the penalty therein prescribed does not apply to the harboring or secreting of any person employed as a seaman on a vessel which does not belong to a citizen of the United States. *Ex parte D'Oliveira*, 1 Gall. 474, Fed. Cas. No. 3,967; *United States v. Minges*, 16 Fed. Rep. 657; *Grant v. United States*, 15 U. S. App. 243, 58 Fed. Rep. 694, 7 C. C. A. 436. But, if it were held that this section applied with equal force to seamen employed on a foreign vessel, § 1952, *Hill's Anno. Laws (Or.)*, not being repugnant thereto or inconsistent therewith, is enforceable in the courts of this state; the rule being that the statute of a state and an act of Congress may each prohibit the commission of the same offense, and prescribe the same or a different punishment therefor, under which the party found guilty thereof may suffer the penalties provided by the laws of the United States and of the state. *Territory v. Coleman*, 1 Or. 192; *State v. Brown*, 2 Or. 221; *Fow v. Ohio*, 5 How. 410, 12 L. ed. 213; *United States v. Margold*, 9 How. 560, 13 L. ed. 257; *Moore v. Illinois*, 14 How. 13, 14 L. ed. 306; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Cross v. North Carolina*, 132 U. S. 131, 33 L. ed. 237, 10 Sup. Ct. Rep. 47. If the statute under consideration be deemed a regulation of commerce, it is local

in its application and limited in its operation; and, Congress not having assumed control of the subject thereof, it is within the power of the state to prescribe the necessary regulations. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 1 Inters. Com. Rep. 382, 29 L. ed. 158, 5 Sup. Ct. Rep. 826; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091. The act in question is a rightful exercise of the police power of the state, in the regulation of the matters to which it applies; and instead of being in conflict with any regulation of Congress upon the subject, or in contravention of the general policy of the government, it is in fact in aid of commerce rather than in restriction of it. *Smith v. Alabama*, 124 U.

S. 465, 31 L. ed. 508, 8 Sup. Ct. Rep. 564; *Western U. Teleg. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *New York, N. H. & H. R. Co. v. New York*, 166 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; *Gladson v. Minnesota*, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289.

The court having erred in discharging the plaintiff, it follows that the judgment is reversed and the cause remanded, with instructions to the court below to have him apprehended, and to require him to plead to the indictment.

SOUTH DAKOTA SUPREME COURT.

Maria ECKER, *Respt.*,

v.

G. A. LINDSKOG, *Appt.*

(.....S. D.....)

1. A selection of the exempted property which is allowed to the head of a family by the Constitution and Laws of 1890, chap. 86, may be made by the wife when the husband is incompetent to make it because he has been adjudged insane and is confined in a state hospital, although most of the property claimed belongs to him.
2. The fact that a wife claims to be the owner of exempt property, the greater portion of which belongs to her insane husband, will not defeat her claim of exemption set up thereto by her as the head of a family, if no injury results from the failure to state the particulars as to the title.

(January 24, 1900.)

APPPEAL by defendant from a judgment of the Circuit Court for Brookings County in favor of plaintiff in an action brought to recover possession of certain property seized by defendant under execution, as being exempt to plaintiff as the head of a family. *Affirmed.*

The facts are stated in the opinion.

Messrs. Cheever & Hall, for appellant:

The burden was upon the plaintiff, in order to establish a prima facie case, to prove: (1) That she was the owner of the property; (2) that she was the head of the family; and (3) the claim of, and right to, exemptions.

If the property belongs to Joseph it is not exempt, and is therefore subject to the execution against him, and plaintiff could not recover.

The answer raising the issue of her ownership, it was necessary for her to establish the same.

Sharp v. Johnson, 44 Neb. 165, 62 N. W.

NOTE.—For wife as head of family, see also *Holloway v. Holloway* (Ga.) 11 L. R. A. 518, and *note*.

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466; *Wagner v. Olson*, 3 N. D. 69, 54 N. W. 286; *Paddock v. Balgord*, 2 S. D. 100, 48 N. W. 840; *Haveron v. Anderson*, 3 N. D. 540, 58 N. W. 340.

The debtor must bring himself and his property within the statute by an affirmative showing.

7 Am. & Eng. Enc. Law, p. 142.

Messrs. Alexander & Hooker and John C. Jenkins, for respondent:

Prior actual possession is sufficient to sustain an action against one who comes into possession afterwards without title.

26 Am. & Eng. Enc. Law, p. 748; *Grand Island Bkg. Co. v. First Nat. Bank*, 34 Neb. 93, 51 N. W. 596.

The "beneficent considerations which prompt the enactment of humane exemption laws require a liberal construction of the same."

Linander v. Longstaff, 7 S. D. 157, 63 N. W. 775; *Meyer v. Beaver*, 9 S. D. 168, 68 N. W. 310.

It is wholly immaterial whether the legal title to the property which the law sets aside for the maintenance and protection of the family is in the husband or wife or both. In either case it is exempt from levy for the debts of either.

Thompson, Homestead & Exemption, §§ 221, 224; *Wilson v. Cochran*, 31 Tex. 680, 98 Am. Dec. 553; *Brigham v. Bush*, 33 Barb. 598; *Murray v. Sells*, 53 Ga. 257; *Willis v. Matthews*, 46 Tex. 478; *Partee v. Stewart*, 50 Miss. 721; *Crane v. Waggoner*, 33 Ind. 83; *Orr v. Shraft*, 22 Mich. 284; *Boelter v. Klossner*, 74 Minn. 272, 77 N. W. 4; *Schaller v. Kurtz*, 25 Neb. 655, 41 N. W. 642; *Hamilton v. Flaming*, 26 Neb. 240, 41 N. W. 1002; *State ex rel. Scoville v. Wilson*, 31 Neb. 462, 48 N. W. 147; *State ex rel. Lucas v. Houck*, 32 Neb. 525, 49 N. W. 462; *Frazier v. Syas*, 10 Neb. 115, 35 Am. Rep. 466, 4 N. W. 934.

The uniform tenor of the decisions of this court appears to correspond with this theory.

Noyes v. Belding, 5 S. D. 603, 59 N. W. 1009; *Meyer v. Beaver*, 9 S. D. 168, 68 N. W. 310; *Linander v. Longstaff*, 7 S. D. 157, 63 N. W. 775.

Fuller, P. J., delivered the opinion of the court:

This action in claim and delivery, to recover from the sheriff certain personal property upon which he had levied executions, and of which plaintiff, in her complaint, claims to be owner, resulted in her favor, and the defendant appeals. The value of the property seized, consisting mainly of farm horses, with their harnesses, and a wagon, together with all personal property enumerated in her schedule of exemptions, does not exceed the amount allowed by law to the head of the family; and the ownership of such property, and her right to claim the same as exempt, are the only points that need be considered.

One execution is upon a judgment against respondent and her husband jointly, and the other upon a judgment against her alone; and within the time allowed by law she claimed her exemptions, by serving upon appellant a schedule of all the property belonging to both herself and husband, including that seized, and notified him of the appointment of an appraiser to act in her behalf, and an appraisement was demanded. In this verified schedule of personal property, respondent states that the same belongs to herself and husband, Joseph Ecker, and "is exempt from levy and sale on execution, and affiant hereby claims the same as exempt from levy and sale, upon the ground that the value of the same, and of the whole thereof, does not exceed the sum of \$750; that affiant is the wife of said defendant, Joseph Ecker, and has been his wife for the period of several years past; that said Joseph Ecker has been adjudged insane by the board of insanity of said Brookings county in the year 1896, and was committed by the judge of the county court of said county of Brookings to the hospital for the insane at Yankton, in said state of South Dakota, where he is still confined." Her schedule and demand for an appraisement were wholly disregarded by appellant, and the failure to comply with the following is the only reason assigned for his refusal to have the property appraised. "To Maria Ecker: You are hereby demanded to furnish me forthwith a statement of property included in the schedule of yours, dated September 24th, 1897, served upon me" in the case of N. A. Schouweiler and M. E. Schouweiler, copartners as Schouweiler Bros., against Joseph Ecker and Maria Ecker, showing which articles of personal property you claim to belong to yourself, and which you claim to belong to Joseph Ecker separately; and also, in such statement, you inform me whether you claim you are the head of the family of Joseph Ecker." We think the ownership was sufficiently stated, together with facts justifying a reasonable inference that respondent based her exemption right upon the claim that she was the head of the family of Joseph Ecker; and it was appellant's duty to pursue statutory steps to determine whether such property, or any part thereof, was so exempt. *Holdridge v. Lee*, 3 S. D. 134. 52 N. W. 265; *Paddock v. Balgord*, 2 S. D. 100, 48 N. W. 840. When the

head of the family, rightfully in possession of personal property, claims the same as exempt, although informally, and no waiver of such claim has been made, it is the duty of the sheriff to whom the schedule has been submitted to have such property appraised, although the husband or wife of such debtor may own some interest therein. It has been held that exempt personal property, confessedly owned by the debtor's wife, but seized for his debts, may be recovered by him from the grasp of his creditors, by reason of a mere possessory right. *Steen v. Hamblet*, 66 Miss. 112, 5 So. 524; *Braswell v. McDaniel*, 74 Ga. 319. In Minnesota "a disclaimer by the debtor of any ownership of the property levied on will not estop him from afterwards asserting and proving his title thereto as owner, when the disclaimer has not influenced the conduct of the officer, or been acted on by him or the plaintiff in the execution." *McAfee v. Thompson*, 27 Minn. 134. 6 N. W. 479. It is undisputed that respondent, with her children, occupied a rented farm, and has by the use of the property seized maintained the family during the two years of her husband's affliction and detention in the hospital for the insane; and she must therefore, in contemplation of the statute, be regarded as the head of the family. *State ex rel. Lucas v. Houck*, 32 Neb. 525, 49 N. W. 462; *Frazier v. Syas*, 10 Neb. 115, 35 Am. Rep. 466, 4 N. W. 934. The property claimed being exempt, the wife, under the circumstances disclosed by the record, had the right to demand it for herself and family; and, in the absence of any injury resulting therefrom, the fact that she claimed to be the owner, when a greater portion thereof belonged to her insane husband, will not defeat a recovery.

To the point that the wife is entitled to make such claim out of her husband's property, see *Noyes v. Belding*, 5 S. D. 603, 59 N. W. 1069; *Meyer v. Beaver*, 9 S. D. 168, 68 N. W. 310. Where exempt property is involved, the controlling point in claim and delivery is the right of possession, rather than the right of property; and as against appellant, whose duty it was to have an appraisement made, respondent has shown by uncontroverted evidence a right of exclusive possession of all the property described, and she was entitled to maintain the action. *Sprague v. Clark*, 41 Vt. 6; *Moorman v. Quick*, 20 Ind. 67; *Elbridge v. Sherman*, 70 Mich. 266, 38 N. W. 255; *Lazard v. Wheeler*, 22 Cal. 139. Judge Cooley, in speaking for the court in *Tandler v. Saunders*, 56 Mich. 142, 22 N. W. 271, says: "One who has a right to use property at will can replevy it from any wrongdoer, as, for example, from a sheriff's officer who has taken it on an execution issued against another person." The constitutional declaration is that to all heads of families a reasonable amount of personal property, the kind and value of which is to be fixed by general law, shall be exempt; and the plain intent of the law is to preserve such property, to the value of \$750, for the benefit of the family, to be selected by the head of the family, or by his agent or attor-

ney, as additional exemptions. Chap. 86, Laws 1820. Where, therefore, by reason of the insanity or other infirmity of the husband, the wife becomes the head of the family, the interest of its members in personal property rightfully in her possession, to the value of that involved in this suit, is sufficient to authorize the wife to select the same under claim of ownership, although the greater portion thereof may really belong to her husband. *Crane v. Waggoner*, 33 Ind. 83; *Linander v. Longstaff*, 7 S. D. 157, 63 N. W. 775. To effectuate the purpose of statutes enacted for the protection of families against want occasioned by the forced sale of exempt property, a liberal rule of construction should be invoked, by which the wife and mother, when the head of the family, may claim exemptions, within the statutory limitation, out of her own and her husband's property, or the separate property of either, without specific allegation as to which the different articles belong. *Braswell v. McDaniel*, 74 Ga. 319. The value of the use of the property during its wrongful detention was in this case the truest measure of damages, and the amount awarded was fully justified by competent evidence. *Allen v. Fox*, 51 N. Y. 563, 10 Am. Rep. 641; *Northrup v. Cross*, 2 N. D. 433, 51 N. W. 718.

Under the view we have taken, the rulings of the court relating to evidence admitted and excluded become immaterial, as the result could not have been different.

There being no reversible error, the judgment appealed from is affirmed.

David WATERHOUSE, Respt.,

v.

JOSEPH SCHLITZ BREWING COMPANY,
Appt.

(.....S. D.....)

1. The owner of a building standing on a business street, who, knowing that it has been negligently constructed by the use of improper materials and liable to fall of its own weight, continues to use it or permit it to be used, is guilty of continuing a nuisance, and is liable for injuries caused by its collapse, to a person lawfully standing in front of it at the time, although it is then in the possession of a lessee.
2. The fact that a building has stood for ten years without falling is not sufficient to disprove that it was negligently constructed.
3. A complaint alleging the negligent maintenance of a building that was improperly constructed is not insufficient because it fails to state specifically in what respects it was negligently constructed, or in what respect the materials used were insufficient for such a structure.

(January 18, 1900.)

APPPEAL by defendant from an order of the Circuit Court for Codington County

NOTE.—As to individual liability for falling walls or buildings, see *Ryder v. Kinsey* (Minn.) 34 L. R. A. 557, and note.
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overruling a demurrer to the complaint in an action brought to recover damages for personal injuries alleged to have resulted from the fall of a building owned by defendant. *Affirmed*.

The facts are stated in the opinion.

Mr. George W. Case, for appellant:

Negligence is not actionable unless it is the proximate cause of the injury complained of.

Mathiason v. Mayer, 90 Mo. 585, 2 S. W. 834; *Sedgw. Damages*, § 9.

Actionable negligence must be the proximate cause of the injury.

Bishop, Noncontr. Law, § 455.

In determining the question of negligence the situation and knowledge of the parties, and the attendant circumstances, must be considered.

Maxwell, Code Pl. p. 255.

When a structure has uniformly proved safe its use may be continued without the imputation of carelessness.

Lafflin v. Buffalo & S. W. R. Co. 106 N. Y. 136, 60 Am. Rep. 433, 12 N. E. 599; *Dougan v. Champlain Transp. Co.* 56 N. Y. 1; *Loftus v. Union Ferry Co.* 84 N. Y. 455, 38 Am. Rep. 533; *Burke v. Witherbee*, 98 N. Y. 562.

The charge of negligence in the construction of the building, being absolutely destroyed by the length of time which the complaint alleges the building stood, not showing any weakness or decay, is wholly insufficient upon which to predicate this action.

Estate, Pl. 4th ed. § 1861; *Wallace v. San Antonio & A. P. R. Co.* (Tex. Civ. App.) 42 S. W. 865; *Brown v. Chicago, R. I. & P. R. Co.* 59 Kan. 70, 52 Pac. 65; *Elliott v. Carter White-Lead Co.* 53 Neb. 458, 73 N. W. 948.

The acts which constitute the negligence are not alleged.

Flint & P. M. R. Co. v. Stark, 38 Mich. 714; *Smith v. Buttner*, 90 Cal. 95, 27 Pac. 29; *Sieber v. Blanc*, 76 Cal. 173, 18 Pac. 260; *Ryder v. Kinsey*, 62 Minn. 85, 34 L. R. A. 557, 64 N. W. 94; *Bishop, Noncontr. Law*, § 459; *Metzger v. Schultz*, 16 Ind. App. 454, 43 N. E. 886, 45 N. E. 619.

The building being rented at the time of the injury, if any liability whatever resulted from its fall, unless because of some concealed defect, or a contract on the part of the owner to repair it, the tenant or person occupying it would be liable.

Barman v. Spencer (Ind.) 44 L. R. A. 815, 49 N. E. 9; 16 Am. & Eng. Enc. Law, p. 474; *Shearm. & Redf. Neg.* 5th ed. §§ 503, 708; *Van Every v. Ogg*, 59 Cal. 563; *Sieber v. Blanc*, 76 Cal. 173, 18 Pac. 260; *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438; *Bove v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471; *Fellows v. Gilhuber*, 82 Wis. 639, 17 L. R. A. 577, 52 N. W. 307; *Willson v. Treadwell*, 81 Cal. 58, 22 Pac. 304; *McKenzie v. Cheatham*, 83 Me. 543, 22 Atl. 469; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767.

The stranger has no greater rights against the landlord than the tenant himself, unless it is a case where the building when leased to the tenant was in a dangerous condition,

and such defect was concealed, and from its nature could not readily be ascertained by either the tenant or the stranger.

Corey v. Mann, 14 How. Pr. 163.

Messrs. Cheever & Hall, for respondent:

Though the burden of proving negligence is on the plaintiff, yet in many cases the nature of the accident may be such as to constitute prima facie proof thereof.

J. Russell Mfg. Co. v. New Haven S. B. Co. 50 N. Y. 121.

The fact that this particular building had through fortuitous circumstances stood for ten years, and then fell of its own weight at the end of that time, raises no presumption of law or fact that it was not negligently constructed; but, on the other hand, the fact that it did so fall without any extraneous cause, not only constitutes evidence of negligence *per se*, but it also raises a presumption of negligence in its construction.

16 Am. & Eng. Enc. Law, p. 449; 3 Lawson, Rights, Rem. & Pr. § 1160; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Deering*, Neg. § 314.

If an injury occurs after the person who erected the same has alienated the property, he is not liable, the new owner alone being responsible.

16 Am. & Eng. Enc. Law, p. 475; *Blunt v. Aikin*, 15 Wend. 522; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603.

The gist of this action is negligence, and it is not necessary to show that it was wilful.

Barnes v. Beirne, 38 La. Ann. 280; *Tucker v. Illinois C. R. Co.* 42 La. Ann. 114, 7 So. 124; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Bassett v. Fish*, 75 N. Y. 305; *McCarthy v. Syracuse*, 46 N. Y. 194.

The owner of the building is the proper defendant.

16 Am. & Eng. Enc. Law, p. 449; 3 Lawson, Neg. § 314; 3 Lawson, Rights, Rem. & Pr. § 1160; *Congrove v. Smith*, 18 N. Y. 79; *Clifford v. Dam*, 81 N. Y. 52; *Swords v. Edgar*, 59 N. Y. 34, 17 Am. Rep. 295; *Davenport v. Ruckman*, 37 N. Y. 568; *Anderson v. Dickie*, 26 How. Pr. 105; *Knauss v. Brua*, 107 Pa. 85; *Khron v. Brock*, 144 Mass. 516, 11 N. E. 748; *Albert v. State use of Ryan*, 66 Md. 325, 59 Am. Rep. 159; *Marshall v. Heard*, 59 Tex. 266.

The owner cannot avoid liability for improper construction of a building by turning the possession thereof over to a tenant.

Hannem v. Pence, 40 Minn. 127, 41 N. W. 657; *Jessen v. Sweigert*, 66 Cal. 182, 4 Pac. 1188; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; 16 Am. & Eng. Enc. Law, 475; *Blunt v. Aikin*, 15 Wend. 522.

Corson, J., delivered the opinion of the court:

This is an action by the plaintiff to recover damages for injuries received by him, caused by the falling of a building owned by the defendant. A demurrer was interposed to the complaint on the ground that the same did not state facts sufficient to constitute a cause of action against the defendant, and 48 L. R. A.

also that it appears on the face of the said complaint that there is a defect of parties defendant. The demurrer was overruled, and from the order overruling the demurrer defendant appeals.

The following are the material allegations in the complaint necessary to be considered in determining as to the correctness of the court's ruling in overruling the demurrer:

"(3) That on the 21st day of June, 1897, defendant owned, had control of, and had for more than ten years immediately prior thereto owned and had control of, a certain grout building, known as the 'Mulholland Building' which was then and there, and for some time prior to said date had been, occupied by a tenant of defendant, and situated on the following described premises in the city of Watertown, county of Codington;

... that said building was negligently constructed of improper materials, and in an improper and negligent manner (being what is known as a 'grout building,' consisting principally of mortar), and was old, and negligently used and permitted to be used by the defendant as a place where the public were permitted to resort, and was rented by the defendant at the time of its collapse, hereinafter mentioned, for saloon purposes, on a main business street in said city of Watertown; that said building was at all of said times, and particularly on the 21st day of June, 1897, in a dangerous and unsafe condition, by reason of its negligent construction and the negligent use of improper materials in its construction, and was liable at any time, of its own weight, to collapse and injure persons who might be lawfully in or near the same, as defendant well knew. (4) That on the 21st day of June, 1897, while the plaintiff was lawfully in front of said Mulholland Building, above described, the said building, by reason of its said defective and negligent construction, and the negligent and defective materials of which it was constructed, and by reason of the negligence of the defendant in permitting said building to remain and be used as aforesaid, did fall and collapse, and that said building, and a large and heavy mass of timbers and materials out of which it was constructed, did fall upon and greatly injure this plaintiff, without any fault on his part. . . ."

It is contended on the part of the appellant that the complaint is defective, in that it fails to charge that the appellant constructed the building, and hence it cannot be claimed that the appellant was guilty of negligence in the construction of the same, and it must be inferred that, if appellant was negligent in regard to the building, it was because of its knowledge of its faulty construction after it had been so constructed. The appellant further contends that the allegation that the appellant owned the said building, and had owned the same for more than ten years immediately prior thereto, contradicts and negatives the allegation that the building was negligently constructed of improper materials and in an improper manner; that the construction of the building was too remote to constitute the proximate cause of re-

spondent's injury. The respondent contends in support of the court's ruling that the complaint is one for damages sustained by the plaintiff by reason of the falling of the defendant's building without extraneous cause, which building was negligently constructed of improper materials, and in an improper and negligent manner (being what is known as a "grout building," consisting principally of mortar), and was old, and negligently used and permitted to be used by the defendant, and rented by it, for saloon purposes. It is not claimed by respondent that the injuries were sustained by reason of a failure to repair the building, or that the purpose for which it was used caused the injury, but the gist of the action is the negligent construction and maintenance of the building by the defendant as owner. The defect claimed is one which repairs could not obviate. It is claimed by respondent that the fact that it was rented by the defendant for saloon purposes, and used as such, is set forth in the complaint for the purpose of showing that it was not the improper use of the building which caused it to fall, but that the fault was in the structure, inherently. The defendant by its demurrer admits, for the purposes of the demurrer, that the facts stated in the complaint are true. The defendant therefore admits that the said building was negligently constructed of improper materials, and in an improper and negligent manner; that the said building was what is known as a "grout building," consisting principally of mortar, and was old, and negligently used and permitted to be used by the defendant as a place where the public were permitted to resort; that said building was at all of said times, and particularly on the 21st day of June, 1897, in a dangerous and unsafe condition, by reason of its negligent construction and was liable at any time, of own weight, to fall and injure persons who might be lawfully in or near the same, as defendant well knew. It is true that it is not stated that the defendant constructed the said building, but it is stated that it has owned and used the building for ten years or more, well knowing that it was so negligently constructed by the use of improper materials, and was liable at any time to fall of its own weight. Assuming these facts to be true, it would seem to necessarily follow that the defendant would be liable for any injuries resulting to persons rightfully in or about said building, and the fact that the building was leased to, and in the possession of, a tenant at the time the accident occurred would not relieve the defendant from such liability. It seems to be the proper rule that the landlord is liable for the negligent construction, and the tenant for the negligent use, of the premises. If a dangerous or injurious structure is erected on the premises when he lets them to the tenant, the landlord is, of course, liable, but he cannot be made answerable for such a structure erected by the tenant unless he renews the lease for the premises after knowledge of such dangerous or injurious structure; and if the injury occurs after the

original owner has alienated the property, from a dangerous structure erected by him before alienation, he is not liable, the new owner alone being responsible. 16 Am. & Eng. Enc. Law, pp. 473, 474; *Congreve v. Smith*, 18 N. Y. 79; *Clifford v. Dam*, 81 N. Y. 52; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Davenport v. Ruckman*, 37 N. Y. 568; *Anderson v. Dickie*, 26 How. Pr. 105; *Knauss v. Brua*, 107 Pa. 85; *Khron v. Brock*, 144 Mass. 516, 11 N. E. 748: The owner of a building adjoining a street or highway is under a legal obligation to take reasonable care that it is kept in proper condition, so that it shall not fall into the street or highway and injure persons lawfully there. *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530. The general rule is that every person must so use his own property as not to injure others. Anything wrongfully done or committed which injures or annoys another in the enjoyment of his legal rights is an actionable nuisance. Cooley, Torts, § 565. A nuisance may result from the negligent acts of commission or omission of another. The owner is liable if the nuisance was erected on the land by the prior owner or by a stranger, and he knowingly maintains or continues it. *Metzger v. Schultz*, 16 Ind. App. 454, 43 N. E. 886, 45 N. E. 619. If, therefore, the building in controversy was originally negligently constructed of unsafe and unsuitable material, so that it was liable to fall of its own weight, it constituted a nuisance; and if the defendant, with knowledge of its negligent construction and the use of unsuitable material therein, continued to use said building, or permitted it to be used, it was guilty of continuing the nuisance, and would be liable to the party injured by reason of the negligent construction of the building, and the use in the construction of such building of improper and unsuitable materials. *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *House v. Metcalf*, 27 Conn. 631.

The contention of appellant that the statement in the complaint that the building had been owned and used by the defendant for more than ten years tends to contradict the statement that the building was negligently and improperly constructed, is not tenable. From the fact that the building fell of its own weight, without any external violence, a fair presumption would be that the fall occurred through adequate causes, one of the most natural of which would be the negligent and faulty construction of the building itself. The fact, therefore, that it had stood for a number of years without falling would afford very slight evidence that it had been properly constructed, and of suitable material. In the case of *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530, the building which fell, as reported in that case, was constructed in 1854, and remained standing until 1870, when a part of its walls fell outward into the street, causing the injury to the plaintiff in that action; but it does not appear to have been there claimed that the fact that the building had been in use 16 years or more

constituted any objection to the recovery by the plaintiff.

It is further contended by the appellant that it does not appear from the complaint, specifically, in what respects the building was negligently constructed, nor in what respect the materials used were insufficient for such a structure; but it seems, in general, that a complaint specifying the act, the commission or omission of which caused the injury, and averring generally that it was negligently and carelessly done or omitted, will suffice. 14 Enc. Pl. & Pr. 334, and cases cited. See

also *Rogers v. Truesdale*, 57 Minn. 126, 58 N. W. 688.

It will be observed that in the case at bar no negligence of the tenant is alleged, nor is it alleged that the building fell by reason of any decay, or by reason of its being out of repair. Hence there seems to be no cause of action for which the tenant would be liable, and hence there is no misjoinder of parties.

Our conclusion is that the overruling of the demurrer by the court was correct.

The order overruling the demurrer is affirmed.

TENNESSEE SUPREME COURT.

D. M. DOTY, *Appt.*,

v.

CHATTANOOGA UNION RAILWAY COMPANY *et al.*

(.....Tenn.....)

A covenant in a deed of land for a railroad right of way, that certain trains shall be run on the road to be built thereon, which is the chief consideration of the conveyance, is a covenant running with the land, on which an action may be maintained against a subsequent purchaser of the railroad who fails to run such trains, notwithstanding the fact that the covenant had been broken by the original grantee before such transfer, and although the covenant does not expressly refer to assigns.

(November 18, 1899.)

APPEAL by plaintiff from a judgment of the Circuit Court for Hamilton County in favor of defendants in a proceeding to enforce a covenant requiring the running of trains over a right of way granted by plaintiff to defendants. *Reversed.*

The facts are stated in the opinion.

Messrs. Fritchard & Sizer, for appellant:

The artificial rule in *Spencer's Case*, 5 Coke, 16a, made a distinction between covenants which related to things *in esse* and those which related to things not *in esse*, holding that the former bound the assignee although not named, but that the latter did not bind the assignee.

In the English note to *Spencer's Case*, in 1 Smith, Lead. Cas. 9th Am. ed. pp. 186-188, it is pointed out that in the English case of *Minshull v. Oakes*, 2 Hurlst. & N. 793, the court of exchequer has not only ex-

pressed an opinion that the rule announced by Coke as having been decided in *Spencer's Case* is unreasonable, but has also suggested that the case decided the contrary.

And at page 208, in the American note, it is said: "It may be absurd that the question whether it is necessary to covenant for 'assigns' as to anything not *in esse* at the time of the covenant, discussed in the first and second resolutions of the leading case, has generally been passed over lightly in this country, and the use of the word 'assigns' considered of little importance if an intention that the covenant shall run be gathered from the whole instrument."

Masury v. Southworth, 9 Ohio St. 340; *Bradford Oil Co. v. Blair*, 113 Pa. 83, 57 Am. Rep. 442, 4 Atl. 218.

The intention of the parties to a covenant respecting real property is the controlling element in determining whether or not a covenant runs with the land.

Bald Eagle Valley R. Co. v. Nittany Valley R. Co. 171 Pa. 284, 29 L. R. A. 423, 33 Atl. 239; *Horn v. Miller*, 136 Pa. 640, 9 L. R. A. 810, 20 Atl. 706.

The covenant sued on does clearly touch and concern the estate.

Horn v. Miller, 136 Pa. 640, 9 L. R. A. 810, 20 Atl. 706.

The deed in this case is (1) a conveyance of a railroad right of way.

2. The deed is made and expressed to be made "in consideration of an agreement by the grantee to run daily passenger trains over and along the right of way granted."

3. The habendum of the deed is to "the Chattanooga Union Railway Co., its successors and assigns," and the warranty uses the same words.

NOTE.—As to effect of stipulation in a deed of a railroad right of way for the maintenance of a fence as a covenant running with the land, see *Gulf, C. & S. F. R. Co. v. Smith* (Tex.) 2 L. R. A. 281.

For effect of covenant in deed of right of way as to the running of a stream, see *Peden v. Chicago, R. I. & P. R. Co.* (Iowa) 4 L. R. A. 401.

On the general question of covenants running with the land, see *Nalle v. Paggi* (Tex.) 1 L. R. A. 33, and note; *Middletown v. Newport Hospital* (R. I.) 1 L. R. A. 291; *Kettle River R. Co.* 48 L. R. A.

v. Eastern R. Co. (Minn.) 6 L. R. A. 111; *Crawford v. Witherbee* (Wia.) 9 L. R. A. 561; *Mygatt v. Coe* (N. Y.) 11 L. R. A. 646; *Mott v. Oppenheimer* (N. Y.) 17 L. R. A. 409; *Hickey v. Lake Shore & M. S. R. Co.* (Ohio) 23 L. R. A. 396; *Mygatt v. Coe* (N. Y.) 24 L. R. A. 850; *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.* (Pa.) 20 L. R. A. 423; *Landell v. Hamilton* (Pa.) 34 L. R. A. 227; *Rochester Lodge No. 21. A. F. & A. M. v. Graham* (Minn.) 37 L. R. A. 404; and *Northern F. R. Co. v. McClure* (N. D.) 47 L. R. A. 149.

4. The deed contains no reference to the building of the railroad.

5. The deed contains no provision that improvements placed upon the land shall pass to grantor, and no words that by any stretch of the imagination can be applicable to "things not in esse" within the rule in *Spencer's Case*.

The effect of this deed is to convey an easement only.

Cincinnati, I. St. L. & C. R. Co. v. Geisel, 119 Ind. 77, 21 N. E. 470; *Blakely v. Chicago, K. & N. R. Co.* 46 Neb. 272, 64 N. W. 972; *State, Morris Canal & Bkg. Co., Prosecutors v. Brown*, 27 N. J. L. 13; *Ottumwa, C. Falls, & St. P. R. Co. v. McWilliams*, 71 Iowa, 164, 32 N. W. 315; *Williams v. Western U. R. Co.* 50 Wis. 71, 5 N. W. 482; *Bodfish v. Bodfish*, 105 Mass. 317.

If the expression in the grant, "in consideration of an agreement to run daily passenger trains over and along the right of way granted," is a condition, it is necessarily attached to the grant; it necessarily "runs with the land," and savors of the thing granted.

Provisos, recitals, or other words of a deed which indicate the purpose of a grant are sufficient of themselves to create a condition.

Taylor v. Cedar Rapids & St. P. R. Co. 25 Iowa, 371; *Den ex dem. Southard v. Central R. Co.* 26 N. J. L. 13; *Rathbone v. Tioga Nev. Co.* 2 Watts & S. 74; *Indianapolis, P. & C. R. Co. v. Hood*, 66 Ind. 580; *Aiken v. Albany, V. & C. R. Co.* 26 Barb. 289; *Donisthorpe v. Fremont, E. & M. Valley R. Co.* 30 Neb. 142, 46 N. W. 240.

Where the estate is conveyed for a specified purpose, or is to exist so long as the property is used for a specified purpose, it makes a limit or boundary beyond which the estate conveyed cannot exist.

Macon v. East Tennessee, V. & G. R. Co. 82 Ga. 501; 3 Elliott, Railroads, §§ 939-941.

The remedy of the grantor for failure to perform a condition is not limited to the assertion of the forfeiture and re-entry. He may waive the forfeiture and sue for damages.

3 Elliott, Railroads, §§ 942 et seq.; *Rush v. Burlington, C. R. & N. R. Co.* 57 Iowa, 201, 10 N. W. 628; *Gray v. Burlington & M. R. Co.* 37 Iowa, 119; *Joliet & N. I. R. Co. v. Jones*, 20 Ill. 221; *Kankakee & S. W. R. Co. v. Fitzgerald*, 17 Ill. App. 525; *Baker v. Chicago, R. I. & P. R. Co.* 57 Mo. 265.

If the covenant relates to the interest or estate granted, so that its performance or nonperformance will affect the quality, value, or mode of enjoyment of the estate, it will run with the land, and bind anyone taking the estate with notice.

8 Am. & Eng. Enc. Law, 2d ed. pp. 138, 139 et seq.

The grant of the property for a right of way was a grant of an easement only, and the declaration of the purpose of the grant imposed a restriction upon the use of the property.

Any person holding the property, with no-

tice, would be liable to the plaintiff for damages for condition or covenant broken.

The doctrine of *Spencer's Case* has no application.

Dorsey v. St. Louis, A. & T. H. R. Co. 58 Ill. 65; *Norfleet v. Cromwell*, 64 N. C. 1; *Georgia Southern R. Co. v. Reeves*, 64 Ga. 492; 2 Washb. Real Prop. 263, 264; *Countryman v. Deck*, 13 Abb. N. C. 110; *Hickey v. Lake Shore & M. S. R. Co.* 51 Ohio St. 40, 23 L. R. A. 396, 36 N. E. 672.

The law does not require any particular form of word to constitute a covenant which shall run with the land.

Trull v. Eastman, 3 Met. 121, 37 Am. Dec. 126; *Comyns' Dig. Title, Covenant*; *Masury v. Southworth*, 9 Ohio St. 341; *Thomas v. Von Kapff*, 6 Gill & J. 372; *Midland R. Co. v. Fisher*, 125 Ind. 19, 8 L. R. A. 604, 24 N. E. 756; *Lake Erie & W. R. Co. v. Priest*, 131 Ind. 413, 31 N. E. 77; *Hazlett v. Sinclair*, 76 Ind. 488, 40 Am. Rep. 254; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Huston v. Cincinnati & Z. R. Co.* 21 Ohio St. 235; *Carr v. Lowry*, 27 Pa. 257; *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550; *Gilmer v. Mobile & M. R. Co.* 79 Ala. 569.

There is nothing in the rule in *Spencer's Case* to prevent a covenant like the one in Doty's deed running with the land.

Schmucker v. Sibert, 18 Kan. 104; *Ricard v. Sanderson*, 41 N. Y. 179; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556; *Rogers v. Eagle Fire Co.* 9 Wend. 618; *Spaulding v. Hallenbeck*, 35 N. Y. 204; *Newell v. Hill*, 2 Met. 180; *Goodwin v. Gilbert*, 9 Mass. 510; *Huff v. Nickerson*, 27 Me. 106; *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633.

Messrs. Shepherd & Frierson, for appellees:

The benefit of a covenant relating to land will run with the land, but the burden of such a covenant will not, except in cases growing out of leases, as to which the rule was changed by 32 Hen. VIII. chap. 34.

First Nat. Bank v. Security Bank, 61 Minn. 31, 63 N. W. 264; *Spencer's Case*, 1 Smith, Lead Cas. pp. 172 et seq.

A covenant real is that whereby an obligation to pass something real is created, as lands or tenements, or the obligation of which is so connected with the realty that he who has the latter is entitled to the benefit or liable to perform the other.

Sharwood's Bl. Com. 304, note 10; *Brew v. Van Deman*, 6 Heisk. 439.

Such a covenant is not a lien on the land, but merely imposes a personal obligation on whoever becomes the owner or enjoys the possession of the land, and this, ordinarily, whether the covenant in terms names the covenantor and "assigns," or only the covenantor.

But to the latter part of this rule *Spencer's Case* made an exception.

A covenant cannot be said to attach itself to, and become a part of, something which does not exist.

Kerr, Real Prop. § 1213; *Bream v. Dickerson*, 2 Humph. 128; *Cronin v. Watkins*, 1

Tenn. Ch. 125; *Brooks v. Smith*, Thompson's Tenn. Cas. 226, Shannon's Cases, 158.

The covenant in this suit extended to the manner of operating a railroad, a thing not then *in esse*, and could not bind an assignee or vendee of the covenantor unless "assigns" were expressly mentioned in the covenant.

The omission of the word "assigns" in one covenant shows that the parties considered it, or intended it, to be of a different nature from the covenants in which it is used.

Blount v. Harvey, 51 N. C. (6 Jones, L.) 191; *Conduitt v. Ross*, 102 Ind. 168, 26 N. E. 198; *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.* 171 Pa. 295, 29 L. R. A. 423, 33 Atl. 239.

All covenants relating to a subject-matter not *in esse*, such as for the erection of buildings upon the premises demised, are personal covenants, and do not run with the land so as to bind the assignees, unless they are expressly named therein.

Kerr, Real Prop. § 1218; Tiedeman, Real Prop. § 190, p. 158; Washb. Real Prop. pp. 532, 533; Taylor, Land. & T. § 260; *Spencer's Case*, 1 Smith, Lead. Cas. p. 138; *Newburg Petroleum Co. v. Weare*, 44 Ohio St. 612, 9 N. E. 845.

If the covenant be annexed to a thing not *in esse* before, but *de novo* to be erected on the thing,—as, to set up a new house, and the like,—in this case it will not bind the assignees unless they be named in the covenant.

Tallman v. Coffin, 4 N. Y. 136; *Spencer's Case*, 1 Smith, Lead. Cas. pp. 1, 22; Roscoe, Actions Relating to Real Prop. 438; *Bally v. Wells*, Wilmot's Notes, 345; Shep. Touch. 179; *Thompson v. Rose*, 8 Cow. 266; *Hansen v. Meyer*, 81 Ill. 322.

A covenant to build and maintain a partition fence or party wall does not run with the land, and is only personal.

Hartung v. Witte, 59 Wis. 294, 18 N. W. 175; Platt, Covenants, 471; Taylor, Land. & T. 301; Williams, Land. & T. 290; *Lametti v. Anderson*, 6 Cow. 307; *Thompson v. Rose*, 8 Cow. 266; *Allen v. Culver*, 3 Denio, 284; *Sampson v. Easterby*, 9 Barn. & C. 505; *Doughty v. Bowman*, 11 Q. B. 444; *Congleton v. Pattison*, 10 East, 138; *Lyford v. North Pacific R. Co.* 92 Cal. 95, 28 Pac. 103; *Hoard v. Chesapeake & O. R. Co.* 123 U. S. 222, 31 L. ed. 130, 8 Sup. Ct. Rep. 74.

This is the rule in Tennessee.

Bream v. Dickerson, 2 Humph. 128; *Brooks v. Smith*, Thompson's Tenn. Cas. 226, 1 Shannon's Cases, 158; *Cronin v. Atkins*, 1 Tenn. Ch. 125; *J. I. Case Co. v. Jayer*, 89 Tenn. 337, 12 L. R. A. 519, 16 S. W. 147.

A purchaser of land acquires all the benefits or burdens incident to a covenant running with the lands when he purchases.

Whenever a breach occurred, a right of action accrued at once. Doty could have brought the same suit six months after the breach that he brought five years after.

If the covenant did not cease to run after its breach, there would be continuing and recurring breaches of it, and Doty might maintain action after action, and recover in each his full damages.

48 L. R. A.

If a breach of the covenants in the lease occurs after the conveyance to the purchaser, it is his prejudice, and he may recover therefor the damages sustained.

3 Comyns, Dig. 256, 257.

If before, the covenant is a mere chose in action, and does not pass as an incident to the land.

Shelby v. Hearne, 6 Yerg. 512; *Thursby v. Plant*, 1 Wms. Saund. 241; *Greenby v. Wilcocks*, 2 Johns. 1, 3 Am. Dec. 379; *Marston v. Hobbs*, 2 Mass. 439, 3 Am. Dec. 61; 1 Chitty, Pl. 1, 5th Am. ed. 10; *Brooks v. Smith*, Thomp. (Tenn.) Cas. 226, 1 Shannon's Cases, 158; *Peters v. Bowman*, 98 U. S. 59, 25 L. ed. 92; *Spencer's Case*, 1 Smith, Lead. Cas. 204; *Beddoe v. Wadsworth*, 21 Wend. 121; *Townsend v. Morris*, 6 Cow. 122; *Cornell v. Jackson*, 3 Cush. 509; *Clark v. Swift*, 3 Met. 390; *Thayer v. Clemence*, 22 Pick. 490.

A nominal breach is sufficient to arrest the covenant in the hands of the covenantee, and prevent it from passing with a subsequent descent or transfer.

Greenby v. Wilcocks, 2 Johns. 1, 3 Am. Dec. 379; *Collier v. Gamble*, 10 Mo. 467; *Hacker v. Storer*, 8 Me. 228; *Mitchell v. Warner*, 5 Conn. 497; Rawle, Covenants for Title, 338, 342.

The covenant ran with the land until the breach. It then ceased to run because it was turned into a chose in action.

Washington Natural Gas Co. v. Johnson, 123 Pa. 592, 16 Atl. 799; *Walton v. Campbell*, 51 Neb. 794, 71 N. W. 737; *Ladd v. Noyes*, 137 Mass. 151; *Davis v. Lyman*, 6 Conn. 255.

Wilkes, J., delivered the opinion of the court:

This is an action for breach of covenant contained in a deed made by plaintiff, Doty, to the Chattanooga Union Railway Company. The effort is to hold the assignee of that company upon the covenant, as one running with land. Under the charge of the trial judge, the jury found for the defendant assignee, and plaintiff has appealed and assigned errors.

The question, as submitted to this court, is whether the covenant sued on is one which runs with the land, and affects the transferee, or is merely the personal covenant of the Chattanooga Union Railway Company, the original grantee. In 1889 this railway company desired to extend its lines, already partially constructed, through the lands of the plaintiff. An agreement was made between the railroad company and plaintiff, which, for the purposes of this suit, sufficiently appears from the recitals and covenants in the deed by plaintiff to the railroad company. These recitals are as follows: "For and in consideration of \$5 in hand paid, the receipt of which is hereby acknowledged, and an agreement by the grantee to run daily passenger trains on and along the right of way granted, I, D. M. Doty, have bargained and sold unto the Chattanooga Union Railway Co., for right of way for the road of said company, the following de-

scribed pieces and parcels of land, . . . to have and to hold the same, together with all the rights, privileges, erections, and appurtenances thereon or thereunto belonging, to the said Chattanooga Union Railway Company, its successors and assigns, forever, with the promise that no other railway company shall be allowed to put its tracks on the right of way aforesaid; and, if the same is abandoned by nonuse for six months, the title will revert to me. . . . I warrant the title thereunto, and hereby bind myself, my heirs and representatives, to defend the same to the said Chattanooga Union Railway Company, its successors and assigns, against the lawful claims of all persons." The deed is dated July 19, 1889. About three months thereafter the road was constructed and completed over the land, trains were put in operation, and a passenger service inaugurated. A station house was built on the land, passenger trains were run once every hour each way, and passengers were received and discharged at Doty's, the station on the land; all trains stopping there. After some time the trains were decreased to three a day. After September, 1892, only mixed trains were operated and only one per day; and in November, 1896, they ceased altogether to stop at this station, and ceased altogether to run passenger trains. In 1895, the railway company having become insolvent, all its property was sold to one Merrill, and he afterwards conveyed to the Belt Railway Company; and this company leased to the Alabama Great Southern Railroad Company, which undertook to operate the line, pay all expenses, and defend all suits arising out of the operation of the road, to pay all judgments recovered against it, keep the premises in repair, and return same when the lease expired. The circuit judge, in substance, told the jury that, inasmuch as the railroad had not been built when Doty made the deed, the contract was personal and binding on the Chattanooga Union Railway Company only, and had no binding force upon its successors or assigns, and that, as the covenant had been breached before the road was transferred to the parties against whom relief is sought as transferees, no recovery could be had against them. The plaintiff asks no judgment against the Chattanooga Union Railway Company, as it is insolvent, and the contest is with the transferees, upon the idea that the terms of the deed make a covenant upon the part of such transferees; and, as before stated, this is the only question this court is requested to determine. Very exhaustive and able briefs have been filed by counsel, and we are cited to a large number of cases, many of which we do not think apply to the real case under consideration.

We think, if we look at the situation of the parties, and what was intended by the provisions in question, it will aid us in reaching the rights of the parties. The Chattanooga Union Railway Company desired to obtain a right of way over the plaintiff's land. The plaintiff was willing to

grant it, provided passenger service was furnished over the road. It appears that plaintiff also expected a station to be maintained upon the land, or so near to it as to make the passenger service a convenience and benefit, but for some reason he seems to have omitted this feature from his written contract. It is manifest he cannot demand of any of the defendants anything more than that they shall run daily passenger trains over that right of way as provided in the deed. Whatever benefit would accrue to plaintiff from this, he is entitled to from his grantee, and more than this he cannot claim from anyone. Now, as to the original grantee: It acquired under this agreement, and the conveyance in which it is embodied, a right of way for railroad purposes, and for these purposes alone. This right granted to the railroad conferred upon it an easement over and upon the land; that is, a right to construct and lay its track over and upon the land, and to operate it. Jones, Easem. § 212. It is not provided how long this easement shall continue, except that, if it is abandoned for six months, it shall be extinguished, and the full title shall revert in or revert to the plaintiff, as owner of the fee or reversion. Nor is it provided how long the plaintiff shall be entitled to have the daily passenger trains operated. It is plain that the running of the train was to be, and was, the consideration for the right of user of the easement. Both were continuing rights, and they were mutually dependent upon each other. So long as the consideration was paid (that is, the trains were run), just so long was the road entitled to operate and enjoy its easement. It seems plain that if the consideration should fail, by trains being discontinued, then the privilege purchased for this consideration of using the right of way should also fail. If the landowner had sold his land, he could not have conveyed it clear of this servitude, so long as the railroad company kept up its part of the contract by furnishing the service. If the railroad company had sold its property, its assignee could only continue to operate the road by paying the consideration therefor, to wit, operating the train. A sale *in invitum* would carry with it the same results, as to either the landowner or the easement owner. The obligations are continuing and mutual. Each is based upon the other, and incurred in view of the other. It might not have been a wise contract to make, but there is no law prohibiting unwise contracts. It may turn out that the duty of running a passenger train will be a burden upon the road. It may be it will be but a barren benefit to the landowner, as he can only require it to run, and not to stop.

We have examined the numerous cases cited by defendant's counsel. We do not think they are applicable, and many cited by the plaintiff's counsel are also inapplicable, as we view the case. We are of opinion the principle involved is that passed upon by the supreme court of Alabama in *Gilmer v. Mobile & M. R. Co.* 79 Ala. 569. In that case the plaintiff had conveyed to the

Alabama & Florida Railroad Company a right of way through his land, in consideration that the railroad would stop its passenger and freight trains opposite his house, and receive and discharge passengers and freight, upon proper signal. The deed contained no language binding the assigns of the railroad company. The Mobile & Montgomery Railroad Company was the successor and assign of the grantee. The plaintiff contended that the covenant ran with the land and bound the assignee. This was demurred to. The circuit judge sustained the demurrer, and the supreme court reversed this ruling, and held that the assignee was bound, though not named in the deed or covenant, and that the obligation to maintain a flag station was a continuing one, for any breach of which any owner of the right of way would be liable. The obligation to receive and discharge passengers was a burden upon the easement, which was in turn a burden upon the land. In the case at bar the obligation to run a daily passenger train over this particular piece of road was a burden upon the easement or privilege of owning and operating the right of way. In both cases the service to be rendered by the railroad was in the nature of rent for the use of the right of way, no other consideration being paid therefor. The road might have paid *in solido*, in money or otherwise, for this right of way, once for all; but it stipulated to render certain service, that service to be continuous, and it is bound by its agreement. And so is any assignee or transferee bound to render the same service, so long as it claims and enjoys the privilege, even though the word "assigns" is not used. The personal obligation of the original grantee could not extend beyond the time when his ownership ceased, as he would no longer be able to render the service without the road to render it upon, nor could the owner be required to look to such original grantee for any damages, except such as accrued up to that time; and yet the obligation to render the service must still continue, as a burden upon the easement or privilege of operating the road. So, if the contract was breached by the original grantee, the owner would have had his right of action at once. But this would not have exhausted his rights or remedies, for the obligations on each side are continuing; and a suit for breach at any time would, in a case like this, only cover the damages to that time, and as to the time subsequent to the breach the obligation continues, with successive rights of action for successive breaches. Even if we were mistaken in this view, still the breach by the original grantee of the obligation to render the service did not put an end to that obligation, and convert the landowner's right to merely a chose in action for the breach already committed; and, even if it did, he might waive such right, or delay it, and bring the action at such time as he chose, and against such parties as at the time being might be liable for such breach. The consideration for this conveyance was not the building of the railroad, but it was

the daily running of the trains. We might suppose the right of way occupied, and the road in operation. The landowner applies for damages under the statute, and the road meets him with the proposition, "If you will forego your damages, we will stipulate to render certain continuous service." Would this not be a continuing obligation that would attach to the use of the easement? But the present case is stronger, for the railroad obtains the privilege of occupancy and operation before there is any actual occupancy, upon the consideration that for such occupancy and privilege of operation the road will render a continuing service. The case of *Midland R. Co. v. Fisher*, 125 Ind. 19, 8 L. R. A. 604, 24 N. E. 756, is also in point. In that case a right of way was granted to a railroad company in consideration of its agreement to construct a fence on each side of the railroad when completed. The railroad was not built until three years after the deed was made. The grantee road mortgaged all its property, including the right of way, and the mortgage was foreclosed, and the defendant purchased and entered into possession. The land also passed to another owner. No fence was built. In an action for damages against the purchaser of the road at foreclosure sale, upon the agreement to build, the court held it liable, not because it was bound for the debts of the old company, but because, by accepting and taking charge of the right of way, it became obligated to build the fence; and the court said the purchaser could not be permitted to enjoy the easement, and refuse to perform the agreement which created and conferred it. It said further that one who takes a privilege in land, to which a burden is annexed, has no right to assert a claim to the privilege and deny responsibility for the burden; a party who acquires such a privilege acquires it subject to the conditions and burdens bound up with it, and must, if he asserts a right to the privilege, bear the burdens which the contract creating the privilege brought into existence. The covenant is an integral part of the deed upon which rests the right of the appellant. The deed which creates the asserted right discloses the covenant which burdens the right. In accepting the right under such a deed, and asserting a claim to the privilege conferred by it, subsequent grantees of the original covenant become bound to perform the agreement. The covenant passed with the land. The easement which burdened the fee was an encumbrance, and the party that took the land took it subject to the encumbrance; but, in taking subject to the encumbrance of the easement, that party acquired the benefit interwoven with the encumbrance. Both the burden and the benefit, the easement and the covenant, essentially inhere in the land. One benefits the estate, the other burdens it. The party who acquires the estate necessarily acquires it with both the burden and the benefits. He must submit to the one, but he has a right to the other. In accord with this holding are cited *Lake Erie & W. R. Co. v. Priest*,

131 Ind. 413, 31 N. E. 77; *Haslett v. Sinclair*, 76 Ind. 488, 40 Am. Rep. 254; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Huston v. Cincinnati & Z. R. Co.* 21 Ohio St. 235; *Carr v. Lowry*, 27 Pa. 257; *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550; and, while there are distinguishing features in each case, the general principle involved is the same in each.

The case of *Georgia Southern R. Co. v. Reeves*, 64 Ga. 492, was one where the grantor, in consideration of \$25 and of the building of the railroad, conveyed to a company, its successors and assigns, forever, in fee simple, the right of way through his land, and added in the deed the following words: "It is hereby agreed and understood a depot and station is to be located and given to said Osborn Reeves on the land, or strip above conveyed, to be permanently located for the benefit of said Osborn Reeves and his assigns and to be used for the general purposes of the railroad company." And it was held that the railroad, by accepting such deed, entered into a covenant to comply with its terms, and this covenant ran with the land, and became obligatory upon any second company which became the purchaser, under proper legal direction, of all the rights, privileges, franchises, and property of the former. It has been held in a number of cases, and is not questioned, that the acceptance of such a deed, though not signed by the grantee, binds such grantees to the stipulations and covenants in it. *Midland R. Co. v. Fisher*, 125 Ind. 19, 8 L. R. A. 604, 24 N. E. 756, and authorities there collated. In *Dorsey v. St. Louis, A. & T. H. R. Co.* 58 Ill. 65, it appears that a railroad entered into an agreement with Dorsey, in consideration of his conveyance of certain premises, that it would make and maintain certain fences and cattle guards at such places as Dorsey might designate, and soon thereafter it conveyed its franchises to another road. Dorsey brought an action on the covenant against the assignee, averring that it had notice of the agreement. A general demurrer was interposed and sustained upon the ground that the covenant was merely personal, and did not bind the assignee; and it was held that this was error; that the covenant related to the land, and was, from the relations of the parties, perpetual in its nature, and bound the assignee when the legislature conferred upon it power to purchase the land. Where an estate is conveyed for a specified purpose, the purpose marks the limit or boundary beyond which the estate conveyed cannot exist. *Macon v. East Tennessee, V. & G. R. Co.* 82 Ga. 501, 9 S. E. 1127; 3 Elliott, Railroads, §§ 939-941. The courts incline, when the words may be construed as a condition or covenant, to hold that they create a covenant, and not a forfeiture. 3 Elliott, Railroads, § 945, and cases cited. But, if the words were construed to be a forfeiture, that might be waived, and the party aggrieved may have his damages. 3 Elliott, Railroads, §§ 942 et seq. It is said in 8 Am. & Eng. Enc. Law, 2d ed. pp. 138, 139, that if a covenant relates

to the interest or estate granted, so that its performance or nonperformance will affect the quality, value, or mode of enjoyment of the estate, it will run with the land, and bind anyone taking the estate with notice. See the cases there cited. The supreme court of North Carolina held in *Norfleet v. Cromwell*, 61 N. C. 1, in substance, that the rule in *Spencer's Case*, 5 Coke, 16a, had no application to grants and covenants concerning easements, and said, in effect, that covenants creating easements run with the land, as against assignees in fee, when the intent to create them is clear, the easement apparent, and the covenant consistent with public policy; and added that covenants are the proper mode of creating such servitudes as consist in acts to be done by the owner of the servient estate. The court said: "The canal has been cut. The defendant cannot, in the nature of things, release the benefits which he acquired. The land cannot be returned to its former condition." And so the court held the party in possession upon his covenant to repair. See, to same effect, *Crawford v. Witherbee*, 77 Wis. 419, 9 L. R. A. 561, 46 N. W. 545. It is true, in the North Carolina case the words "heirs and assigns" were used with regard to both parties, and the canal was already in existence; and the case is cited only as to the question of the applicability of the rule in *Spencer's Case* to easements. In *Masury v. Southworth*, 9 Ohio St. 351, this principle is announced: "That if the thing to be done upon the land, though not existing at the time of the demise, would be of a permanent nature, connected with the use and enjoyment of the land, and beneficial to the assignee, an intent that it should run with the land and bind the assignee, shown by naming him in the deed, would be effectual." It was then held that the word "assigns" is not used in a technical sense, and as the only word appropriate for the purpose, but that any equivalent words manifesting an intent to bind an assignee will suffice.

While we think this is the proper view to take of the case, and these are the rules and principles to be applied, we are not unmindful of the authorities cited for the defendant, and which, it appears, were persuasive, if not controlling, in the court below; and the very able presentation of them in this court calls for a notice of them. We think they are clearly distinguishable from the cases we have cited and from the one at bar. The contention of the defendant may well be formulated in the following words from Tiedeman, Real Prop. § 190: "Covenants which relate to a subject-matter not *in esse*, as for the erection of a new building upon the premises, do not run with the land, so as to bind assignees, unless they are expressly named therein." See, to same effect, Kerr, Real Prop. § 1218; Washb. Real Prop. p. 532; Taylor, Land. & T. § 260; *Spencer's Case*, 5 Coke, 16a, 1 Smith, Lead. Cas. 138; *Newburg Petroleum Co. v. Weare*, 44 Ohio St. 604, 9 N. E. 845; *Tallman v. Coffin*, 4 N. Y. 136; *Lyford v. North Pacific C. R. Co.* 92 Cal. 95, 28 Pac. 103. The last-named case

was decided under a Code limiting covenants running with the land to those conferring benefits on the land, and is not applicable in this state. We are referred to the cases of *Bream v. Dickerson*, 2 Humph. 126; *Brooks v. Smith*, Thompson's Tenn. Cas. 158; *Cronin v. Watkins*, 1 Tenn. Ch. 125; *Hite v. Parks*, 2 Tenn. Ch. 373,—as holding with defendant's contention. In the first-named case there was an agreement on part of the lessor to pay the lessee for improvements made during the lease, or that the lessee might take pay out of the rents. There was an assignment of the lease, on the one hand, and of the reversion, on the other; and the court treated the question as to whether the agreement or covenant to pay for improvements passed to the assignee of the lease as against the assignee of the reversion. The court said that there was no covenant on the part of the lessees to improve, except at their option, and the covenant of the lessor was to pay if they were made and left standing at the expiration of the lease. It was added that it was difficult to conceive how a covenant to pay a pecuniary consideration for a house, if the tenant should see proper to erect it, could be said to touch and concern the land, so as to run with it. But the court also held that the agreement was a personal covenant, upon the theory of *Spencer's Case*, 5 Coke, 16a, where it was sought to charge the defendant, as assignee of the lessee, for failure to construct a brick wall upon the demised premises. The court said, among other things: "When the covenant extends to a thing in esse, parcel of the demise, the thing to be done by force of the covenant is, *quodam modo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words; but, when the covenant extends to a thing which is not in being at the time of the demise made it cannot be appurtenant or annexed to the thing which hath no being: as, if the lessee covenants to repair the houses demised to him during the term, that is parcel of the contract, and extends to the support of the thing demised, and therefore is, *quodam modo*, annexed appurtenant to houses, and shall bind the assignee, although he be not bound expressly by the covenant. But in the case at bar, the covenant concerns a thing which was not in esse at the time of the demise made, but to be newly built after, and therefore shall bind the covenantor, his executors or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being." *Bream v. Dickerson*, 2 Humph. 128. The case of *Brooks v. Smith*, Thompson's Tenn. Cas. 226, approves this doctrine, stating it in these words: "A covenant to do something to a thing in existence at the time, as to repair the houses, cultivate the land in a particular manner, to reside on the premises, to let the lessee have free access to certain rooms in the house, etc., runs with the land, and binds the assignee, even without the word 'assigns'; . . . but if it be to erect something upon the

premises, such as a house, shop, machinery, or wall, that does not bind the assignees, unless they are expressly named." Citing *Addison*, Contr. 979. The two cases cited from 1 and 2 Tenn. Ch., above, are in accord with this holding, and all recognize the *Spencer Case*. In other jurisdictions the *Spencer Case* has been criticised, if not denied. Without questioning the correctness of this holding upon the reason given, and confined strictly to the facts of the case, we think there is a difference in the cases, in this: In these cases there was a covenant or agreement (so far as it was absolute and not optional) to do a certain specified thing, as to build a house or wall, or pay for improvements. There was no continuing and daily accruing consideration or agreement on either side, there was no continuing obligation on either, as in this case. Here, from the very nature of the agreement, the burden must be borne by the party in possession for the time being, and operating the road. The benefit must accrue to the party in possession of the premises over which the easement is granted. The service can be rendered by no other, the benefit can be reaped by no other, except the parties in possession. It is not a consideration capable of being reduced to an absolute money value. The land is burdened by the easement. This can only be offset by the benefit to the servient estate, and this is a continuing burden and benefit.

But there is another view to take of the matter. The contract in this case on the part of the railroad is, not to build the road, but to render the passenger service after it is built. The contract upon the part of the landowner is to grant an easement. So far as this agreement goes, there is no stipulation to build or put something new on the land,—neither upon the servient estate nor upon the dominant estate. While, of course, the trains cannot operate unless the road is first built, there is no stipulation for the latter, but only for the former; treating the road as already constructively built. But, as to the landowner, his contract is to give an easement over his land. He does this by the very instrument which stipulates for the service. Upon the execution of this agreement the road has an easement before it does a lick of work on the land, or even enters upon it. There is no contract, therefore, to put anything new upon the land, but, rather, to use it in a certain manner; both parties acting upon the assumption that the road is already built. This makes a case analogous to the provisions already referred to, of cultivating or using the land in a certain manner, or residing on the premises, or allowing access to certain rooms in the house, in all of which cases the covenant runs with the land. We think, upon these grounds, and perhaps others that might be more satisfactorily stated, there is a well-marked distinction between the cases, and that this case does not fall within the reason or letter of the cases cited by defendant, but under those relied on by plaintiff, and others herein cited and commented upon.

For the reasons stated, we are of opinion

that the learned trial judge was in error, and the judgment is reversed, and cause remanded for a new trial.

The appellee will pay costs of appeal.

Edward LEEPER, Appt.,

v.

STATE of Tennessee.

(.....Tenn.....)

1. A statute prescribing uniform text-books for schools throughout the state, with provisions for their selection by a commission and the letting of a contract thereafter to the lowest bidder for supplying any books that have been approved by the commission, is not in violation of Const. art. 1, § 22, against monopolies, since the purpose of the statute is, not to confer any pecuniary benefit upon the state or school officials or publishers, but to confer a benefit upon the public.
2. The fact that the state is not bound by an agreement authorized by statute, giving a publisher the right to furnish all the text-books used in the public schools of the state, does not make the privilege invalid, so as to relieve a school teacher from liability for violating the provisions of the statute by using unauthorized text-books.
3. The authority of the state to regulate and control public schools includes the power to provide for the selection of uniform text-books for all the schools of the state, and to provide for the purchase thereof under a contract with the lowest bidder.
4. There is not such lack of safeguards against extortion and oppression as to render invalid a statute providing for the purchase of all the text-books used in the public schools of the state from the same publisher, where the statute provides for a letting at the lowest rates, in free competition, after public advertisement, and that the prices shall always be as low as the books have ever been, or are now being, published under contract in any state, county, or district of the United States, when like conditions prevail, while power is conferred upon a commission to judge of these conditions and enforce them.
5. Requiring payment in advance in order to obtain school books which have to be delivered out of the county is not an arbitrary provision of a statute providing for the purchase of all the text-books used in the public schools of the state from one publisher on a contract let to the lowest bidder, and does not infringe the right of the citizen to make purchases on credit.
6. Legislative power is not conferred upon a commission and the executive by a statute which authorizes the commission to select school books, make contracts with the lowest bidder for obtaining them for all the schools of the state from one publisher, and perfect the details of the general plan of providing all schools with such books, and gives to the commission and the governor, as an incident to this, the authority to announce when the details have been arranged so that the law may be put into operation.
7. No right of local self-government is

infringed by a statute which provides for the selection of uniform text-books for all the schools in the state by a commission, and for letting a contract therefor to the lowest bidder.

(November 15, 1899.)

A PPEAL by defendant from a judgment of the Circuit Court for Blount County convicting him of violating the statute requiring the use of uniform text-books in the schools. *Affirmed.*

The facts are stated in the opinion.

Messrs. Turley & Turley, for appellant:

The contract or arrangement contemplated by this act disseises the citizens of Tennessee of the common privilege of buying in the open market at the best price. It creates a monopoly.

Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 11 Pet. 607, 9 L. ed. 847; *McMphie v. Memphis Water Co.* 5 Heisk. 529; *Slaughter-House Cases*, 16 Wall. 102, 21 L. ed. 417; *Norwich Gaslight Co. v. Norwich City Gas Co.* 25 Conn. 38; *Cooley*, Const. Lim. 5th ed. pp. 344, 345.

The clause of the Constitution prohibiting the creation of monopolies is of equal force and dignity with the clause giving the legislature power to control the public schools.

The purchase and sale of school books, as well as of all other books, is a matter of common right.

Any law which limits the common right of the citizens to buy the commodity of school books in the open market is a law which affects every citizen of the state.

If the contract or special-privilege feature of the act is unconstitutional, then the whole act must fall. The two features of the act—the one the selection of the books, and the other the creation of a special privilege or monopoly—are inextricably commingled.

Jones v. Memphis, 101 Tenn. 188, 47 S. W. 138; *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 153, 34 L. R. A. 725, 36 S. W. 1041; *Pollock v. Farmers' Loan & T. Co.* 158 U. S. 635, 39 L. ed. 1125, 15 Sup. Ct. Rep. 912.

Messrs. H. A. Mann, Ingersoll & Peyton, and *E. E. Houh* also for appellant.

Mr. G. W. Pickle for appellee.

Wilkes, J., delivered the opinion of the court:

Defendant is convicted of violating the provisions of act 1899, chap. 205, commonly known as the "Uniform Text-Book Act," and sentenced to pay a fine of \$10 and costs, and has appealed.

The indictment in the case is in the following words:

State of Tennessee, Blount County Circuit Court, Oct. Term, 1899. The grand jurors for the state of Tennessee, upon their oaths, present that Edward Leeper heretofore, to wit, on the 5th day of October, 1899, in the state and county aforesaid, being then and there a public school teacher, and teaching the public school known as "School No.

NOTE.—As to the adoption of text-books for public schools, see *Campana v. Calderhead* (Mont.) 36 L. R. A. 277, and *note*.

48 L. R. A.

5," sixth district of Blount county, did unlawfully use and permit to be used in said public school, after the state text-book commission had adopted and prescribed for use in the public schools of the state Frye's Introductory Geography as a uniform text-book, another and different text-book on that branch than the one so adopted as aforesaid, to wit, Butler's Geography, and the New Eclectic Elementary Geography, against the peace and dignity of the state.

A. J. Fletcher,
Attorney General.

From the bill of exceptions, it appears that the defendant is a teacher of the public school known as "School No. 5," in the sixth district of Blount county, and that he failed and refused to teach the geography adopted by the state text-book commission, namely Frye's Introductory Geography, and that instead he wilfully and unlawfully taught Butler's and the New Eclectic Elementary Geography in said school. It is not insisted that there is any defect in, or objection to, the book prescribed by the state text-book commission to be used, and which he refused to teach.

The caption to the act under which the conviction is had thus expresses the object and subject-matter of the law, to wit: "An Act to Create a State Text-book Commission, and to Procure for Use in the Public Free Schools in This State a Uniform Series of Text-books; to Define the Duties and Powers of Said Commission, and Other Officers; to Make an Appropriation for the Carrying into Effect This Act, and to Provide Punishment and Penalties for the Violation of the Same." The substance of the act, so far as now necessary to be set out, is as follows:

Section 1 creates a state text-book commission, and empowers and directs it to select and adopt a uniform system or series of text-books for use in the public schools of the state. The commission is to consist of the governor, state superintendent of public instruction, and three members of the state board of education, to be selected by the governor. The text-books selected by the commission are to be used for five years in all the public schools of the state, and it is made unlawful for any school officer, director, or teacher to use any other text-books on the same branches. The series of books to be selected cover all the branches of study usually taught in the public schools. The commission is required to appoint a subcommission of five, to be selected from the teachers, and city and county superintendents, actually engaged in teaching in the state, to whom all books submitted to the commission shall be referred for report.

Section 2 makes the governor president of the commission; requires the commission to meet and organize immediately after the passage of the act; and directs it, as soon as practicable, and not later than thirty days after organization, to advertise in such manner, and for such length of time, and at such places, as may be deemed advisable, for sealed bids or proposals, from publishers of 48 L. R. A.

school text-books, for furnishing books to the public schools in the state, through agencies established by said publishers at places designated by the commission. Each bidder is required to deposit with the treasurer of the state a sum of money, such as the commission may require, not less than \$500, nor more than \$2,500, according to the number of books he may propose to supply. This deposit is to be forfeited if the bidder, in the event his bid is accepted, fails and refuses to make the contract and bond required by the act. Each bid is to be accompanied by one or more specimen copies of each book proposed to be furnished.

Section 3 requires all the specimen copies sent in with the bids to be referred to the subcommission for examination, with instructions to report back to the commission the books they recommend for adoption. When this report is submitted, the commission is to meet in executive session, open the bids, examine and consider the report of the subcommission, and determine the books to be selected for adoption. The successful bidder is then to be notified, and the contract executed. Each contractor is to give a bond, in the penalty of not less than \$30,000, for the faithful performance of the contract.

Section 4 provides that the contractors shall print plainly on the back of each book the contract price, as well as the exchange price, at which it is to be furnished; and it then provides, among other things, as follows: "And the said text-book commission shall not, in any case, contract with any person, publisher or publishers, for the use of any book or books which are to be, or shall be sold to patrons for use in any public school in this state, at a price above or in excess of the price at which such book or books are furnished by said person, publisher, or publishers under contract to any state, county, or school district in the United States, under like conditions prevailing in this state, and under this act. And it shall be stipulated in each contract that the contractor has never furnished, and is not now furnishing under any contract, any state, county, or school district, in the United States, where like conditions prevail as are prevailing in this state, and under this act the same book or books as are embraced in said contract, at a price below or less than the price stipulated in said contract."

Section 5 provides that the state shall not be liable to any contractor, in any manner, for any sum whatever, but all such contractors shall receive their pay or consideration in compensation solely and exclusively derived from the proceeds of the sale of the book. It also provides that, in furnishing the new books, the contractor shall take up the old school books now in use, in exchange, at a price not less than 50 per cent of the contract price.

Section 6 provides for re-advertising for other bids and proposals if the first are not satisfactory, and also for receiving proposals from authors who have manuscripts of books not yet published.

Section 7 requires the governor, as soon as the contracts have been entered into, to

issue his proclamation announcing such fact to the people of the state.

Section 8 requires the contractors—First, to establish and maintain, in some one city in each grand division of the state, a depository to be designated by the commission, where a supply of the books, sufficient to meet the immediate demand, shall be kept; second, to maintain in each county of the state, if the commission so demands, not less than one, nor more than four agencies for the distribution of the books; and, third, to deliver to the person ordering all books ordered, provided the price is paid in advance, free of exchange or postage, if out of the county. It also provides that in each book sold there shall be printed the following: "The price fixed herein is fixed by state contract, and any deviation therefrom shall be reported to your county superintendent of public instruction, or the state superintendent at Nashville."

Section 9 allows the commission to renew the contracts, or, in its discretion, to re-advertise and make new contracts, for an additional five years.

Section 10 requires the state superintendent to issue a circular letter to each city and county superintendent, and to such others as he may desire, giving the list of books adopted, prices, location of agencies, etc.

Section 11 provides that the books adopted shall be introduced as text-books, and be used as such, to the exclusion of all others, in all the public free schools in the state.

Section 12 reserves to the citizens the right to buy books in the usual way, in the event that no contract is made, or if the contractor fails or refuses to furnish the books.

Sections 13 and 14 make it a misdemeanor for any person or teacher to violate the act, and for any teacher to use, or permit to be used, in his or her school, any text-book other than those adopted by the commission, and fix as the punishment for same a fine of not less than \$10, nor more than \$50.

Section 15 makes it a misdemeanor for any dealer, clerk, or agent to sell the book for more than the contract price.

Section 16 appropriates \$1,000 for the purpose of carrying out the provisions of the act.

Section 17 deals with the question of compensation for the commission and sub-commission.

And § 18 provides that the act shall take effect from its passage.

It is insisted that the act is unconstitutional, because (1) it allows a monopoly; (2) it delegates legislative power; (3) it denies local self-government.

These are quite general terms, and, if they stood alone would be insufficient to challenge the validity and constitutionality of the act; for it is well settled that he who insists upon the unconstitutionality of an act of the general assembly must point out the specific provision of the Constitution which, either expressly or by necessary implication, it violates. It has been said: It cannot be 48 L. R. A.

invalidated upon some supposed or assumed natural right or equity, upon the general statement that it is opposed to the inherent rights of freemen, nor upon any spirit supposed to pervade the Constitution not expressed in words, nor because it is opposed to the genius of a free people, nor upon any general or vague interpretation of a provision beyond its plain and obvious import. *Bell v. Bank of Nashville*, Peck (Tenn.) 269; *Hope v. Deaderick*, 8 Humph. 8, 47 Am. Dec. 507; *Demoville v. Davidson County*, 87 Tenn. 220, 10 S. W. 353; *Davis v. State*, 3 Lea, 377; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 497, sub nom. *Dibrell v. Lanier*, 12 L. R. A. 70, 15 S. W. 87; *Luehrman v. Shelby County Taxing Dist.* 2 Lea, 438; *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 159, 34 L. R. A. 725, 36 S. W. 1041; *Henley v. State*, 98 Tenn. 683, 39 L. R. A. 126, 41 S. W. 352, 1104.

It is insisted that the following provisions of the Constitution are violated: Article 1, § 8, provides, among other things, that no man shall be diseised of his privileges but by the judgment of his peers or the law of the land. Art. 1, § 22, provides that perpetuities and monopolies are contrary to the genius of a free state, and shall not be allowed. Article 11, § 8, provides, among other things, that the legislature shall not have power to pass any law granting any individual rights, privileges, immunities, or exemptions, other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of this law.

These may be considered together, as presenting the general question that the effect and operation of the act is to grant to the publisher who has been successful in obtaining the privilege of furnishing the books a monopoly, and has conferred on him special rights, privileges, immunities, and exemptions, and thus a monopoly is allowed, and that the people generally of the state are deprived of the right and privilege of (1) selecting their own school books, (2) of buying them in the open market, and (3) other publishers are excluded from selling in competition with the successful party.

The interpretation given to this act by the state school authorities is clearly set out in an official letter from the state superintendent of public instruction as follows:

State of Tennessee, Department of Public Instruction.

Morgan C. Fitzpatrick, Superintendent.
David L. Spence, Clerk.

Nashville, Tenn., Sept. 23, '99.

Mr. Wilford Caulkins, Chattanooga, Tenn.

Dear Sir:

The text-book law passed by the last legislature provides that the contract and exchange prices of all books shall be printed upon them; and the law provides, further: "All books shall be sold to the consumer at the retail contract price, and in each book shall be printed the following: The price fixed hereon is fixed by state contract, and any deviation therefrom shall be reported to

your county superintendent, or the state superintendent at Nashville." From this it will be clearly seen that it was the intention of the legislature to adopt for use in the schools of this state a certain series of books, and that every book so adopted should have printed upon it the contract and exchange prices, and that no books should be used except those so marked. It was the intention of the commission, acting under the law, to provide an excellent series of books, and to protect the people against the importation and sale of second-hand books. The safe, correct, and legal rule to follow is: Purchase and use no books unless they have the contract and exchange prices printed upon them. Superintendents and teachers should accept and use the books adopted by the commission with prices according to law.

Yours, very truly,
Morgan C. Fitzpatrick.

Treating this, as well as the act, as an inhibition against the use of any books unless they have printed upon them the words specified in § 8, even though other books similarly bound, containing the same matter and by the same author, can be bought at less price in the open market, the question recurs, Is such legislation valid, or does it allow a monopoly, and confer special rights and privileges, or restrict the right to sell and buy which previously existed? It must be noted that the act only applies, and the inhibition only extends, to persons interested in public schools as officers, teachers, patrons, and pupils, and only to books that are used and to be used in the public schools. For any other purpose than use in the public schools, any book may be bought, and from any person, and by any person, and put to any use. This is the common right to buy and sell which existed before the act was passed, and which still continues unaffected. The books may now be bought as freely as before the act. It is the use in the public schools which the act regulates, and is intended to regulate. So that as to the buyer, no common right is taken away. As to the seller, he may also sell as before the act; and not only so, but, under the provisions of the act, the exclusive right to publish and sell for schools was left open to his competition in the first instance,—that is, all publishers were invited to freely compete for the contract or privilege of furnishing all the books, or any series of them, to be used in the schools.

A "monopoly" has been defined to be an exclusive right granted to a few of something which was before a common right. *Memphis v. Memphis Water Co.* 5 Heisk. 529; *Proprietors of Charles River Bridge v. Proprietors of Warren River Bridge*, 11 Pet. 607, 9 L. ed. 847. It is insisted that the right to sell and the right to buy in the open market are common rights, open to all, and without restriction upon any. But the right to sell and buy in the open market and the right to contract is not an unlimited one. The legislature has in a number of instances restricted such rights, and the limitations have been upheld by the courts. Thus, it

is provided by statute that a person may not sell unwholesome fish or flesh, or bread or adulterated liquors, or poisonous drugs without a label (Shannon's Code, § 6743, and subsections); and it is held that transportation companies and telegraph companies cannot contract for exemption from liability from their own negligence (*Merchants' Dispatch Transp. Co. v. Bloch Bros.* 86 Tenn. 392, 6 S. W. 881; *Marr v. Western U. Teleg. Co.* 85 Tenn. 529, 3 S. W. 496). It is true the first class of cases rests upon the exercise of the police power of the state, and the latter upon the public character of the railroad and telegraph company upon which a use is imposed which sanctions legislative interference. But it is not difficult to place the present legislation under either of these heads, since the kind and quality of instruction given the young is as important as the food furnished the people, and the public school is, in the highest sense, a public institution, whose operation involves a public use. But legislation has not been confined to such cases, in limiting the right to contract. It is provided by statute that a husband may not sell his wife's real estate during her life without her consent, and that he may not contract away the rents and profits without such consent. Shannon's Code, §§ 4234-4239. The constitutionality of such acts has been declared, though they abridge the right which the husband had at common law to contract. *Coleman v. Satterfield*, 2 Head, 264; *Taylor v. Taylor*, 12 Lea, 490. So it has been held that the legislature might prohibit the sale of loose cotton between sundown and sunrise. *Truss v. State*, 13 Lea, 311. Statutes of frauds, statutes against usury, statutes making contracts of married women unenforceable, and many others, are limitations upon the power of the citizen to contract. So with the statute making void stipulations in insurance policies which limit liability to less than full amount of the loss. This has been held valid. *Dugger v. Mechanic's & T. Ins. Co.* 95 Tenn. 245, 28 L. R. A. 796, 32 S. W. 5, and cases there cited.

It is immaterial whether we consider this act as deriving validity from the police power of the state or the public character of the schools. It is evident that the basic principle of it is the power of the legislature to subserve the general welfare by prohibiting certain contracts, and throwing around others restrictions tending to promote the general welfare, and protect the citizen from oppression, fraud, and wrong. That the state may establish a uniform series of books to be taught in the schools, which it provides and controls; seems to be a proposition as evident as that it may provide a uniform system of schools, which we take it is not now an open question; and while the selection of text-books may, in the earlier and cruder stages of the law, have been left to, and exercised by, local superintendents, directors, and teachers, it was not for want of authority in the state to prescribe a uniform system, but rather because the system had not reached that stage of development

and progress that made it advisable, in the opinion of the legislature, to so provide. If we were allowed to look to the wisdom of such a provision, it would seem that a uniform series of school books, selected by men of large experience and extensive information, would be preferable to leaving such selection to superintendents, directors, and teachers, many without experience, some with limited education, and with limited opportunity of examining and comparing the different books.

But it is said that, if it be granted that a uniform series may be selected, still it is beyond the power of the legislature to confer upon one individual the right to publish and sell to the public school any particular book or books, and to prohibit teachers and patrons from using any other; thus forcing them to buy the books thus furnished or refusing them the benefits of the public school. We think it clear that the state itself might, if it saw proper, publish the books to be used in its public schools, and might sell them to the children of the state or patrons of the schools; and, if it can do this, why may it not authorize another to do so, and prescribe the terms upon which it shall be done, in the interest of its citizens? *Memphis v. Memphis Water Co.* 5 Heisk. 530. The authority of the state over schools is a legislative one, and it is difficult to see how a uniform system can be maintained which will confer equal benefits upon all sections of the state, unless it is done by legislative action. If the authority to regulate and control schools is legislative, then it must have an unrestricted right to prescribe methods, and the courts cannot interfere with it, unless some scheme is devised which is contrary to other provisions of the Constitution; so that the question recurs, Does the act create such a monopoly as the Constitution inhibits?

It is not insisted that the intention or operation of this act is to confer a pecuniary benefit on the state or school officials or publishers. On the contrary, its evident purpose is to confer a benefit upon the public, by providing ways and means by which books may not only be made uniform throughout the state, but also furnished to the public at as small cost as possible. If a privilege thus conferred upon an individual, the object of which is to benefit the state and its citizens, can be termed a "monopoly," it is certainly not of that class prohibited by the Constitution, which refers to privileges granted for a money consideration, or which are bestowed upon an individual for his benefit. The monopoly prohibited by the Constitution is a privilege farmed out to the highest bidder, or conferred because of favoritism to the donee, and not one awarded to the lowest bidder, and for the convenience and benefit of the public.

If this doctrine be not correct, then the state can make no contract for supplies for its penitentiary, for its charitable institutions, for its public printing, for building its state houses, or any other work of public utility or necessity; for when it has, perchance, after the sharpest competition,

awarded a contract or privilege for any particular enterprise, such contract becomes at once a monopoly, because every other citizen of the state may not also do the work or furnish the material. In other words, to let any public work to the lowest bidder creates at once a monopoly, contrary to the Constitution. Under this reasoning, the successful bidder becomes *ipso facto* a monopolist, because, by virtue of his bid (the lowest made), he becomes entitled or obligated to supply the article or do the work. If this grant to a publisher to furnish all the books needed in the schools was not coupled with a restriction upon price and other benefits to the citizen, then it might be denominated a "monopoly."

It is said that the arrangement made with the publisher is not a contract with the state, and the argument appears to be that the state has not bound herself in any way to the publisher, that it does not receive or pay for the books, and there is no contract between the publisher and the school boards nor with the patrons of the schools, and for this reason the privilege is invalid. Even if it be not a contract, in the sense that the state cannot be forced to comply with it, this would not invalidate the law. *Bancroft v. Thayer*, 5 Sawy. 502, Fed. Cas. No. 835. We think this contention, however, is not well made. The state frequently grants to railroads and other agencies privileges and concessions coupled with conditions in favor of the public, and so with municipalities in granting water rights and lighting rights, and rights to street-car companies. It is said there are no safeguards against extortion and oppression; but we have, in the first place, a letting at the lowest rates, in free competition, after public advertisement, and a further provision that the price shall always be as low as the books have ever been or are now being published under contract in any state, county, or district of the United States, when like conditions prevail. It is said that this term, "like conditions," is indefinite, and that it is not specified who is to be the judge as to whether the conditions are alike or not. But this, as well as the enforcement of the undertaking, is provided for in the fourth and eighth sections of the act, which empower the commission created by the act to sue for a breach of the contract at any time, and this commission is the judge of the conditions, as well as all breaches of the contract, by the terms of the act itself, subject, in all proper matters, to revision by the courts. It is said that to allow the state to prescribe the books, fix their prices, and let out the privilege of supplying them would establish a precedent that would lead to extreme results; that, if the state may thus control the books, it may in like manner provide the houses and desks, and a uniform for the students, and let out the privilege for furnishing them to some one individual. Grant this may be so. It is evident that someone must decide upon these matters, and provide the articles deemed necessary; and it simply resolves itself into the query whether the state, which provides and main-

tains the system, shall control and regulate it, or leave that duty to others, who, at last, are but its agents and representatives. Of course, we cannot presume, nor can any argument be based upon the assumption, that the state will go to absurd lengths; but the presumption is that the legislature, which more immediately represents the people, will do what it deems best for the people.

It is said the schools do not belong to the state, but to the people, and while, in a certain sense, this is true, it is, at last, but a play upon words. The system is inaugurated, operated, shaped, supported, and controlled by the state through its legislature, but for the benefit of the people, and, as in all other matters of public concern, the people act through their immediate representatives, the legislature.

It is said the fixing of the price is not at all necessary to the maintenance of the uniform series; that if the books are selected, and the patrons are left free to buy them in the open market, the best interest of the citizen will be conserved. But it is evident that such would not be the result in case of a copyright book, since they could only be obtained of the party having the right, and many of the best books are copyrighted; nor is it reasonable to suppose that individual buyers in open market could secure rates as low for a single book or a lot of books as can be obtained when the contract is for the entire publication, and all the books used, or any particular series. But this, after all, is a matter which addresses itself to the sound judgment of the legislature.

It is said the state has no right to prescribe that the citizen or consumer must pay cash in advance for an article he buys, and that credit is a matter of public right. It is evident that the requirement for a cash payment must be considered along with all the other features of the legislation, and that, if the payment of cash may seem arbitrary, it is not so, but enables the contractor to reduce his price, as he feels sure of his money, and that it will not be either delayed or rendered uncertain. Besides, the provision requiring cash payment only applies when books are ordered to be sent out of the county, when a depository is not located in it, in which case the book must be delivered free of expense of carriage.

It is said that it is not a function of government to pass statutes to secure cheap prices to the consumer, and this should be left to the laws of competition of supply and demand. This is but a statement of the main question in a different shape. We may grant that the state may not regulate prices of commodities generally, and may not legislate so as to secure cheap rates for the same; but this does not prevent the state from securing for the children of the state, who desire to enter the schools which it has provided for their benefit, favorable terms upon which they may enter and enjoy its benefits.

The next objection urged is that the act delegates legislative power to a commission and to the executive of the state. The main provisions of the act which bear upon this 48 L. R. A.

question are those which provide that a commission may select the books, make contracts for obtaining them, and perfect the details of the general plan of providing all schools with the books chosen, and obtain for pupils and patrons the lowest prices possible. As an incident to this, the commission and governor are to announce when the details have been arranged, so that the law may be put into operation. If we grant that the legislature has the power to prescribe and enforce the system, since it is one that requires the adjustment of many details, it is evident that such details can only be carried out by a commission. In such cases, the legislature can only act through boards and commissions or other agencies, and there can be no valid objection, unless legislative power is conferred upon the board.

It is said the act leaves it to the commission to say when it shall take effect. This, we think, is not a proper construction of it. The act takes effect from and after its passage, as do other acts. The commission has no power to delay its force as a law. It simply is authorized to report when it has consummated the preliminary work devolving upon it of selecting the course, making contracts for the books, fixing their price, designating the depositories, and otherwise prescribing the time and manner in which the patrons and children may begin to receive its advantages. This commission is given no power to delay the enforcement of the law beyond this limit. It is true it may do so, but this would be not in obedience to the law, but in violation of it. Suppose that the state should determine to erect a penitentiary or an asylum for the blind or deaf or insane, and should appoint a commission to select a site, to prepare plans, to employ an architect, to contract for buildings and erect them, to frame rules and regulations for the government of the inmates, and should direct that, when ready for occupation, the commission should, by public advertisement, announce the fact, so that the buildings could be put to the intended use, and that persons could be received therein; could this be called a delegation of legislative authority? We think not, and we fail to see any difference between the provisions of such an act and the present one. It does not delegate legislative power; that is, any power to pass or annul a law. There is a difference between a delegation of power to make laws involving, necessarily, a discretion as to what they shall be, and a grant of authority relating to their execution, though the latter may involve the exercise of discretion under and in pursuance of the law. 6 Am. & Eng. Enc. Law, 2d ed. p. 1029. Merely administrative or executive functions may be delegated. *Cincinnati, W. & Z. R. Co. v. Clinton County Comrs.* 1 Ohio St. 88. The difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed is obvious. *Georgia R. Co. v. Smith*, 70 Ga. 694. The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state

of things upon which the law makes, or intends to make, its own action depend. *Locke's Appeal*, 72 Pa. 498, 13 Am. Rep. 716; In *Moers v. Reading*, 21 Pa. 202, it was said: "Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such a discretion is the making of the law." A notable instance of the delegation of such discretion and power to the executive is found in the case of *Field v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495, wherein the president was authorized to reduce the revenue and equalize duties on imports, and for other purposes to suspend, by proclamation, the free introduction of sugar, molasses, coffee, tea, and hides, when he would be satisfied that any country producing such articles imposed duties or exactions upon the agricultural or other products of the United States which he deemed to be reciprocally unequal or unreasonable. See the doctrine fully illustrated in 6 Am. & Eng. Enc. Law, 2d ed. pp. 1029-1031, and cases there cited.

It is said the act denies local self-government. This, of course, is a general term, and no specific provision of the Constitution is referred to, upon this feature of the case, as being violated. It is said, in broad terms, that the people have an inherent fundamental and vested right to administer their own local affairs, as the people of each county and district shall deem right and proper. We cannot enter into a consideration of such general doctrine, but will attempt to discuss it so far as it touches upon the common-school system, and the manner of its execution. This system is supported in part by state funds, and in part by county taxes. But the latter, at last, are but state funds, provided by the state through the power delegated to the counties. It is insisted that heretofore there has been more or less local control and government of the public schools, but this local government was authorized by, and was the creature of, the statute, and the legislature is not precluded from framing other statutes, if it deem it wise to do so, modifying former plans. By the act of 1873, under which the present system was inaugurated, it was provided that there should be established and maintained in this state a uniform system of public schools, and that it should be administered by a state superintendent, county superintendents, and district directors. Shannon's Code, §§ 1401, 1402. The fund for school purposes was provided by the same act, and consists of the interest on the permanent school fund and all other moneys that may come into the state treasury for that purpose from any source whatever; treating the permanent school fund and the educational fund as one for all purposes of distribution. Act 1873, chap. 25, § 35; Shannon's Code, § 1391. The interest on the permanent school fund and school tax was augmented by a poll tax, and by fines and penalties in certain cases, and also by a tax

by each county, when other taxes were not sufficient to sustain the schools for five months in the year. By the act of 1844, all school funds then existing, no matter from what source derived, were ordered to be deposited in the Bank of Tennessee for investment in state bonds. The proceeds of lands which had been sold under the acts of Congress became thenceforth a part of the capital of the bank. They became assets of the bank, and the counties which had deposited school-land funds became simple creditors of the bank, except so far as they might be enabled to identify bonds bought for them, and this they could never do. So that counties entitled to such special funds thereafter had no priority over other depositors of the bank or its general creditors. *State v. Bank of Tennessee*, 5 Baxt. 7, 31, 32. However this may be, the Constitution of 1870 and the act of 1873, recognizing the fact that the entire actual school fund originally existing had been lost by the fortunes of war and subsequent events, spoke into existence, by constitutional and legislative feat, a school fund of \$2,512,500, which was made a permanent fund, and the faith of the state was pledged to the payment of interest upon that fund for the equal benefit of all the people of the state. This fund, thus spoken into existence, was for the benefit of every county and all the people equally. The constitutional provision of 1870 relating to it is as follows: "Knowledge, learning, and virtue, being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the state being highly conducive to the promotion of this end, it shall be the duty of the general assembly, in all future periods of this government, to cherish literature and science. And the fund called the common-school fund, and all the lands and proceeds thereof, dividends, stock, and other property of every description whatever, heretofore by law appropriated by the general assembly of this state for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund, the principal of which shall never be diminished by legislative appropriation; and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the state, and for the equal benefit of all the people thereof; and no law shall be made authorizing said fund or any part thereof to be diverted to any other use than the support and encouragement of common schools." Const. art. 11, § 12. Since the inauguration of the present system of public schools, in 1873, it has never been even suggested that the state and counties may have different systems and schools, the state operating a state school, and the county a county school, but the basic idea is that the county may supplement the state funds, so as to enlarge and improve the state schools. Carried to its logical result, the contention of counsel is that each county may have its own system, make its own rules, prescribe its own course of study, and, proceeding fur-

ther, each school district may do the same, so that we may have as many systems in the state as there are school districts. This is carrying the doctrine of local government too far. By the same parity of reasoning, it might be said that each county may establish its own criminal laws, provide its own courts to execute the laws, and to deny them these rights would be to deny the right of local self-government. We are of opinion that the legislature, under the constitutional provision, may as well establish a uniform system of schools and a uniform administration of them, as it may establish a uniform system of criminal laws and of courts to execute them. The object of the criminal laws is, by punishment, to deter others from the commission of crimes, and thus preserve the peace, morals, good order, and well-being of society; and the object of the public-school system is to prevent crime, by educating the people, and thus, by providing and securing a higher state of intelligence and morals, conserve the peace, good order, and well-being of society. The prevention of crime, and preservation of good order and peace, is the highest exercise of the police power of the state, whether done by punishing offenders or educating the children. What is the scope and meaning of the term "police power" has never been defined. The Supreme Court of the United States has expressly declined to define its limits. *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079. In *New York v. Miln*, 11 Pet. 139, 9 L. ed. 662, it is said: It embraces every law which concerns the welfare of the whole people of the state or any individual within it, whether it relates to their rights or duties, whether it respects them as men or citizens of the state, whether in their public or private relations, whether it relates to the rights of persons or property of the whole people of the state or of any individual within it and upon the persons and things within it. In *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 627, it is said: The police power of a state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and to the protection of all property, within the state, and hence to the making of all regulations promotive of domestic order, morals, health, and safety. In *Smith v. State*, 100 Tenn. 505, 41 L. R. A. 432, 46 S. W. 566, it is said, in substance, that it extends to all questions of health, morals, safety, order, comfort, and well-being of the public, and that this enumeration does not make the list complete. Similar language has but recently been used in the case of *Harbison v. Knoxville Iron Co.* (Tenn.) 53 S. W. 955, and this is no new doctrine, either in this state or in the United States. In *Bancroft v. Thayer*, 5 Sawy. 502, Fed. Cas. No. 835, it has been held that a state may provide by legislation that a designated person shall have the exclusive privilege of furnishing all the text-books needed for use of the public schools, and the court said: "To authorize and provide that, by means of contract or legislative grant, a particular person . . . shall have the exclusive right to do

or furnish a particular thing, upon certain conditions, for the use and convenience of the public, has always been a common mode of exercising the police powers of the state." This question of providing a uniform series of text-books, and prescribing the manner in which it may be done, and the procuring of such books, and their distribution, as here done, is not a new one in the United States. It appears that more than twenty states have preceded Tennessee in passing uniform text-book laws. It is said that in some of them it has not resulted favorably, and the system has met with disfavor. How this is, is a matter which addresses itself to the legislature, and not to the court. With the wisdom and policy of the law we have nothing to do. In some of the states the validity and constitutionality of the acts have been called in question, and the material provisions of the law have been maintained. The subject is elaborately considered in the case of *State ex rel. Clark v. Haworth*, 122 Ind. 462, 7 L. R. A. 240, 23 N. E. 946, when the constitutionality of an act very similar to the one now under consideration was involved, and the arguments against it were much the same as are now made. The court very elaborately considered the provisions of the act and the objections raised, and sustained the act, citing many authorities in accord, and, among them, Cooley, Const. Lim. 5th ed. 225, note 1; *Curryer v. Merrill*, 25 Minn. 1, 33 Am. Rep. 450; *State ex rel. Newnham v. State Bd. of Edu.* 18 Nev. 173, 1 Pac. 844; *People ex rel. Beckwith v. Oakland Bd. of Edu.* 55 Cal. 331; *People ex rel. Bellmer v. State Bd. of Edu.* 49 Cal. 684. See also *Baltimore City School Comrs. v. State Bd. of Edu.* 26 Md. 505; *State ex rel. Snoko v. Blue*, 122 Ind. 600, 23 N. E. 963; *State ex rel. Roberts v. Springfield School Directors*, 74 Mo. 21; *State ex rel. Andrew v. Webber*, 108 Ind. 31, 58 Am. Rep. 30, 8 N. E. 708; *School Trustees v. People ex rel. Van Allen*, 87 Ill. 303, 29 Am. Rep. 55; *Jones v. Detroit Bd. of Edu.* 88 Mich. 371, 50 N. W. 309; *Effingham v. Hamilton*, 68 Miss. 523, 10 So. 39.

The reasoning of the court in the principal case of *State ex rel. Clark v. Haworth* is so satisfactory and conclusive that we cannot perhaps do better than give a synopsis of it. It was held that such an act does not infringe in the slightest degree upon the right of local self-government; that essentially and intrinsically the schools, in which are educated and trained children who are to become rulers of the commonwealth, are matters of state, and not local, jurisdiction; that in such matters the state is a unit, and the legislature the source of power; that the establishment and control of public schools is a function of the general assembly, both under the Constitution and because it is a matter of state concern. Being a matter of legislative control, the legislature may abandon one plan, and try another, if it see proper, and the court cannot interfere. It is further pertinently said that it is impossible to conceive of the existence of a uniform system of public schools without power

lodged somewhere to make it uniform, and, in the absence of express constitutional provisions, that power must necessarily reside in the legislature; and hence it has the power to prescribe the course of study, as well as the books to be used, and how they shall be obtained and distributed; and its discretion as to methods cannot be controlled by the courts; that such an act does not provide a benefit for book dealers, but its purpose is to secure such benefits for the public, and such benefits as may arise to any individual are merely incidental; that such statute is not within the constitutional provisions directed against monopolies, but that the purpose of the act is to secure books for the public schools by means of open competition, after full notice; no special privilege is granted, none denied,—all are invited to enter the field. The court says: "We can find neither reason nor authority that suggests a doubt as to the power of the legislature to require a designated series of books to be used in the schools, and to require that the books selected shall be obtained from the person to whom the contract for supplying them may be awarded. It is to be remembered that the statute does not command that every person shall buy the books. It confines the requirement to those who receive the benefit of the public schools. These schools are owned and maintained by the state, and the state may prescribe the terms and conditions upon which pupils may enter them, except that it cannot disregard the constitutional injunction, 'tuition shall be without charge and equally open to all.' It may, as we have seen, prescribe the course of study that shall be pursued, and the system of instruction that shall be adopted, and, to perfect and complete its control, it must have the power to prescribe the books that shall be used, and the mode in which the books shall be obtained. . . . The legislature simply commands that those who enjoy the benefit of the schools which it maintains shall secure such books as it deems best, and in the mode it regards as expedient. Power thus asserted is exercised

in a matter which is not of common right, but which concerns institutions founded and fostered by the state. The regulation, in its entire scope, relates exclusively to the enjoyment of the privilege afforded by a system of education created and maintained by the state for the general good, and it must follow that the state does have power to make the regulations effective by prescribing the method which shall be pursued by those who seek to enjoy the privilege it has created. Certainly, no one will deny the existence of such a right, and, if it does exist, it must reside in the lawmaking power of the state."

The regulation of the mode of receiving books by the pupils of the common schools is not analogous to a regulation of general property rights; for books are peculiar to schools, and schools are the property of the state. It is no answer to this argument to affirm that the state may not give one person the exclusive privilege of selling fuel, clothing, or the like to a community; for school books are unlike such property in their chief characteristics, and the legislature does not assume to declare that any person may not sell books to a community. It simply assumes the power of declaring that the person whom the state board of education decides is the lowest bidder shall have the exclusive privilege of supplying its schools with books. In doing this, it does no more respecting schools than a private citizen does who contracts with another to furnish him goods for a designated period, nor does it do more regarding schools than it does with respect to all public institutions whose officers are authorized to give the exclusive privilege of furnishing groceries, medicines, or other articles to the person to whom a contract covering a designated period is awarded; for the state owns and maintains its schools just as much as it does its public institutions of every kind.

For the reasons stated, we are of opinion the act is valid and constitutional, and *there is no error in the judgment of the court below, and it is affirmed, with costs.*

ILLINOIS SUPREME COURT.

ILLINOIS CENTRAL RAILROAD COMPANY, Appt.,

v.

Henry H. HARRIS.

(184 Ill. 57.)

The communication of Texas fever by infected cars to cattle transported in them renders the railroad company liable for the damages.

NOTE.—As to duty of carrier to furnish proper cars for the transportation of live stock, see *Compland v. Housatonic R. Co.* (Conn.) 15 L. R. A. 534, and *Betts v. Chicago, R. I. & P. R. Co.* (Iowa) 26 L. R. A. 248.

On the general subject of a carrier's liability as to live stock, see *note to Duntley v. Boston & M. R. Co.* (N. H.) 9 L. R. A. 449; also *Benson v. Gray* (Mass.) 13 L. R. A. 262. 48 L. R. A.

(February 19, 1900.)

A PPEAL by defendant from a judgment of the Appellate Court, Third District, which affirmed a judgment of the Circuit Court for Champaign County in favor of plaintiff in an action brought to recover damages for the loss of cattle shipped over defendant's road, from fever alleged to have been communicated to them from infected cars. *Affirmed.*

As to liability for death of stock caused by allowing salt water to run through pens, see *Harman v. Norfolk & W. R. Co.* (Va.) 44 L. R. A. 289, and *note.*

As to statutory duty with reference to care of stock during transportation, see *Chesapeake & O. R. Co. v. American Exch. Bank* (Va.) 44 L. R. A. 449, and *note.*

The facts are stated in the opinion.

Mr. John G. Drennan, with Messrs. Wolfe & Savage, for appellant:

When circumstantial evidence is relied on to found an inference as to the main fact the circumstances themselves cannot be presumed.

In such cases the facts from which the inference is to be drawn must be proved by direct evidence as if they were the very facts in issue.

Starkie, Ev. p. 80; *United States v. Ross*, 92 U. S. 281, 23 L. ed. 707; *Globe Acci. Ins. Co. v. Gerisch*, 163 Ill. 629, 45 N. E. 563; *Lawson*, Presumptive Ev. p. 652.

The trial and appellate courts have fallen into the error of presuming that this car carried infected cattle, and further presuming that they came from an infected part of the country; and further presuming that such carriage was within a time to have communicated the disease, which, with the circumstances proved by direct evidence, enabled them to presume the car infected as alleged.

This is not a legal method of sustaining a verdict.

Messrs. Gere & Philbrick for appellee.

Craig, J., delivered the opinion of the court:

This is an appeal from a judgment of the appellate court affirming a judgment of the circuit court of Champaign county, wherein the appellee recovered damages against the Illinois Central Railroad Company for the loss of a lot of cattle shipped by appellee over appellant's railroad in cars alleged to have been infected with a cattle disease known as "Texas fever." It appears that appellee purchased 114 head of cattle near Centralia and Edgewood, in this state, and on September 30, 1898, shipped the cattle, in cars furnished by the Illinois Central Railroad Company, from those two points to Seymour, Illinois. When the cattle arrived at Seymour they were taken directly from the cars to the farm of appellee, and turned into his pasture. On October 13 some 5 or 7 of them were sick, and the symptoms were splenic or Texas fever. The 114 cattle that were shipped over appellant's road were then placed by themselves. Subsequently 26 of these cattle died of splenic or Texas fever. Thirty-three, in all, were affected with the disease.

At the close of plaintiff's evidence, defendant asked the court to give the jury the following instruction: "That, under the law and evidence, plaintiff is not entitled to recover, and the verdict must be, 'Not guilty.'" The court refused the instruction, and defendant excepted. The refusal of the court to give the instruction is the only question relied upon by the appellant to reverse the judgment. In requesting the court to instruct the jury to find for the defendant, the truth of plaintiff's evidence, and all inferences to be properly drawn therefrom, were admitted; and, in passing upon an application to take a case from the jury, we

do not consider or pass upon the weight of the evidence. *Offutt v. World's Columbian Exposition*, 175 Ill. 472, 51 N. E. 651. In such case the real question is whether the evidence, with all inferences to be properly drawn therefrom, fairly tended to prove plaintiff's cause of action as set out in his declaration. If it does, then it is the duty of the court to refuse to take the case from the jury. Here, when appellee applied to appellant, as a common carrier, to ship his cattle, it was the duty of appellant to furnish reasonably safe cars in which the cattle might be transported, and it was also the duty of appellant to furnish cars which were not infected with any contagious cattle disease; and if appellant failed to discharge its duty, and appellee was injured in consequence of such failure, then appellee is entitled to recover such damages as he may have sustained. Upon looking into the record, it will be found, from the evidence, that the appellant's line of road extends from Chicago to New Orleans, and that appellant's cars in which the cattle were shipped had recently been used by the company in carrying other cattle. It also appears that the cattle purchased by appellee and shipped were native cattle, all raised in the localities where they were purchased; that no Texas fever had existed in those localities for more than twenty-five years; that these cattle were shipped by the appellee from the points where they were loaded, to Seymour, Illinois; that they were unloaded and immediately taken to appellee's pasture; and, further, that Texas or splenic fever had not existed or been known at the point where these cattle were unloaded, or at the pasture of appellee where the cattle were put, or in that section of the country, for more than twenty-five years last past; that the cattle for which a recovery was asked died of Texas fever. From the facts thus established, the logical inference would be that the disease of which the cattle died was communicated to them from appellant's cars, infected by the germs of the disease which were in the cars. The evidence points to no other source from which the disease could have been communicated to the cattle. The evidence demonstrates to a certainty that the cattle could not have contracted the disease before they entered appellant's cars. It also establishes beyond dispute that they did not contract the disease after they left the cars. Such being the case, the cattle must necessarily have contracted the disease on the cars, from germs which had been left in the cars from recent shipments. We think, therefore, the jury were fully warranted in finding from the evidence that appellant's cars were infected with the disease, and that it was communicated to plaintiff's cattle in the cars. From what has been said, it follows that the court did not err in refusing appellant's instruction.

The judgment of the Appellate Court will be affirmed.

WASHINGTON SUPREME COURT.

SEATTLE NATIONAL BANK, *Respt.*,
v.Daniel JONES, Impleaded with George R.
Carter *et al.*, *Appts.*

(13 Wash. 281.)

1. Inconsistent defenses cannot stand when the admission of the truth of one necessarily proves the falsity of the other.
2. The denial of an allegation by a general denial is nullified so that proof of the allegation is unnecessary by a special averment in an affirmative defense of the truth of the allegation which had been denied.

(December 24, 1895.)

NOTE.—Right to plead inconsistent defenses.

- I. Scope of note.
- II. Inconsistency in single plea.
- III. Original common-law rule as to inconsistency between pleas.
- IV. The rule under the statute of Anne.
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- VIII. Inconsistency, how taken advantage of.
- IX. Conclusion.

I. Scope of note.

This note is confined to the question of inconsistencies in the same pleading, either in the same or different counts. The question under common-law practice as to the effect of pleading in abatement and in bar turns upon the theory that a plea in bar is a waiver of a plea in abatement, and not upon any idea of inconsistency, and is not therefore included, and the reason why general and special pleas in the same answer are sometimes held improper is based upon the language of the statute providing that a party may plead generally or specially, rather than on any idea of inconsistency. And the question of difference between pleas and

APPEAL by defendant Jones from a judgment of the Superior Court for King County in favor of plaintiff in an action brought to recover the amount of certain promissory notes and to foreclose a mortgage. *Affirmed.*

The facts are stated in the opinion.

Messrs. Thompson, Edson, & Humphries, with *Messrs. James Ledy and Gleason & Babcock*, for appellants:

The respondent bank alleged in its amended complaint that prior to the maturity of the notes in suit the said Griffith, Bluett, and Remsburg, as such committee, for a valuable consideration, duly indorsed and delivered the said promissory notes to it, and it became, ever since has

amended pleas and subsequent pleadings by the same party is one of departure rather than inconsistency, and cases with reference to such pleas are not included in this note, unless it appears in the particular case that the question of consistency was involved.

II. Inconsistency in single plea.

Neither under the old common-law practice, nor under the statute of Anne, adopted by nearly if not all the states as common law, nor under the Codes of the different states, did the general rule that a defendant may make as many defenses as he sees proper, and that the pleas are not objectionable because of repugnancy or inconsistency, apply to single pleas; a single plea was always required to be consistent with itself. *Ansley v. Bank of Piedmont*, 113 Ala. 467, 21 So. 59; *Hensley v. Tartar*, 14 Cal. 503; *Bell v. Brown*, 22 Cal. 671; *Buhne v. Corbett*, 43 Cal. 264; *People ex rel. Crawford v. Lothrop*, 3 Colo. 428; *Tucker v. Edwards*, 7 Colo. 209, 3 Pac. 233; *McIlroy v. Buckner*, 35 Ark. 555; *Hillebrant v. Booth*, 7 Tex. 499; *Porter v. McCreedy*, Code Rep. N. B. 88; *Buddington v. Davis*, 6 How. Pr. 401.

And a plea in an answer which is open to two intendments is to be construed most strongly against the defendant. *United States v. Linn*, 1 How. 104, 11 L. ed. 64; *Fowler v. Dav-enport*, 21 Tex. 626, *dictum*.

And an affidavit of defense admitting at the outset an indebtedness of a certain amount to the plaintiff, but asserting in conclusion that the defendant does not owe the plaintiff a cent, is clearly contradictory, and judgment will be entered notwithstanding the affidavit. *Kelly v. Singer Mfg. Co.* 4 Pa. Dist. R. 440.

So, a claim for damages *ex contractu* cannot be set up as a defense in an answer, and be united in the same plea with a claim of tort. *Ansley v. Bank of Piedmont*, 113 Ala. 467, 21 So. 59.

And a denial of a corrupt, usurious, and illegal agreement, or of a device, shift, or contrivance to evade the usury laws, can have little or no effect, if, from the facts which are admitted, it follows that the statute has been violated; and such denials cannot be deemed denials of matters of fact, but are denials of inferences of law from the facts only. *Manice v. New York Dry Dock Co.* 3 Edw. Ch. 144.

And while civil death abates an action for personal tort, an answer averring that the defendant is civilly dead contains two contradictory averments, it being a fiction of law that the act of answering by a defendant, though by

been, and now is, the owner and holder of said promissory notes. These allegations are denied by the appellant in his amended answer, and, before a recovery can be had against him, the allegations of the complaint must be proved as alleged.

Tullis v. Shannon, 3 Wash. 716, 29 Pac. 449; *Spicer v. Smith*, 23 Mich. 96.

The members of the committee are joint payees, and each must sign.

1 Dan. Neg. Inst. 4th ed. §§ 684, 701a, 704; *Ryhiner v. Feickert*, 92 Ill. 305, 34 Am. Rep. 130; *Haydon v. Nicoletti*, 18 Nev. 290, 3 Pac. 473.

The word "committee" is mere *descriptio personæ*, and implies no authority in one, even the chairman, to act for others.

1 Dan. Neg. Inst. 4th ed. § 403.

Extension of time of payment given to a principal debtor for a consideration moving from him, without the knowledge or consent

attorney, is a conclusive averment that he is neither civilly nor physically dead, and therefore the averment that he is civilly dead must be deemed untrue. *Freeman v. Frank*, 10 Abb. Pr. 370.

And a demurrer admits the allegations in the answer when contradictory only when the law adjudges them to be true, and therefore it does not admit the allegation of a defendant in his answer that he is civilly dead. *Ibid.*

So, a scilicet repugnant to the matter precedent to it is void on demurrer, as well as after verdict. *Cutler v. Southern*, 1 Lev. 194.

And a plea in an action on a note, of failure of consideration, alleging that the consideration of the note has failed, or that it was given on the purchase of certain notes, accounts, and land papers belonging to the plaintiff's intestate, which were sold by her at public sale, and that there was no sale or delivery by the plaintiff of anything whatever, and that the consideration of the note was entirely different from that before alleged, is in itself inconsistent, and is rightly rejected by the court. *Hillebrant v. Booth*, 7 Tex. 499.

And a paragraph of an answer in an action on a note in which a denial that the note had any consideration to support it appears in direct connection with a plea of *non est factum* is inconsistent with itself, making it the duty of the court to require the defendant to paragraph the answer so as to enable the plaintiff to know what defenses are being relied on; and where he objects to striking out the paragraph, and to filing a reply to it, and his objection is sustained, the only issue is that of *non est factum*, and a judgment *non obstante veredicto* on the ground that the defense of want of consideration was confessed should not be granted. *Mullikin v. Mullikin*, 15 Ky. L. Rep. 612, 25 S. W. 598.

A denial of the full amount claimed in an action, however, and an admission of a certain amount to be due, and a tender of that amount, constitute but a single defense, and the allegations cannot be separated, and are not subject to objection for inconsistency. *Spencer v. Tooker*, 12 Abb. Pr. 353.

III. Original common-law rule as to inconsistency between pleas.

The original common-law rule, strictly observed for ages, was that a defendant could plead only one plea without infringing the rule against duplicity. *Auburn & O. Canal Co. v. Leitch*, 4 Denio, 65. This, of course, brought

of the surety,—accommodation maker,—releases the accommodation maker.

2 Randolph, Com. Paper, §§ 474, 960; *Westervelt v. Frech*, 33 N. J. Eq. 451; *Barron v. Cady*, 40 Mich. 259; *Smith v. Shelden*, 35 Mich. 42, 24 Am. Rep. 529; *Byers v. Franklin Coal Co.* 106 Mass. 131; *Child v. Eureka Powder Works*, 44 N. H. 354; *Cummings v. Little*, 45 Me. 183; *Chester v. Dorr*, 41 N. Y. 279; *First Nat. Bank v. Leavitt*, 65 Mo. 562; *First Nat. Bank v. Harris*, 7 Wash. 139, 34 Pac. 466; *Warburton v. Ralph*, 9 Wash. 537, 38 Pac. 140; 2 Dan. Neg. Inst. § 1332a; *Hoffman v. Butler*, 105 Ind. 372, 4 N. E. 681; *Guild v. Butler*, 127 Mass. 386; *Meggett v. Baum*, 57 Miss. 22.

Messrs. Carr & Preston and W. R. Bell, for respondent:

That Griffith was authorized to discount the notes cannot be doubted on the evidence.

every pleading by a defendant directly within the rule laid down in *supra*, i. e., that a single plea must not be inconsistent with itself. This original common-law rule of pleading, however, is entirely obsolete, having been entirely superseded by statutory enactments, and the cases laying it down and supporting it have therefore been omitted from this note, and the rule itself is of importance only with reference to the origin and history of existing rules.

IV. The rule under the statute of Anne.

a. With reference to inconsistent facts.

By the statute of 4 Anne, chap. 16, § 4. it was provided that "it shall be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin in any court of record, with leave of the court, to plead as many several matters thereto as he shall think necessary for his defense."

This statute superseded the original common-law rule, and has since substantially remained the rule of pleading in England, and was adopted by most, if not all, of the United States as common law, and probably still remains the rule of pleading in such states as have retained the common-law system. The cases decided under it therefore, though arising in states in which it has been superseded by the enactment of Codes, are still authoritative, and they are here included so far as they bear upon the question of inconsistent defenses.

Under these rules of pleading a defendant might set up any number of grounds of defense which are not inconsistent with each other. *Yocum v. Morice*, 4 Phila. 106; *Auburn & O. Canal Co. v. Leitch*, 4 Denio, 65.

But the courts exercised a controlling power over a defendant who sought to plead inconsistent matters, and it was discretionary with them to receive or reject the inconsistent pleas which were tendered. *Furniss v. Ellis*, 2 Brock. 14, Fed. Cas. No. 5,162; *Lincoln v. Wiliamowicz*, 7 Ark. 378, *dictum*; *Com. v. Myers*, 1 Va. Cas. 188, *dictum*; *Jenkins v. Edwards*, 5 T. R. 97.

And it has been said that the court would take care not to permit a defendant to plead inconsistently. *Com. v. Myers*, 1 Va. Cas. 188.

And it would appear to have been the rule of the earlier cases under that statute that incompatible pleas were not to be allowed, whether the inconsistency was one of fact, consisting of an express contradiction, or one of law, arising from admissions by implication of law

Authority to discount such paper includes authority to indorse it.

Merchants' Bank v. Central Bank, 1 Ga. 418, 44 Am. Dec. 665; *Story, Agency*, §§ 59, 77; *Bayley, Bills & Notes*, 5th ed. chaps. 2, 7; *Mechem, Agency*, § 391.

The general allegations in a pleading give way to special allegations upon the same subject.

Moyer v. Fort Wayne, C. & L. E. Co. 132 Ind. 88, 31 N. E. 567; *Queen Ins. Co. v. Hudson Co.* 8 Ind. App. 22, 35 N. E. 397.

A general or specific denial in an answer is always controlled by an affirmative allegation inconsistent with it.

Derby v. Gallup, 5 Minn. 119, Gil. 85; *Miller v. Larson*, 17 Wis. 625; *School Dist. No. 27 v. Holmes*, 16 Neb. 486, 20 N. W. 721; *Dickson v. Cole*, 34 Wis. 626; *Seaton v. Rhames*, 13 Wis. 104; *Mara v. Gross*, 26

Jones & S. 221, 9 N. Y. Supp. 720; *Maxwell, Code Pl.* p. 396; *Hartwell v. Page*, 14 Wis. 52; *Farrell v. Hennesey*, 21 Wis. 633; *Yakima Nat. Bank v. Knipe*, 6 Wash. 348, 33 Pac. 834.

The rights of the respondent with respect to these notes are determined by the facts known to it at the time it took the paper, and the manner in which it took it, and the amount paid for it.

Bank of Montgomery County v. Walker, 9 Serg. & R. 229, 11 Am. Dec. 709; *Fentum v. Pocock*, 5 Taunt. 192; *Manley v. Boycot*, 2 El. & Bl. 46; *White v. Hopkins*, 3 Watts & S. 99, 37 Am. Dec. 542; *Walker v. Bank of Montgomery County*, 12 Serg. & R. 383; *Lord v. Ocean Bank*, 20 Pa. 384, 59 Am. Dec. 728; *Stephens v. Monongahela Nat. Bank*, 88 Pa. 157, 32 Am. Rep. 438.

The giving of the debtor's own note, bill,

requisite to the introduction of new matter in defense.

Thus, where facts are alleged in an answer, which from their nature must be within the personal knowledge of the defendant, and which if true are a complete answer to the claim, he will not be permitted to set up in addition another set of facts inconsistent with the previous defenses, but will be required to elect upon which he will rely. *Arnold v. Dimon*, 4 Sandf. 650.

And matter in avoidance cannot be set up in an answer when the matter it seeks to avoid is denied. *Roe v. Rogers*, 8 How. Pr. 356; *Arthur v. Brooks*, 14 Barb. 533.

And a plea of tender cannot be pleaded with the general issue to the whole declaration because the tender confesses the amount due. *Williams v. Harris*, 2 How. (Miss.) 627, *dictum*.

So, a defendant in an action on a bond was not permitted to plead *non est factum* and a tender as to part. *Jenkins v. Edwards*, 5 T. R. 97.

And the pleas of *non est factum* and tender, in an action of covenant for the nonpayment of rent, were inconsistent, and could not be united in the same answer. *Orgill v. Kemshead*, 4 Taunt. 459.

Non assumpsit or *non est factum* and a tender were not permitted to be pleaded together on the ground that the one goes to deny any cause of action and the other admits it, and that if the general issue should be found for the defendant it would appear on the record in the action of assumpsit that no debt was due, in the face of the defendant's admission by the plea of tender that something was due; that there never existed such a bond as that declared on, when the plea of tender admits something to be due on that very bond. *Union Bank v. Ridgely*, 1 Harr. & G. 324, *dictum*.

And a mandamus would not issue from the Supreme Court of the United States to a district judge directing him to restore to the record a plea of tender which had been filed together with a plea of *non est factum*. *Ex parte Davenport*, 6 Pet. 661, 8 L. ed. 537.

And pleas of *non est factum* and *soleit post dici* in debt on a bond were incompatible, and could not be pleaded together. *Fox v. Chandler*, 2 W. Bl. 905; *Arnold v. Baas*, 2 W. Bl. 903.

So, an allegation in an action for trespass that the lands in suit were copyhold, and another allegation that they were descendible, were inconsistent and repugnant. *Hutchinson v. Jackson*, 2 Lut. No. 1324.

43 L. R. A.

And a plea in an action for trespass and false imprisonment that the plaintiff was an alien enemy could not be united with a special justification that, the plaintiff having committed a felony, the defendant gave him in charge of a constable to be taken before a magistrate. *Truckenbrodt v. Payne*, 12 East, 206.

The defendant in an action for trespass should have confessed the trespass if he meant to justify or avoid it, or denied it altogether. The general issue and a justification, as these defenses were understood before the enactment of the Code, could not be united in the same answer, as both could not be true at the same time. *Royce v. Brown*, 3 How. Pr. 391.

So, in *Prinzel v. Preston*, *Barnes's Notes*, 351, which was a motion for leave to plead not guilty and a license in trespass, it was said that the court has never admitted not guilty and a release of a particular trespass, though it has admitted not guilty and a general release where an affidavit was produced; but the motion seems to have been decided upon the absence of an affidavit showing the necessity of both defenses.

Likewise, a plea in bar on a writ of entry *sur disseisin* under leave to plead double of the general issue, that the defendant was never seised of the demanded premises in manner and form as he in his declaration has alleged, where the answer contained a previous plea of the general issue of *non disseisin*, which was joined by the defendant, was bad and subject to demurrer as putting in issue a fact which must be proved under the first issue. *Martin v. Woods*, 6 Mass. 6.

And where an answer to a bill filed for an account for tithes sets up certain yearly payments as moduses, but insists that if the same for any reason were not good and valid moduses from time immemorial they must be taken to have been payable as a good and valid real composition made with the assent of all the parties, the two allegations are inconsistent, and the latter branch cannot be rejected as surplusage, but must be taken as an admission entitling the plaintiff to a decree. *Jesus College v. Gibbs*, 1 Younge & C. Exch. 160.

And leave to plead double was not granted under the statute of Anne, where the plaintiff's title to an advowson was traced through a period of two centuries, and the defendant's claim arose on the alleged invalidity of a particular deed so as to permit the defendant to traverse all the allegations in the declaration, or to plead more pleas than were necessary to contest that particular deed. *Gully v. Exeter*, 5 Bing. 42.

or check, or the note, bill, or check of a third person, to meet an antecedent indebtedness, is *prima facie* not a payment or discharge of such indebtedness.

First Nat. Bank v. Newton, 10 Colo. 161, 14 Pac. 428; *Byrne v. Van Hoesen*, 5 Johns. 66; *Jaffrey v. Cornish*, 10 N. H. 505; *Woodward v. Miles*, 24 N. H. 289; *Collins v. Dawley*, 4 Colo. 141, 34 Am. Rep. 72; *Hart v. Boller*, 15 Serg. & R. 162, 16 Am. Dec. 536; *Sutton v. The Albatross*, 2 Wall. Jr. 327, Fed. Cas. No. 13,645; *Fickling v. Brewer*, 38 Ala. 685; *White v. Jones*, 38 Ill. 159; *Matthews v. Dare*, 20 Md. 248; *Schilling v. Durst*, 42 Pa. 126; *McMurray v. Taylor*, 30 Mo. 263, 77 Am. Dec. 611; *Kephart v. Butcher*, 17 Iowa, 240; *Welch v. Allington*, 23 Cal. 322; *Peter v. Beverly*, 10 Pet. 562, 9 L. ed. 534; *Sheehy v. Mandeville*, 6 Cranch, 253, 3 L. ed. 215; *The Kimball*, 3 Wall. 45, *sub nom. Duncan v. Kimball*, 18 L. ed. 54.

So, a plea of *non est factum*, denying the execution of a deed, and a plea of conditions performed, admitting its execution, cannot be pleaded together. *Pope v. Latham*, 1 Ark. 66.

Nor can payment and *non est factum* be pleaded to a deed. *Com. v. Myers*, 1 Va. Cas. 188, *dictum*.

And an averment in an answer in an action on a delivery bond that all the defendant's property was not worth \$100 was inconsistent with a subsequent averment that his property, exclusive of that levied on, did not amount in value to \$100, and rendered the answer subject to objection by demurrer. *Barber v. Summers*, 5 Blackf. 339.

So, a plea of tender in an action on contract admitted the contract to the extent of the sum tendered, and was therefore inconsistent with a denial of the whole demand, and the two pleas cannot be united in the same answer. *Chew v. Close*, 9 Phila. 211.

And the defendant in an action in assumpsit could not plead *non assumpsit* of all the counts, and a tender as to a part of them. *Dowgall v. Bowman*, 3 Wils. 145; *Maciellan v. Howard*, 4 T. R. 195.

The reason for the rule being that if the general issue should be found under such plea for the defendant, it would then appear on the record that no debt was due, and yet that the defendant admitted something to be due. *Maciellan v. Howard*, 4 T. R. 195.

But where a defendant in an action of assumpsit pleaded *non assumpsit* and payment or set-off, failure on his part to prove set-off was not an acknowledgment of the plaintiff's debt which the plaintiff might give in evidence. *Rogers v. Old*, 5 Serg. & R. 411.

So, a plea of tender in an action for debt admitted that the plaintiff had a *locus standi* in court as to part of the demands, and a plea of alien enemy denied that he had any right to stand in court or to recover anything, and the two were therefore repugnant, and could not stand together. *Shombeck v. De La Cour*, 10 East, 326.

And where several defendants in an action of debt had joined in pleas in bar, one of them could not afterwards sever and put in a plea going to his personal discharge as a discharge under the insolvent act. *Andrus v. Waring*, 20 Johns. 158.

Nor was a plea in an action upon a promissory note admitting part of the sum sued for, taken in connection with a plea of the general issue and of failure of consideration, good on 48 L. R. A.

Dunbar, J., delivered the opinion of the court:

This case was originally begun by the respondent in the equity department of King county, but, some questions of fact arising for determination between the appellant and the respondent, it was transferred to the law department in the superior court of said county. The notes in suit were made by the appellant as a subscription in aid of an enterprise in which he and a number of other persons were interested, *viz.*, the building of a boulevard along the west shore of Lake Union. At a meeting of those interested in the enterprise, at which appellant was present, he subscribed \$2,500 towards carrying on the enterprise, and a committee was elected and appointed by the meeting as an executive committee to have full charge and control of the work. This committee consisted of L. H. Griffith, Edward Bluett, and

demurrer, as it was incompatible with them all. *Williams v. Harris*, 2 How. (Miss.) 627.

And where defendant sued upon a promissory note pleads the general issue with notice of set-off, and at a later stage puts in a special plea *puts darrein continuance*, and sets up a composition made with the plaintiff and other creditors under the bankruptcy act, by interposing the second plea, he abandons the first, and places the issue of the suit entirely on the new plea, the second plea being virtually a confession of the cause of action; and in such case an award of final judgment in favor of the plaintiff is the legitimate result in point of law. *Whittemore v. Stephens*, 48 Mich. 574, 12 N. W. 858.

And a plea in an action by the drawer against the acceptor of a bill of exchange, that before the acceptance it was agreed between the plaintiff and defendant that the plaintiff should consign certain goods to a designated person, and that out of the proceeds of such goods the plaintiff should direct the consignee to pay to the defendant the amount of the bill, and that if the proceeds should not arrive in the country when the bill was due the plaintiff should renew the bill, alleging that they did not arrive at that time, and that the plaintiff declined to renew, and that it was thereupon agreed that the defendant should direct the consignee to pay the whole of the proceeds to the plaintiff, and that such direction and payments were made pursuant thereto, is repugnant to another plea in the same answer, that the defendant had not received any consideration for the payment of the bill, and the answer is subject to special demurrer. *Byas v. Wylie*, 1 Cramp. M. & R. 686, 3 Dowd. P. C. 524, 5 Tyrw. 877, 1 Gale. 50.

So, in *Chitty v. Hume*, 13 East, 255, which was an action on a bond in which the defendant caused delay by insisting upon oyer of the original instead of a sworn copy of the bond, and pleaded by leave of the court *non est factum*, *solvit ad diem*, and *solvit post diem*, the court in view of the delay, and of the further delay which might be occasioned by taking the depositions of subscribing witnesses in a foreign country, and upon an affidavit that part payments had been made, rescinded the rule for pleading double in order to make the defendant elect to stand either upon his plea of *non est factum* or of payment.

And in *Anderson v. Anderson*, 2 W. Bl. 1157, leave to plead in dower that the deceased was not seised of the premises in which dower was claimed, together with a plea denying the mar-

C. E. Remsburg. The committee, through its manager, Griffith, afterwards sold the notes given by appellant to respondent, the Seattle National Bank. The notes were made payable to the order of the members of the committee. One of the notes sued on is a renewal of the note, made payable three months after its date. The renewal was made after the maturity of the original note, and while it was held by respondent. The other note was made payable six months after date. Griffith indorsed on the back of each note the following: "L. H. Griffith, Edward Bluett, C. E. Remsburg, Committee, by L. H. Griffith, Chairman," and delivered them, so indorsed, to the respondent, and received from the respondent the sum of \$2,500, the full face of the notes. This money was deposited to the credit of the treasurer of the boulevard enterprise, and was expended in prosecuting that enterprise.

George R. Carter and Nellie Phinney, as the executrix of the last will and testament of Guy C. Phinney, deceased, were made defendants for the purpose of reforming and foreclosing a certain mortgage given as security for the notes in question; but they have not appealed from the judgment rendered, and need not be further noticed in this opinion. The amended complaint alleged that, prior to the maturity of the notes in suit, the said Griffith, Bluett, and Remsburg, as such committee, for a valuable consideration, duly indorsed and delivered the said promissory notes to plaintiff, and plaintiff then became, and now is, and ever since has been, the owner and holder of said promissory notes. These allegations are denied by general denial in the amended answer of the appellant, and on this denial the principal point in this case is raised.

We have examined the testimony in this

riage, was denied, the denial having been placed by one of the judges upon the ground of inconsistency. And the same thing was denied in *Hillier v. Fletcher*, 2 W. Bl. 1207.

And in *Robins v. Crutchley*, 2 Wils. 118, similar pleas in an action of dower were held bad on demurrer.

As to general denial and an averment that the taking of personal property was justifiable under the statute of Anne, see *Foster v. Henry* (N. Y.) 5 Alb. L. J. 173, *infra*, VI. c. 5.

Attention is here called to the fact that several of the cases above set forth were decided after the adoption of the reform procedure in their respective states. They are here included because decided before the principles of reform procedure were thoroughly understood, and when the courts were trying to apply to it the principles of the former practice, and because therefore such cases constitute, as will be seen by comparison with the later cases, an exposition of the former rules of pleading, rather than of Code pleading.

b. With reference to different modes of trial.

Under the common-law system of pleading, as well as under the statute of Anne, if different pleas or defenses in an action raised issues triable by a different method or a different form of action, or by a different court, they were regarded as inconsistent, and the pleader would be required to elect between them.

Thus, two pleas in the same action were not admissible if they presented different issues that must be tried by different courts. *Chapman v. Sloan*, 2 N. H. 464.

A defendant was not allowed to plead several pleas which required different trials, as *nul tiel record* and payment, in an action on a judgment, and he would in such case be put to an election between his pleas. *Parks v. McClellan*, 44 N. J. L. 552; *Riley v. Riley*, 20 N. J. L. 114.

And he could not plead *nul tiel record* and give notice that he would rely upon proof of the same facts in bar, where the plea under which he proposed to give the special matter in evidence was to be determined by the court upon an inspection of the record, while the facts to be given under the general plea were matters for the consideration of the jury. *Card v. Saragant*, 15 Vt. 393.

So, notice of special matter could not be given with a plea of *nul tiel record* in an action of debt on a judgment, as such notice could only

accompany a plea which presented an issue to be tried by a jury. *Barheydt v. Haverly*, 1 Wend. 70.

The plea of *nul tiel record* was not that general issue intended by the New York statute under which the defendant was authorized to give notice of special matter of defense of which he intended to give evidence at the trial, the statute referring only to issues triable by the country. *Raymond v. Smith*, 18 Johns. 329.

Likewise, in *Le Conte v. Pendleton*, 1 Johns. Cas. 104, the defendant in an action of debt on a judgment obtained in another state was required to elect between a plea of *nul tiel record* and *nul debit*, and one of the pleas was ordered stricken out.

And in *Carnes v. Duncan*, Col. Cas. 35, it was held that *nul tiel record* could not be pleaded with any other defenses.

But, the ground upon which a defendant was compelled to elect between a plea *nul tiel record* and other pleas, was that their mode of trial was different, one being by the record and the others by jury, and as the existence of a justice's judgment was not determinable at bar by the record a plea of *nul tiel record* to a declaration on a judgment in a justice's court was not triable by record but by jury, and might be joined with a plea in abatement. *Witherwax v. Averill*, 6 Cow. 589.

And *non est factum* and *nul tiel record* might be pleaded together in an action upon a bond which was by record in court. *Brown v. Bickle*, 7 Ark. 410.

And an issue of *nul tiel record*, being an issue of fact, was not inconsistent with another plea of an insolvent discharge, under 2 N. Y. Rev. Stats. p. 409, § 4, so as to require the court to rule that the defendant must elect between them, as under that act the distinctions as to the trial of facts were abolished, and all issues of fact were triable by jury. *Trotter v. Mills*, 6 Wend. 512.

So, under the former practice a defendant in ejectment could not, in an answer denying the plaintiff's legal title, set up an equitable defense looking to affirmative relief, for the reason, among others, that the equitable issue would require a different mode of trial. *Cochran v. Webb*, 4 Sandf. 658.

And an answer in an action by an indorsee against the maker of a note, averring that the note was made and indorsed in blank and given to a third person to secure a sum of money borrowed from him by the defendant, and that such third person had not assigned his interest

case in minutiae, and believe that it is sufficient to sustain all the contentions of the respondent as to the manner of executing the notes, the reason for their execution, the authority conferred upon Griffith, the manager of the committee, to transfer the notes, and in every other particular. On all these propositions, it is true, the testimony is conflicting; but we think it would be sufficient to sustain the verdict, even if the law of the case were as contended by appellant. But as the question of inconsistent defenses is raised squarely in this case, and has been argued with much zeal and ability by the attorneys on both sides, we have concluded to enter upon an investigation of that question and settle the law, so far as this state is concerned, on that proposition. Cases from this court are cited by both counsel to sustain their respective contentions, but

whatever may have been said by this court on this subject heretofore has been of the character of *dicta*, or an incidental reference to a question which was not material to the decision of the case under discussion. So we feel at liberty to enter upon its investigation as an original proposition. The answer, as we have said, denies that the plaintiff was the owner and holder of said notes, or that they had been indorsed and delivered to it for a valuable consideration, or otherwise. The court in its instructions, to which the appellant duly excepted, charged the jury that under the pleadings in this case the only question for their consideration was the question of whether the notes were paid. The defendant, after his general denial, which was upon information and belief, affirmatively alleges the transfer of the notes to the plaintiff. He alleges, in

but was the real creditor, and a plea of usury taken by such third person upon the loan paid the defendant, was bad and subject to demurrer, as the plea of usury was not triable in the whole by the mode of trial to which the defendant refers himself. *Binney v. Merchant*, 6 Mass. 190.

c. Relaxation of the rule.

The tendency of the more modern cases, as well as some of the older ones, has been to relax the strict rule with reference to inconsistent pleas formerly adopted under the statute of Anne, and it is thought that the rule may now be said to be, even under the rule of law supplied by that act, that the union of pleas will be permitted unless there is an inconsistency of fact as distinguished from an inconsistency by application of law.

Thus, as early as about the year 1800 it was said in *Wilson v. Aimes*, 5 Taunt. 340, 1 Marsh. 74, that the rule of strict consistency in pleading has been much relaxed, and a defendant in an action for rent may now be permitted to plead non tenure, nothing in arrear, and infancy in the same answer.

And in *Butt's Case*, 7 Coke, 25a, it was held that an answer pleading a grant of the rent out of a term of years, and also alleging that by virtue thereof he was seized in his demesne as a freehold for the term of his life, is not bad for repugnancy.

And in *Cooke v. Sayer*, 2 Burr. 753, an answer pleading not guilty, and also the statute of limitations, was held good on demurrer.

And in *Gerring v. Manning, Barnes's Notes*, 866, which was an action for trespass, a rule absolute was granted giving the defendant leave to plead not guilty and tender of amends.

So, in *Martin v. Keesterton*, 2 W. Bl. 1089, it was said that a tender is a very conscientious plea and ought to have every indulgence, and the court, in the exercise of its discretion, permitted a plea of not guilty and one of tender to be united in the same answer in an action in trespass, notwithstanding the seeming inconsistencies.

And in *Dye v. Leatherdall*, 3 Wills. 20, which was an action for trespass, a plea of not guilty, coupled with another plea that the defendants took the plaintiff's hog damage feasant and impounded it, was upheld on demurrer.

And in *Steele v. Pindar, Barnes's Notes*, 347, a plea of not guilty and one of general release from one of the plaintiffs were held not to be absolutely contradictory on motion for permission to plead double, where the release was general 48 L. R. A.

and not particular, and that it could not be given in evidence under the plea of not guilty.

And in *Nagle v. Edwards*, 3 Anstr. 702, in which inconsistent defenses were interposed and the answer was objected to on that ground, and it was insisted that it ought to be rejected as a whole, the court went into the defense upon its appearing that there had been no intentional misconduct, and that the inconsistency arose wholly from the mistake of legal advisers.

And in *Wright v. Russell*, 8 Wills. 536, 2 W. Bl. 923, which was an action of debt upon an obligation against a surety for the honesty of a clerk to a brewer, an answer, in which the defendant pleaded, first that the obligation was not his deed, and second that at the time of the making of the alleged obligation the plaintiff carried on the trade of the brewer on his own account only without a partner, and that while he so carried on the business the clerk served him honestly and justly, was held to be good.

So, under the more relaxed rule a plea of *non est factum* may be joined with a plea of payment in an action of covenant. *Merry v. Gay*, 3 Pick. 388.

And while pleading a general denial and a justification in an action for trespass was not allowed at common law, it was subsequently permitted by the statute of Anne, and is believed to be legitimate in all systems which allow several pleas in defense. *Grash v. Sater*, 6 Iowa, 302.

So, the defendant in an action for debt for work and labor and money paid to his use, might plead, first the general issue, and second that the demand accrued for carrying into effect illegal wagers, without inconsistency. *Triebner v. Duerr*, 1 Blng. N. C. 266, 1 Scott. 102, 3 Dowl. P. C. 133.

And the inconsistency and incompatibility of the pleas of general performance and of *non est factum* in an action of debt, were not such under the statute of Anne, 18, or under the statute of Maryland on the subject, as to prevent their being pleaded together in the same answer. *Union Bank v. Ridgely*, 1 Harr. & G. 324.

Nor were a plea of *ne unques executor* in an action for debt brought against a defendant as executor, and a plea of *non est factum*, repugnant so that a defendant who had filed the earlier plea would be refused leave to also file the latter. *Langford v. Frey*, 8 Humph. 444.

So, under the statute of Anne, chap. 16, § 4, which is a part of the common law of the state of Maine, inconsistent pleas were allowed, and

his first affirmative defense, that the notes were executed and delivered to L. H. Griffith, Edward Bluett, and C. E. Remsburg, and that, subsequently to the execution and delivery of the said notes, the said committee transferred them to the plaintiff, and, in another paragraph of the same affirmative defense, alleges the payment of these notes by L. H. Griffith to the respondent. The averment of the transfer of the notes to the respondent is repeated in the second affirmative defense, where it is also alleged that the respondent, for a valuable consideration, extended the time of payment of the notes, and by reason of such extension of time the appellant claims that he is exonerated from the payment of the notes. The allegation of transfer is again repeated in the third affirmative defense, and an agreement for the settlement and the compromise

for the appellant's liability upon said notes is there averred, by which it is alleged it was agreed that certain lands owned by the appellant should be conveyed in full payment of the notes, and appellant alleges the conveyance of the said lands to George R. Carter as trustee for the respondent, in full payment of the said notes. He further alleges, in the third affirmative defense, that, subsequently to the maturity of the notes, he demanded the surrender to him and possession of said notes. Now, the question under this pleading is, Was the court justified in instructing the jury in substance, that the question of ownership of the notes and transfer to the respondent was not for their consideration?

On this subject of inconsistent defenses there have been many conflicting decisions, but we think their origin has been in a mis-

mere inconsistency between two pleas was not an objection to their being pleaded together. *Granite State Bank v. Otis*, 53 Me. 133.

And under that act in force in Pennsylvania though it was formerly the practice of the court to refuse leave when the proposed pleas were inconsistent, in modern practice it will be permitted notwithstanding an apparent repugnancy, growing out of a plea of not guilty and a justification. *Peters v. Ulmer*, 73 Pa. 403.

And where an action is brought upon a promissory note against a prior indorser, and the defendant enters a plea of payment, and afterwards, but before trial, dies, his administrator should be permitted on motion to add the plea of *non assumpsit* so as to compel the plaintiff to prove the intestate's liability, and enable the administrator to meet such proof. *Smith v. Kessler*, 44 Pa. 142.

The discretion vested in the court by the statute of Anne to refuse leave to put in more than one plea is a legal discretion not to be exercised unless good reason exists. *Peters v. Ulmer*, 74 Pa. 403.

So, the court, in its discretion, may, under the South Carolina system of pleading, grant a motion to plead double at any time, and a plea of *non demisit* in an action for rent and a plea of no rent in arrear are not so inconsistent that the court, in the exercise of its discretion, will refuse to permit them to be pleaded together. *Van Holten v. Lewis*, 1 McCord, L. 12.

And a defendant can plead under the West Virginia statute, which is the same in substance as 4 and 5 Anne, as many matters of law and fact as to him may seem necessary to his defense, and the facts stated in one or more of them cannot be used as evidence or as admissions to disprove anything contained in the others, or to sustain plaintiff's declarations; and where a defendant has pleaded not guilty in an action of trespass for taking and carrying away the goods of another, and also specially pleaded justification by reason of being in the service of the confederate states of America, and the special pleas have been demurred to, and the demurrer sustained, plaintiff should not be permitted to offer the special pleas in evidence to prove the trespass, and the defendant is not estopped by such special pleas on the issue joined on the plea of not guilty from denying the trespass, and where the plaintiff fails to prove the allegations of the declaration by other evidence, he cannot recover. *Nadenbousch v. Sharer*, 2 W. Va. 235.

The relaxed rule would seem to have been that an answer is not inconsistent when the different

facts stated in it may all be true. *Jesus College v. Gibbs*, 1 Younge & C. Exch. 180.

But that two pleas in the same action will not be permitted if one expressly admits what the other denies, unless they both appear necessary to the merits of the defense. *Chapman v. Sloan*, 2 N. H. 464.

Thus, in *Ten Broeck v. Orchard*, 79 N. C. 518, it was said that incompatible pleas were admissible under the former system of pleading, and a defendant could deny the plaintiff's claim and at the same time insist on its having been paid, or on the bar of the statute of limitations.

Inconsistent pleas should not be allowed, however, unless accompanied by an affidavit to show that they are necessary to the justice of the cause. *Pleading Several Matters*, 3 Bing. 635; *Prinel v. Preston*, Barnes's Notes, 351.

So, the whole subject of pleading several inconsistent pleas is left, under N. J. Rev. Stat. p. 807, § 118, which is substantially the same as the statute of Anne, in the discretion of the court to be controlled as the ends of substantial and speedy justice may require. And if the defenses pleaded are inconsistent the court may require an affidavit that they are necessary to the justness of the cause. *Parks v. McClellan*, 44 N. J. L. 552.

But a defendant will generally be allowed to plead in different pleas as many substantially different grounds of defense as may be thought necessary, though they appear to be contradictory and inconsistent, and the court will deny leave only where the several pleas are clearly repugnant, or will create unjust delay or embarrassment in obtaining a trial. *Ibid.*

So, in *Pope v. Welsh*, 18 Ala. 632, it was said that in an action for slander the pleas of not guilty and justification are inconsistent, but they may be and sometimes are pleaded together by leave of the court, under the statute of Anne; but the question in the case was as to the right to prove general bad character under the general issue.

V. The rule in equity.

The rule has been stated to be that in equity the defendant in a bill may set up any number of defenses in his answer, but the defenses must be consistent with each other. *Scanlan v. Scanlan*, 134 Ill. 630, 25 N. E. 652; *Hopper v. Hopper*, 11 Paige, 46, *dictum*.

And that pleas in equity may consist of a variety of facts and circumstances provided they are not inconsistent with each other, and all tend to one point, making out one connect-

understanding of the cases cited and relied upon as sustaining the doctrine that inconsistent defenses, under the reformed practice of pleading, could be maintained; and, secondly, a loose discussion and misapprehension of what inconsistent pleadings really are. The idea that inconsistent defenses, to the extent of being false defenses, could be tolerated under the Code, has received a stimulus from the announcement of Mr. Pomeroy, in his excellent work on Remedies and Remedial Rights (§ 722), that, "assuming that the defenses are utterly inconsistent, the rule is established by an overwhelming weight of judicial authority that, unless expressly prohibited by the statute, they may still be united in one answer. It follows that the defendant cannot be compelled to elect between such defenses, nor can evidence in favor of either be excluded

at the trial on the ground of the inconsistency." This announcement is attempted to be fortified by the citation of a large number of authorities. It was insisted by counsel for the respondent that an investigation of these authorities would show conclusively that they do not bear out the statement made by the author, and for the purpose of obtaining all the light possible on this question we have carefully examined the cases cited, and are forced to the conclusion that the learned author was unwarranted in making the assertion that the rule he announced was established by an overwhelming weight of judicial authority, or any weight of authority at all, under the Code practice. We think it legitimately follows, however, that if these inconsistent defenses are allowed to be pleaded, evidence under them cannot be excluded at the trial

proposition sufficient of itself to form a defense to the bill, and not showing separate and distinct defenses, one of which would have been sufficient. *Loud v. Sergeant*, 1 Edw. Ch. 184.

And it has been held that if an averment in a plea is inconsistent with the matter pleaded the plea is bad. *Emmott v. Mitchell*, 14 Sim. 482, 14 L. J. Ch. N. S. 179, 9 Jur. 171.

But the prevailing and true rule is thought to be that the question whether or not defenses in equity may be set up together, depends upon whether or not they may all be true in fact.

Thus, a defendant in an action in equity may deny the allegations upon which the plaintiff's title to relief is founded, and at the same time set up in his answer any other matters not wholly inconsistent with such denial as a distinct or separate defense to the claim for relief made by the plea or some part thereof. *Hopper v. Hopper*, 11 Paige, 46.

As the different parts of his answer are not to be construed in the same manner as the different parts of a plea. *Ibid*.

But he cannot set up two distinct defenses therein which are so inconsistent with each other that if the matters constituting one defense are truly stated the matters upon which the other defense is admitted to be based, must necessarily be untrue in point of fact. *Ibid*.

And where an answer in chancery positively denies a fact charged in the bill, but proceeds to give a circumstantial account of the transaction, inconsistent with the truth of the denial, a single witness without corroborating circumstances is sufficient to prove the fact charged. *Barraque v. Siter*, 9 Ark. 545.

And where two papers are exhibited in an action in equity, and are admitted in the defendant's answer and declared by the court to be the agreement of the parties, they are sufficient to control another plea in the answer of the defendant denying the agreement without the aid of any oral testimony in their support. *Jones v. Belt*, 2 Gill, 106.

So, a denial in an answer in an action in equity of the existence of fraud will not avail to disprove it, where the answer admits facts from which fraud follows as a natural and legal, if not a necessary and unavoidable, conclusion. *Hoboken Bank v. Beckman*, 33 N. J. Eq. 53; *Sayre v. Fredericks*, 16 N. J. Eq. 208; *Robinson v. Stewart*, 10 N. Y. 189.

But where inconsistent defenses are set up in an answer to a bill in chancery, and such answer is not excepted to, and, on the hearing one of the defenses pleaded is found to be untrue, and the other is established by the proof, the decree

will not be reversed on account of the interposition of such untrue and inconsistent defenses. *Scanlan v. Scanlan*, 184 Ill. 680, 25 N. E. 652.

And an allegation in an answer in an action to reform a deed, setting up the execution of a previous deed of the same property which had never been delivered, should not be stricken out as irrelevant, redundant, and constituting no defense, even under Mo. Rev. Stat. § 2050, permitting a defendant to set forth in his answer as many consistent defenses as he may have. *Crowder v. Searcy*, 103 Mo. 97, 15 S. W. 346.

But an answer in an action brought by a city to perpetually restrain the defendants from encroaching upon premises alleged to have been dedicated to the public as a public square, and to procure the removal of buildings already placed thereon by the defendants, averring no knowledge or information sufficient to form a belief as to the rights of the plaintiff, but not distinctly denying the possession and ownership in the land, and admitting in another part that they have buildings fronting on the piece of ground claimed to be a public square, and insisting upon a right of access to such buildings and that the public square shall be kept open for their benefit, admits that they own the buildings and are in possession of them. *Williams v. Smith*, 22 Wis. 594.

And the defendant in a suit in equity by the beneficiary of a trust, to enforce the trust and subject the land described in the trust deeds to sale for the payment of moneys loaned on such security, who admits that the debt is still due and unpaid, cannot be permitted to allege that the indebtedness has been satisfied by a prior sale of the property to the complainant under a former suit to enforce the trust, and that the complainant is now estopped to demand a second sale of the property and at the same time aver that such prior sale was a nullity and was so decreed on a suit brought to set aside such sale, and that under such sale and annulment the complainant took nothing. *Pepper v. Shepherd*, 4 Mackey, 269.

And a denial in such an action to establish a lost will, in which it was alleged that the defendant had destroyed it, of all knowledge of the will, and an admission that she had stated that she had the will, but that she meant by such statement that she had certain verbal directions given by her father, the testator, concerning his property which she considered as his will, is inconsistent and absurd where the explanation is disproved by one witness; and the court may act on the admissions contained in

on the ground of the inconsistency. Then, if they are inconsistent to the extent that, if one of the averments in the answer is true, the other must be false, and we follow the rule, as we must, that, if it is a proper subject of allegation, it is a proper subject of proof, a court of justice is placed in the absurd position of listening to proof of a defendant tending to sustain one proposition, and in the next breath proving another proposition, the facts of which are inconsistent with the one just testified to. This theory, carried to its logical result, would permit a defendant who was sued upon a promissory note to allege nonexecution, want of consideration, and payment. Under such allegations he would be permitted to swear that he never executed the note; that he did execute the note, but that it was without consideration; and that he did ex-

ecute the note, that the consideration was good, but that he had paid the same. Such a practice as this would not only be farcical, but absolutely wrong and immoral, and an encouragement of perjury; and the example given is not extravagant, if the theory announced by the author be correct.

We take it that the only object of a lawsuit is the elicitation of truth, and that the only object of pleadings is to aid in determining the truth of the controversy. But the result of allowing pleadings to stand which are inconsistent, to the extent of being untrue, would have exactly the opposite tendency, and courts would simply become machines to aid unconscionable litigants in avoiding their just responsibilities. Under the common-law practice pleadings were based upon fictions, but the Code has undertaken to work a revolution in that respect,

the answer, wholly disregarding the explanation. *Brown v. Brown*, 10 Yerg. 84.

A husband, however, in a suit by his wife against him for a separation on the ground of improper and cruel treatment, may deny the allegations upon which the complainant's title to relief is founded, and may at the same time set up any recriminatory matters not wholly inconsistent with such denials as distinct and separate defenses to the claim for relief, or to some part thereof. *Hopper v. Hopper*, 11 Paige, 46.

And a defendant in an action for divorce may deny the adultery charged in the bill, and also set up adultery on the part of the plaintiff, or any other matter in bar of the suit. *Wood v. Wood*, 2 Paige, 108.

And an allegation in an answer by a husband in an action by his wife for a separation, of improper intimacy on her part with a person with whom she knew her husband was not upon friendly terms, and other conduct calculated to irritate and provoke him, and acts of violence and unkind treatment, is not inconsistent with a denial that any acts of violence or of cruel treatment on his part had ever taken place. *Hopper v. Hopper*, 11 Paige, 46.

But allegations in an answer in an action for a judicial separation which admit of two interpretations, one to the effect that the defendant had abandoned the plaintiff, and that he was justified in abandoning her, and the other to the effect that he did not abandon her and did not intend to, but had left her with her consent, are bad and subject to exception. *Fairchild v. Fairchild*, 43 N. J. Eq. 473, 11 Atl. 426.

VI. The rule under reform procedure.

a. General statement of the doctrine.

Nearly if not all the codes of procedure of the different states contain provisions to the effect that a defendant in an action may plead as many defenses as he has, or as he deems necessary, and under these provisions it has been held generally by a great majority of the cases that separate pleas in an answer are not objectionable because of repugnancy or inconsistency with each other. *Anslay v. Bank of Piedmont*, 113 Ala. 467, 21 So. 59; *Lincoln v. Wiliamowicz*, 7 Ark. 378; *McIlroy v. Buckner*, 35 Ark. 555; *Bell v. Brown*, 22 Cal. 671; *Miles v. Woodward*, 115 Cal. 308, 40 Pac. 1076, 47 Pac. 860; *Banta v. Siller*, 121 Cal. 414, 53 Pac. 935; *People ex rel. Crawford v. Lothrop*, 3 Colo. 428; *Tucker*

v. Edwards, 7 Colo. 209, 3 Pac. 233; *Koll v. Bush*, 6 Colo. App. 294, 40 Pac. 579; *Union Bank v. Ridgely*, 1 Harr. & G. 324; *Farnan v. Childs*, 68 Ill. 547; *Peoria & P. U. R. Co. v. Barton*, 38 Ill. App. 469; *Holmes v. Tarble*, 77 Ill. App. 114; *Morgan v. Hawkeye Ins. Co.* 37 Iowa, 359; *Horton v. Banner*, 6 Bush, 599; *Gordan v. Peirce*, 11 Me. 213; *Rowland v. Dalton*, 36 Miss. 702; *Lay v. Filmore*, 75 Miss. 493, 23 So. 184; *Adams v. Trigg*, 37 Mo. 141; *Cate v. Hutchinson*, 58 Neb. 232, 78 N. W. 500; *Parks v. McClellan*, 44 N. J. L. 552; *Woods v. Reiss*, 78 Hun. 80, 29 N. Y. Supp. 263; *Sheldon v. Heaton*, 78 Hun. 50, 29 N. Y. Supp. 275; *MacColl v. American Union L. Ins. Co.* 89 Hun. 490, 35 N. Y. Supp. 364; *Ostrom v. Bixby*, 9 How. Pr. 57; *Smith v. Wells*, 20 How. Pr. 158; *Siriani v. Deutsch*, 12 Misc. 213, 34 N. Y. Supp. 26; *Bruce v. Burr*, 67 N. Y. 237; *Goodwin v. Wertheimer*, 90 N. Y. 140, 1 N. E. 404; *Societa Italiana Di Beneficenza v. Sulzer*, 138 N. Y. 468, 34 N. E. 193; *Ross v. Duffy*, 12 N. Y. S. R. 584; *Bryant v. Bryant*, 2 Robt. 612; *Ten Broeck v. Orchard*, 79 N. C. 518; *McLamb v. McPhall* (N. C.) 85 S. E. 426; *Reed v. Reed*, 98 N. C. 462; *McDonald v. American Mortg. Co.* 17 Or. 626, 21 Pac. 883; *Millan v. Southern R. Co.* 54 S. C. 485, 32 S. E. 539; *Stebbins v. Lardner*, 2 S. Dak. 127, 48 N. W. 847; *Lawrence v. Peck*, 3 S. Dak. 645, 54 N. W. 808; *Green v. Hughitt School Twp.* 5 S. Dak. 452, 59 N. W. 224; *Shelby County v. Bickford*, 102 Tenn. 895, 52 S. W. 772; *Hillebrand v. Booth*, 7 Tex. 499; *Fowler v. Dav-enport*, 21 Tex. 626; *Smith v. Sublett*, 28 Tex. 103; *Burnham v. Call*, 2 Utah, 433; *Hummel v. Moore*, 25 Fed. Rep. 380; *Lake Shore & M. S. R. Co. v. Warren*, 3 Wyo. 134, 6 Pac. 724; *Furniss v. Ellis*, 2 Brock. 14, Fed. Cas. No. 5,162; *Anonymous*, 1 Code Rep. 134; *Porter v. McCreedy*, Code Rep. N. S. 88.

And the rule is the same under provision that a defendant may set forth by answer or cross complaint as many defenses or counterclaims or set-offs as he may have, whether the subject-matter of such defenses be such as were heretofore denominated legal or equitable or both. *People ex rel. Crawford v. Lothrop*, 3 Colo. 428; *Banta v. Siller*, 121 Cal. 414, 53 Pac. 935; *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076, 47 Pac. 860; *Societa Italiana Di Beneficenza v. Sulzer*, 138 N. Y. 368, 34 N. E. 193; *Ross v. Duffy*, 12 N. Y. S. R. 584; *TenBroeck v. Orchard*, 79 N. C. 518; *McDonald v. American Mortg. Co.* 17 Or. 626, 21 Pac. 883; *Stebbins v. Lardner*, 2 S. Dak. 127, 48 N. W. 847.

And this rule is not affected by the fact that

and under its provisions it is the evident intention that the pleadings shall be based upon facts which are susceptible of proof. Our Code provides that the complaint shall contain a plain and concise statement of facts constituting a cause of action, and while it does not, in so many words, provide that the answer shall contain a statement of facts, it does so, in substance, so far as any affirmative allegations are concerned; for the language of the Code is that it shall contain a statement of any new matter, constituting a defense or counterclaim, in ordinary and concise language. It is true that it further provides that the defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal, or equitable, or both. This is all the authority there is for claiming that,

the answer was verified. *Banta v. Siller*, 121 Cal. 414, 53 Pac. 935.

And it does not follow because he has set up one defense which is good upon its face that he shall not be permitted to set up another. *McDonald v. American Mortg. Co.* 17 Or. 626, 21 Pac. 883.

And a plea of the general issue is not waived by special pleas claimed to be *puts darrein continuance*. *Peoria & P. U. R. Co. v. Barton*, 38 Ill. App. 469.

In *Stebbins v. Lardner*, 2 S. Dak. 127, 48 N. W. 847, *supra*, the rule adopted by a number of the other states, including Missouri, was explained and distinguished upon the ground that that rule is based upon a statute providing that different consistent defenses may be stated in the same answer, and it was said that hence cases decided under such statutes are not an authority in the case at bar.

The only restriction as to the manner of stating such defenses is that requiring that each shall be separately stated. *Buddington v. Davis*, 6 How. Pr. 401; *Anonymous*, 1 Code Rep. 134; *Morgan v. Hawkeye Ins. Co.* 37 Iowa, 359; *McLamb v. McPhail* (N. C.) 85 S. E. 426.

And they must be set out in separate counts or defenses of the answer, each of which must be sufficient in itself to present the defense intended to be pleaded. *Morgan v. Hawkeye Ins. Co.* 37 Iowa, 359; *Farnan v. Childs*, 66 Ill. 547; *Millan v. Southern R. Co.* 54 S. C. 485, 32 S. E. 539; *Hummel v. Moore*, 25 Fed. Rep. 380.

But the statute does not dispense with the necessity of allegations of facts which constitute each ground of defense by consistent averments. *Hillebrant v. Booth*, 7 Tex. 499; *Bryant v. Bryant*, 2 Robt. 612; *Smith v. Wells*, 20 How. Pr. 158.

The answer may embrace a general denial and a plea in confession and avoidance, and so far may embrace inconsistent defenses; but each plea in confession and avoidance must constitute in itself a good defense, and must be consistent in its averments. *Hillebrant v. Booth*, 7 Tex. 499.

Thus, an answer in an action for the violation of a statute containing two separate and distinct defenses, by one of which the defendant denied a violation of the statute and by the other averred matters of extenuation, excuse, and defense, is not subject to objection for inconsistency. *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076, 47 Pac. 800.

Where the statute with reference to pleading several pleas in an answer makes no distinction 48 L. R. A.

under the Code, the defendant is allowed to plead inconsistent defenses. It is true that he may set forth as many defenses as he has, but it could not have been the intention of the Code that he should set forth anything that was not true; for, if it was not true, it would not be a defense. There certainly could have been no intention to have discriminated against the plaintiff by giving advantage to the defendant, so far as the pleadings are concerned. It is just as consistent to insist that the plaintiff may state in his complaint inconsistent causes of action, or facts constituting his cause of action which are inconsistent with each other, as to insist that the defendant may do so in his answer. The evident intention of the Code was to place them upon an equal footing,—to compel the plaintiff by his complaint, through the medium of a statement

with reference to the subject of inconsistency, the right given is not to be limited by construction to strictly consistent pleas, but the privilege is to be given to the defendant of succeeding, not only on the strength of his own case, but on the weakness also of the plaintiff's case, by permitting apparently incompatible pleas to be pleaded, as not guilty and accord and satisfaction, or not guilty and *son assault demene*, or not guilty or *non assumpti* and the statute of limitations, or *non est factum* and payment, or *non est factum* and general performance, etc. *Union Bank v. Ridgely*, 1 Harr. & G. 324.

And a judgment in an action in which such pleas are interposed will not be held erroneous on the ground that the verdict was not responsive to all the issues. *Holmes v. Tarble*, 77 Ill. App. 114.

Oregon Code, § 157, providing that the defendant may set forth by answer as many defenses as he may have separately stated, is similar to IV. Anne, chap. 16, § 4, allowing double pleas, and should be similarly construed, so as to permit a defendant to plead inconsistent and contradictory defenses in the same answer, provided they be separately stated. *Hall v. Austin*, *Deady*, 104, Fed. Cas. No. 5,925.

There is no provision in the statute which allows answers to be struck out on the specific ground of inconsistency unless one of the allegations is necessarily false. *Ostrom v. Bixby*, 9 How. Pr. 57; *Snodgrass v. Andross*, 19 Or. 236, 23 Pac. 969.

Inconsistent pleas may be made and relied on when not forbidden by statute. *Rooney v. Tierney*, 82 Ky. 253.

And under 2 N. Y. Rev. Stat. 352, § 9, leave of the court is not necessary to the defendant to plead as many defenses as he may think necessary for his defense. *Auburn & O. Canal Co. v. Leitch*, 4 Denio, 65.

And a defendant may plead two or more pleas, some of which may terminate in issues of fact to be tried by a jury, while others may result in issues of law to be determined by the court. *Ibid.*

The rights of the defendant are absolute, and cannot be limited or restricted by the court because two or more of the pleas inserted are inconsistent with each other. *Lincoln v. Willamowicz*, 7 Ark. 378.

The court is given no such controlling power over the pleas interposed by a defendant when they are separately stated. *Ibid. dictum*; *Furniss v. Ellis*, 2 Brock. 14, Fed. Cas. No. 5,162; *Snodgrass v. Andross*, 19 Or. 236, 23 Pac. 969

of facts, to inform the defendant what the true cause of action or complaint was; and it was just as much the intention of the framers of the Code to compel the defendant, if he had an affirmative defense, to inform the plaintiff by his answer what that affirmative defense was. There can be no reason or right in any other theory. The object of the Code was to simplify lawsuits. Whether it has succeeded in doing so may be questioned, but certainly it must be consistent with itself; and it would bring about untold confusion and bad results to undertake to ingraft into the Code practice practices which were admissible under, and probably harmonized with, the theory of the common-law practice. The two are incongruous, and must be kept separate and distinct, and therefore the commingling of the two evolves a system which is worse than either.

But when the pleas are not so offered the English doctrine applies, and the right rests in the discretion of the court. *Furniss v. Ellis*, 2 Brock. 14, Fed. Cas. No. 5162.

So, under such an act, while a denial is not technically an affirmative defense, it may be interposed with affirmative defenses, and to strike it out because inconsistent with the affirmative defense interposed is error. *Woods v. Reiss*, 78 Hun. 80, 20 N. Y. Supp. 263.

And under the Texas statute providing that the defendant in his answer may plead as many several matters, whether of law or fact, as he shall think necessary for his defense, and which may be pertinent to the cause, provided he shall file them all at the same time and in due order of pleading, the right given to plead several matters is unlimited if they are pertinent, filed at the same time and in due order of pleading, and there is no qualification or abridgment of the right in matters that are inconsistent. *Fowler v. Davenport*, 21 Tex. 626.

And an intervenor occupying the attitude of a defendant, and resisting a claim to his property asserted by the plaintiff, is entitled to the same latitude, and his pleas cannot be objected to as inconsistent and contradictory. *Smith v. Sublett*, 28 Tex. 163.

But while a defendant may set up as many defenses as he may have, whether inconsistent or not, an order at the opening of a trial requiring defendant's counsel to elect whether he would rely upon the defense set up in the answer as a defense merely or as a counterclaim on the ground that they were inconsistent, if erroneous, is not ground for reversal, where no valid counterclaim was pleaded, and hence the defendant lost nothing by being required in effect to abandon an insufficient pleading. *Societa Italiana Di Beneficenza v. Sulzer*, 138 N. Y. 468, 34 N. E. 193.

In some of the states, however, the right of a defendant to set up several defenses in an answer is limited, either by the language of the statute or by the construction given to it by the courts, to defenses which are not inconsistent. Among these states are Missouri, Kansas, Minnesota, Wisconsin, and Louisiana.

Thus, under the Minnesota system of pleading a defendant may set up as many defenses as he may have, the only limit to the right being that they must not be inconsistent. *Steenerson v. Waterbury*, 52 Minn. 211, 53 N. W. 1146; *Booth v. Sherwood*, 12 Minn. 426.

And under the Missouri statute an answer may contain as many causes of action as the defendant may have, but they must be consistent defenses and separately stated. *Darrett v. 48 L. R. A.*

But, notwithstanding the inconsistency of the courts in announcing the doctrine of inconsistent defenses, the authorities cited by Mr. Pomeroy in the text above referred to, while they use the expression, in some instances, that under the Code inconsistent defenses may be allowed, yet evidently do not mean that the defendant is allowed to plead a false defense,—a defense which is utterly inconsistent with the other defenses pleaded. Thus, one of the cases cited in the note of the author, *viz.*, *Bell v. Brown*, 22 Cal. 671, announces that several defenses inconsistent with each other may, under proper circumstances, be set up in a verified answer. In that case, in an action to recover a mining claim, the complaint alleged title and possession in plaintiffs on a certain day. The answer denied that plaintiffs ever had either title or possession, and afterwards averred

Donnelly, 38 Mo. 404; *Smith v. Culligan*, 74 Mo. 389; *Adams v. Trigg*, 37 Mo. 141.

It is a principle of pleading, under the Missouri Code, that the defendant cannot deny and at the same time confess and avoid the allegations in the petition. *McCord v. Doniphan Branch R. Co.* 21 Mo. App. 92; *Adams v. Trigg*, 37 Mo. 141.

So, under Wis. Rev. Stat. § 2657, a defendant may plead as many defenses and counterclaims as he has, although they may be based on inconsistent legal theories. *South Milwaukee Boulevard Heights Co. v. Harte*, 95 Wis. 592, 70 N. W. 821.

But, the statutory rule that a defendant may plead as many defenses and counterclaims as he has, though based on inconsistent legal theories, does not affect the general principle that the truth should be pleaded. *Ibid.*

And the rule which prevails in Louisiana on the subject of general and special pleas is that they may be presented together if consistent with each other. Inconsistent or contradictory pleas alone are forbidden. *Andrews v. Hensier*, 6 Wall. 254, 18 L. ed. 737.

And while independently of the general issue a defendant may set up other means of defense to use in case the general denial fails him, such special pleas must be consistent with the general one, and not contradictory to it. *Nagel v. Mignot*, 8 Mart. (La.) 493.

And a plea of the general issue in an action for the price of merchandise sold and a plea of payment cannot be united in the same answer. *Dean v. Jackson*, 1 Mart. N. S. 127.

But, a plea of prescription in an action for a money demand is not inconsistent with an admission that the debt was once due, or with a plea of payment and compensation. *Colley v. Latourette*, 7 La. Ann. 222.

It will be found, however, that this apparent conflict is not real, or at least is real to but a slight extent. The courts holding that different defenses in an answer must not be inconsistent have defined inconsistency within the meaning of that rule, as will be seen by reference to decisions of the same courts set forth *infra*, VI. b, and VI. c, 'n the same terms, and as being the same thing as inconsistency in fact as defined by the other courts, and held by them to be improper and objectionable. And it will also be seen that though the cases first above set forth lay down the rule absolutely that inconsistent defenses may be pleaded, the rule must be taken as referring to the facts of the particular cases in which it was so stated, as the inconsistency which is not objectionable under either class of

that if plaintiffs ever had a title to the claim, they had abandoned and forfeited it before defendants' entry. The question of title and possession might have been very largely a question of law, which it would have been unsafe for the defendants to have admitted. But that is altogether a different proposition from the one under consideration, where there is an affirmative allegation in the answer, which, if true, sustains an allegation of the complaint,—a fact alleged, the proof of which is material to the support of the plaintiff's cause of action. In this case there are no hypothetical facts pleaded; but the answer plainly avers that the notes were transferred, that the appellant dealt with the respondent as the owner and holder of them, and that, as such owner and holder, he made settlement for said notes. The most that could be said of such a pleading

as this, where in one breath the pleader denies a fact and in the next admits it, is that the denial and admission balance each other, and leave the complaint in the position it would be in if no denials or admissions had been made. But in this instance the case is stronger against the defendant, for he denies by general denial and avers by special averment the truth of the thing which he denied. *Buhne v. Corbett*, 43 Cal. 264, was an action of ejectment, where the plaintiff demanded the premises, and averred that at a certain date the possession was unlawfully withheld from him by the defendants. The defendants, in their answer, denied that on said day, or at any other time, they entered into the possession of the premises, or that they then withheld the possession of the same. And they affirmatively made the showing that the lands

cases is inconsistency by implication of law as distinguished from inconsistency in fact. See *infra*, VI. b, and VI. c.

b. What defenses are inconsistent.

1. Distinction between inconsistency in fact and inconsistency by implication of law.

The inconsistent defenses which may be set up in an answer under statutory provisions, providing that the defendant may set forth by answer as many defenses and counterclaims as he may have, are those in which the inconsistency arises by implication of law, and which are in the nature of pleas of confession and avoidance as contradistinguished from denials, and not such as involve a direct contradiction of any fact elsewhere directly averred. *Bell v. Brown*, 22 Cal. 671.

It is only where the inconsistency between pleas in an answer complained of is one of fact in favor of the defendant, which could not stand in connection with a fact pleaded in favor of the plaintiff, or where the inconsistency is between two facts contradictory to each other, or which neutralize each other with reference to the same plea, so that the verdict thereon would be a nullity, that such pleas cannot be united. *Kelly v. Craig*, 9 *Humph.* 216.

Defenses are inconsistent only when one in fact contradicts the other, and are not so in law where the inconsistency is merely a seemingly logical one arising from a denial and a plea in confession and avoidance. *Cohn v. Lehman*, 93 Mo. 574, 6 S. W. 267.

Facts set forth in an answer, which controvert the allegations of the complaint in effect only, may be properly pleaded in connection with a direct denial of the main allegations thereof, and they may be so pleaded by way of confession and avoidance of the cause of action alleged in the complaint, though the denial be such that if true it would defeat the cause of action; but the denial should be special and qualified. *McDonald v. American Mortg. Co.* 17 Or. 626, 21 *Pac.* 888.

A denial of the plaintiff's cause of action, and a defense by way of confession and avoidance, may be pleaded together, where the plea by way of confession and avoidance admits the plaintiff's cause of action only by implication of law, as a mere technical supposition on which the defense proceeds, and not as an admission in fact. *Pavey v. Pavey*, 30 *Ohio St.* 600.

Two defenses are not so inconsistent as not to be pleaded together unless there is an absolute

incompatibility of the facts. *Nelson v. Brodback*, 44 Mo. 596, 100 *Am. Dec.* 328.

The only limitation upon the right of a defendant to defend himself against the action of the plaintiff on as many different grounds as the nature of the action and the merits of his defense will allow is that they shall not involve the ridiculous absurdity of being inconsistent in fact. *Richardson v. Whitfield*, 2 *McCord, L.* 148.

And a defense of set-off, counterclaim, discharge in insolvency or bankruptcy, or the statute of limitations, and the like, conflicts with a general denial by implication of law only, and the pleader should not be required to elect between such a defense and a general denial, or refused permission to support such affirmative defense by proof. *Bell v. Brown*, 22 Cal. 671.

So, a defendant may plead under Mo. Rev. Stat. § 2050, as many defenses as he may have, whether legal or equitable or both, the only limit being that they must be consistent, the consistency required being one of fact merely. *Crowder v. Searcy*, 103 Mo. 97, 13 S. W. 346; *Nelson v. Brodback*, 44 Mo. 596, 100 *Am. Dec.* 328.

Pleas which were not inconsistent under the practice of the courts previous to the New York Code will not be held inconsistent as answers under the Code. *Lansing v. Parker*, 9 *How. Pr.* 288.

And in pleading defenses under it a defendant should not be required to elect between a denial of a material allegation in the complaint authorized by New York Code, § 149, subd. 1, and another matter constituting a defense under subd. 2 of that section. *Hollenbeck v. Clow*, 9 *How. Pr.* 289.

So, under the provisions of the South Carolina Code, a defendant may in his answer set forth as many defenses as were allowable under the former practice. *Cohrs v. Fraser*, 5 S. C. N. S. 351.

2. Test as to what inconsistency is objectionable.

The test of inconsistency of defenses which renders their union objectionable under the Codes of Procedure of the several states, like that in equity as well as under the more relaxed rules under the statute of Anne, is generally the question whether both may be true, or whether if one be true the other must be false, and proof of one would necessarily disprove the other. *Gammon v. Ganfield*, 42 *Minn.* 368, 44 N. W. 125; *Backdahl v. Grand Lodge A. O. U. W.* 46 *Minn.* 61, 48 N. W. 454; *Steenerson v. Water-*

belonged to the United States; that the United States had continually occupied and possessed said lands, from a date long prior to the date of the alleged withholding by the defendants, for lighthouse purposes; that it had erected and maintained a lighthouse thereon; that the defendants were the keepers of the lighthouse and employed by the United States at stipulated wages, and that as such keepers they were mere servants and employees of the United States, subject at any and all times to the orders, directions, and commands of the United States; that as such servants they were in the temporary charge of the light and lighthouse buildings on said land for the sole purpose of keeping the light burning at proper times. Averred that they did not at that time, and never had, claimed any interest in said lands or improvements, or any part

thereof, but that, since its reservation for a lighthouse, the land had been in the sole possession of the United States through its employees. And this case was based upon the doctrine announced in *Bell v. Brown*, 22 Cal. 671. So that it will be seen at a glance that, while the court announces in words the rule that inconsistent answers may be pleaded, these answers were really not inconsistent; that the sole object was to raise the issue that the possession alleged by the complaint was the possession of the United States, and not the possession of the plaintiff in the action. The next case cited, that of *Wilson v. Cleveland*, 30 Cal. 192, is a still weaker case, and cites in its support, also, the case of *Bell v. Brown*. All that was decided in that case was that a defendant may deny the title of the plaintiff, and also plead the statute of limitations.

bury, 52 Minn. 211, 53 N. W. 1146; Booth v. Sherwood, 12 Minn. 426. Gil. 810; H. A. Muckle Mfg. Co. v. Rutgers F. Ins. Co. 1 Minn. Dist. R. 3; Nelson v. Brodhack, 44 Mo. 596, 100 Am. Dec. 328; Keane v. Kyne, 2 Mo. App. 317; Schaefer v. Causey, 8 Mo. App. 142; Patrick v. Boonville Gaslight Co. 17 Mo. App. 465; Lee v. Dodd, 20 Mo. App. 271; Moore v. Macon Sav. Bank, 22 Mo. App. 684; Wood v. Hillblah, 23 Mo. App. 389; McCormick v. Kaye, 41 Mo. App. 263; Grier Commission Co. v. Dockstader, 47 Mo. App. 42; Home F. Ins. Co. v. Decker, 55 Neb. 346, 75 N. W. 841; Blodgett v. McMurtry, 39 Neb. 210, 57 N. W. 985; Cate v. Hutchinson, 58 Neb. 232, 78 N. W. 500; Hollenbeck v. Clow, 9 How. Pr. 289; Bryant v. Bryant, 2 Robt. 612; Pavey v. Pavey, 30 Ohio St. 600; McDonald v. American Mortg. Co. 17 Or. 626, 21 Pac. 883; Snodgrass v. Andross, 19 Or. 236, 23 Pac. 969; Lawrence v. Peck, 3 S. Dak. 645, 54 N. W. 808; Lake Shore & M. S. R. Co. v. Warren, 3 Wyo. 134, 6 Pac. 724.

This is the rule of the principal case.

The court has no power, under the Codes, to require defendants to elect upon which of their defenses they will rely, where more than one is set forth by the answer, and evidence is given tending to prove their truth, unless they are so far inconsistent that both cannot properly co-exist in the same transaction. Kelly v. Bernheimer, 3 Thomp. & C. 140.

And a defendant may plead inconsistent defenses under the Code system of pleading provided they are not so incompatible as to render one or the other absolutely false, and in so pleading he does not waive any of the defenses set up by him. Clarke v. Lyon County, 7 Nev. 75.

And defenses are not inconsistent where the facts pleaded in both may be true, merely because proof of one may render proof of the other unnecessary. Backdahl v. Grand Lodge A. O. U. W. 46 Minn. 61, 48 N. W. 454; Gammon v. Ganfield, 42 Minn. 368, 44 N. W. 125.

Repugnancy in an answer is ordinarily not a ground for demurrer when the second allegation is merely superfluous and redundant, and in that case the latter may be stricken out or disregarded, and will not vitiate the pleading; but it is otherwise where the pleading is so inconsistent with itself as to destroy the meaning. Second Nat. Bank v. Hart, 8 Ind. App. 19, 35 N. E. 302.

And under Code provisions that the defendant may set forth by answer as many defenses and counterclaims as he may have, a special defense of new matter in avoidance may go with a tra-

verse, at least when not inconsistent, though the new matter logically admits by implication real or apparent right in the plaintiff, sought to be thus avoided. Veasey v. Humphreys, 27 Or. 515, 41 Pac. 8.

A positive denial of the allegations of the complaint, and an allegation of new matter as a defense thereto in the nature of confession and avoidance, are not necessarily inconsistent with each other where it is possible for both to be true. Snodgrass v. Andross, 19 Or. 236, 23 Pac. 969.

And traverses and answers in avoidance may go together when not inconsistent. Cohn v. Lehman, 93 Mo. 574, 6 S. W. 267; Ledbetter v. Ledbetter, 88 Mo. 62.

And a plea of estoppel may be joined with one amounting to a traverse, where the two are not in their nature inconsistent. Blodgett v. McMurtry, 39 Neb. 210, 57 N. W. 985.

In the above case Whittemore v. Stephens, 48 Mich. 574, 12 N. W. 858, *supra*, IV. a, was distinguished upon the ground that that was a suit upon a promissory note under the common-law practice, in which the general issue was pleaded, and then there was a plea of *puts daretur continuance* averring a composition under the bankrupt act. In that case the plea was in effect one in confession and avoidance, and was therefore entirely inconsistent with the general issue.

And *non est factum*, usury, infancy, duress, and payment may be pleaded together under the Maine system of pleading. Granite State Bank v. Otis, 53 Me. 133, *dictum*.

The right to plead double, when given in civil cases by statute, does not require the permission of the court, and therefore a man may plead payment and *non est factum* together. Com. v. Myers, 1 Va. Cas. 188, *dictum*.

And a plea of *non est factum* as to the instrument sued on, and a plea of payment of another but a different instrument which only appears in the suit by pleading and evidence tending to show why the defendant is not liable in the suit, and a plea of the statute of limitations, are not inconsistent with each other. May v. Burk, 80 Mo. 675.

In the above case, Sheppard v. Starrett, 85 Mo. 387, VI. c, 2, was distinguished upon the ground that in that case the defenses were *non est factum* and payment, which were held to be inconsistent.

So, the defendant in an action has the right to plead under the laws of Virginia as many several matters, whether of law or of fact, as he may deem necessary for his defense, and he

It would seem that comment on this case was unnecessary. One is the pleading of a legal defense, and the other a defense on the merits; and the court in that case specially says that the defenses are not inconsistent.

It may profitably be noted here that a great majority of the cases which have announced the doctrine that inconsistent defenses may be pleaded cite, in support of the announcement, *Hollenbeck v. Clow*, 9 How. Pr. 289, which announces the rule that, in pleading defenses under the Code, the defendant shall not be required to elect between a denial of the material allegations in the complaint and new matter constituting a defense; that is, that the defendant should never be required to admit allegations in the complaint, which he might otherwise be able to deny, as the condition upon which he is permitted to set up affirma-

tive matters of defense. This was an action for slander, where the charge, as stated in the complaint, was that the defendant stated that plaintiff had stolen the defendant's hay. There was a general denial by the defendant, and then the answer proceeded as follows: "And the said defendant, further answering, says that all the words which were spoken or uttered by the defendant of, to, or concerning the said plaintiff, as set forth in the complaint, charging him, said plaintiff, with stealing or taking hay, or that the plaintiff had stolen the defendant's hay, were spoken and uttered by the defendant in reference to a quantity of hay which the defendant had cut and stacked in the summer of 1853, and to which hay the plaintiff claimed title, and which hay the plaintiff, under such claim of title, in the daytime, took and removed

may plead *nil debet* to the count of the declaration on which issue is joined, and the statute of limitations to the same count, without rendering the pleading objectionable for inconsistency. *Bank of United States v. Donnelly*, 8 Pet. 361, 8 L. ed. 974.

And a plea of the statute of limitations, and another that the judgment sued on was rendered without process conferring jurisdiction, and was void, are not inconsistent as the plea of the statute of limitations to avoid the cause of action need not in fact confess it. *Merten v. San Angelo Nat. Bank*, 5 Okla. 585, 49 Pac. 013.

And a plea of the statute of limitations to all the causes of action alleged in the complaint is not inconsistent with another plea averring that the plaintiff and defendant had a full and complete accounting, and that the defendant made and delivered, and the plaintiff accepted, a wagon in full settlement and satisfaction of the amount found due on the accounting, so as to require an election upon the counts. *Conway v. Wharton*, 13 Minn. 158, 11 L. 145.

And a plea in an answer in an action brought by an administrator as such, denying any right in the plaintiff in his capacity as administrator to the subject of controversy, is not inconsistent with another plea alleging the release of the defendant from liability on the instrument in suit, by failure of its consideration, as both averments may be true. *Noonan v. Bradley*, 3 Wall. 394, 19 L. ed. 757.

An answer by way of confession and avoidance of the matter alleged in a complaint, however, is inconsistent with a specific denial thereof, but may properly be pleaded with a special or qualified denial. *McDonald v. American Mortg. Co.* 17 Or. 626, 21 Pac. 883.

All that is contemplated by Iowa Code, § 2710, is that defenses cannot be objected to simply because they are inconsistent with each other. It does not apply to a case in which the assertion of one of the rights pleaded destroys the other. *Crawford v. Nolan*, 70 Iowa, 97, 30 N. W. 32.

And while different defenses may be pleaded in the same answer under the Code, contradictory or inconsistent pleas cannot, and the defendant cannot deny and confess a fact in the same pleading,—especially where the pleading is verified and the fact both denied and confessed is a matter within his own personal knowledge. *Ormsby v. Douglass*, 2 Abb. Pr. 407.

And a plea of tender admits the indebtedness for which the tender was made, and a general denial and tender are inconsistent defenses

which cannot be pleaded to the same cause of action. *Livingston v. Harrison*, 2 E. D. Smith, 197.

So, a plea of usury involves a denial that anything is due from the defendant to the plaintiff, and a plea of tender implies that there is an indebtedness to the amount tendered, and the two are inconsistent and cannot stand together. *Breunich v. Weselman*, 100 N. Y. 609, 2 N. E. 385.

This test has been based upon the theory that under the Code system pleadings are required to be verified by oath, and that if the inconsistency were one of fact the verification of the one defense would be a falsification of the other, and therefore a forgery.

Thus, the right of the defendant under the Code to plead any number of defenses in the same answer is limited only by the necessity of their being verified by oath, and all may be joined therefore which can be verified by oath without swearing falsely. *Pavey v. Pavey*, 30 Ohio St. 600; *Citizens' Bank v. Closson*, 20 Ohio St. 78; *Cate v. Hutchinson*, 58 Neb. 232, 78 N. W. 500.

The defendant may plead as many defenses as he may have, if, when the answer is sworn to, it is not contradictory. *Burnham v. Call*, 2 Utah, 433.

But if a fact which is directly averred in one part of a verified answer is in another part directly denied, the party verifying is guilty of perjury, and on the trial the averment which bears most strongly against him will be taken to be true. *Bell v. Brown*, 22 Cal. 671.

Where two alleged grounds of defense plainly contradict each other, they are not susceptible of verification because it is impossible for both to be true, and the verification of one would be the falsification of the other; and in such case the answer, though sworn to, will be regarded as not verified within the provisions of the Ohio Code, requiring pleadings to be verified by oath, and should, on motion, be stricken from the files, or the defendant be put to his election. *Citizens' Bank v. Closson*, 29 Ohio St. 78.

So, under the Nebraska Code, authorizing the defendant to set up as many defenses as he may have, they must be consistent in fact, and as they must be sworn to the defendant must believe them to be true. *School Dist. No. 27 v. Holmes*, 16 Neb. 488, 20 N. W. 721.

What were consistent or inconsistent pleas under the old practice, where the pleadings were not required to be verified, is a very different question from what are consistent or inconsistent answers under the present Missouri

upon lands adjoining to and in sight of where it had been left by the defendant, which trespass or transaction, and not the crime of larceny, was all that the defendant intended by the speaking of said words, and was so understood by and explained to all who heard the defendant utter the words." We have set this answer out at length because it conclusively shows that the defenses pleaded in this case were not inconsistent, but that the averment, after the general denial, was simply a pleading of the facts, the legal effect of which would be to sustain the general denial, and would in no sense be an untrue averment, conceding the truth of the general denial; and it will be seen that they are in no sense inconsistent, although the court, in announcing its decision, speaks of them as inconsistent defenses. But the cases cited and reviewed

by that court conclusively show that, in the judgment of the court, the defenses were not actually inconsistent, and certainly did not attempt to lay down the rule that inconsistent defenses could be pleaded to the extent of pleading untruthful defenses; for, in commenting on the case of *Arnold v. Dimon*, 4 Sandf. 680, cited by Justice Crippen in *Roe v. Rodgers*, 8 How. Pr. 356, where the action was against a carrier for the loss of goods, and defendant denied that he was the owner of the vessel upon which the goods were shipped, and then averred that the goods had in fact been delivered to the plaintiff, the court said: "It is quite possible, to say the least, that both these defenses might have been true. They were therefore not wholly inconsistent, and should have been allowed to stand." So that it will be seen that this case is no basis at all for the an-

practice, where the pleadings are required to be sworn to. *Atteberry v. Powell*, 29 Mo. 429, 77 Am. Dec. 579, *dictum*.

Where new matter directly alleged would be inconsistent with an absolute traverse, so that both could not be verified, and the pleader desires to avail himself of both defenses so as to put the opposing party to the proof of his plea, and at the same time save to himself an affirmative defense, it is essential that the allegations of new matter should be qualified, or else that they should be superseded by a qualified traverse; but this applies only where the defenses are really, and not merely apparently, inconsistent. *Veasey v. Humphreys*, 27 Or. 515, 41 Pac. 8. See also *McIntire v. Wiegand*, 24 Abb. N. C. 312, 10 N. Y. Supp. 3.

But while all pleadings are not required to be verified under all the Codes, the rule would seem to be universal, applying alike to verified and unverified pleadings.

Thus, the statutory provision that a defendant may set forth by answer as many defenses and counterclaims as he may have, applies alike to all answers, verified and unverified. *Bell v. Brown*, 22 Cal. 671.

There is no distinction, in respect to the effect of inconsistency between defenses, between pleadings verified and pleadings unverified. *Buhne v. Corbett*, 43 Cal. 264.

c. Application of the rule to particular actions.

While the above test as to inconsistency which will prevent the union of defenses has not always been expressly applied in all particular classes of actions in which inconsistencies have been alleged, and the distinction between inconsistency in fact and inconsistency in law has not always been expressly adverted to, it is thought that that test will nearly, if not quite, reconcile the apparent differences between the cases set forth in the following subdivisions with reference to particular actions, and that that distinction will be found running through nearly if not all of them.

1. Actions pertaining to contracts generally.

A defendant in an action on contract, who does not claim any right as against the plaintiff under the contract sued on, may set up both its illegality and its performance without inconsistency, though it would be otherwise if the establishment of the contract were an essential element of the defense. *Lee v. Dodd*, 20 Mo. App. 271.

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And a denial under oath that the defendant executed the written contract sued on, and an allegation that the other contracting party did not build the railroad as therein specified, are not so inconsistent that they cannot stand together. *Cox v. Bishop*, 55 Mo. App. 135.

And a plea by a defendant that he did not undertake, agree, or covenant as alleged in the complaint, and also that he does not owe the plaintiff anything on the deed or covenants or on account of any matters or things whatever alleged in the complaint, are separate pleas making a separate and distinct defense, which are not waived by anything set up or conceded by the legal effect of the pleading or in any other separate or distinct plea. *Shelby County v. Bickford*, 102 Tenn. 395, 52 S. W. 772.

And a defendant is not estopped by pleading his rights under a contract from claiming the advantage of any change in the contract which legitimate proof may develop. *Welden v. Texas Continental Meat Co.* 65 Tex. 487.

So, pleas in an action of assumpsit of the general issue, payment and release, want of consideration, denial of interest in the instrument sued on in the plaintiff, and set-off may be pleaded together, under Miss. Code 1892, § 683, and should not be stricken out as inconsistent and contradictory. *Lay v. Filmore*, 75 Miss. 493, 23 So. 184.

And a defendant who has stated in his answer all the facts necessary to constitute a defense of want of consideration or for a recoupment of damages need not state which defense he will insist upon, and if he does so state, he is not precluded from insisting upon any defense which the facts alleged would justify. *Springer v. Dwyer*, 50 N. Y. 19.

And a counterclaim, the object of which is to obtain damages for breach of contract should it be held that it was binding and that there was no fraud, is not inconsistent with, and may be joined in the same answer with, a defense or counterclaim to avoid the contract on the ground of fraud. *South Milwaukee Boulevard Heights Co. v. Harte*, 95 Wis. 592, 70 N. W. 821.

But while inconsistent defenses are allowed to be pleaded under the New York Code, the courts will not go so far as to permit a defendant to plead, first, that he never executed the instrument sued upon, and, second, that he did execute it but by means of fraud; as no one could safely swear to such a plea. *McIntire v. Wiegand*, 24 Abb. N. C. 312, 10 N. Y. Supp. 8.

And a plea of want of consideration for the contract sued on is inconsistent with an admis-

nouncement of the rule that defenses which are utterly inconsistent may be pleaded. *Butler v. Wentworth*, 9 How. Pr. 282, was also a case of slander, where the defendant answered, saying: "I have no recollection or belief of having so accused you; but, secondly, if I did, the charge was true." As a matter of course, if the defendant had no recollection of having used the slanderous words, he had a right to put the plaintiff upon his proof upon that question. He might not have known as a matter of fact whether he did use them or not. He may have used them, and forgotten them. And if it should eventuate in the trial that he did use them, then certainly he should not be deprived of his defenses of the truth of the words uttered. It cannot be said that, in any sense, these defenses are inconsistent. *Vail v. Jones*, 31 Ind. 467, announces the doctrine

that under the Code, the defendant may set forth in his answer as many grounds of defense as he may have, without regard to the location of the subject-matter, which was simply the language of the statute; but the case itself decides nothing that tends to sustain the doctrine claimed by the appellant. *Weston v. Lumley*, 33 Ind. 486, was a slander case, and the court there simply reiterated the doctrine announced in the other cases of that kind which we have reviewed, although what was said by the court, even in this case, was simply *dictum*, for it decided that the question could not be raised upon demurrer as it was attempted to be raised there. The case of *Moore v. Willamette Transp. & Looks Co.* 7 Or. 355, was where the answer alleged that the defendant was the owner of the entire estate, and also pleaded that he was the owner of one un-

known in an affirmative defense that there was a consideration; and in such case the plaintiff is not required to prove the matter denied. *Allen v. Olympia Light & P. Co.* 13 Wash. 307, 43 Pac. 55.

So, a defense in an action upon contract that the contract had been revoked and another defense that it had been modified, are inconsistent, as it could not be revoked and at the same time modified, and the defendant setting it up should be compelled to elect upon which he will stand. *Cook v. Finch*, 19 Minn. 407, Gil. 350.

And a defense in an answer consisting of a denial of the making of the contract set forth in the complaint, and another consisting of an allegation that the defendants were induced to make the contract by the false and fraudulent representations of the plaintiffs, is inconsistent, and the general denial should be stricken out. *Marx v. Gross*, 9 N. Y. Supp. 719, 26 Jones & S. 221.

And an answer in an action on a bond pleading, by way of confession and avoidance, matters which the defendant claimed operated to release him from his liability as surety for the purchases alleged, thus in effect admitting the purchase, and a later plea of general performance, thus in effect traversing or denying them, is bad for repugnancy, and is subject to demurrer, or one of the pleas may be stricken out on motion. *Wright v. Card*, 16 R. I. 719, 19 Atl. 709.

And a special plea in an action on a bond, averring that the pleader and another were sureties for the principal, and that the principal failed to discharge the duties prescribed in the condition of the bond, and that the plaintiff had knowledge of such failure and did not notify the sureties thereof, but wilfully concealed such matters, thereby releasing him, is inconsistent with a plea of *non est factum*. *Accident Ins. Co. v. Baker*, 34 W. Va. 668, 12 S. E. 834.

But a denial by a defendant that he executed the order sued on, and an admission that he signed his name to a paper, but alleging that if his signature was attached to the order sued on the same was obtained by fraud and misrepresentation, are not wholly inconsistent with each other so as to warrant requiring the defendant to elect as to which defense he will rely on. *Bird & M. Map Co. v. Jones*, 27 Kan. 177.

And a plea in an action on a bond by sureties sued thereon of a settlement of all matters in difference between the plaintiff and the principal, and that the principal then gave his checks in full settlement and satisfaction of any and all liabilities and matters of difference between

him and the plaintiff, is not inconsistent with a plea of *non est factum*. *Accident Ins. Co. v. Baker*, 34 W. Va. 668, 12 S. E. 834.

And a plea in an action on a bond that the plaintiff received and accepted from the principal therein two negotiable notes in full settlement and satisfaction of the breaches of the conditions of the alleged bond, is not necessarily inconsistent with a plea of *non est factum*. *Ibid.*

So, a plea in an action brought to recover the amount of several bonds, that the defendant did not owe the money demanded or any part thereof in manner and form as the plaintiff had alleged, is not inconsistent with a second plea in the same answer that the supposed writings were not, nor were any of them, the deed of the defendant. *Grand Chute v. Winegar*, 15 Wall. 355, 21 L. ed. 170.

And a denial of all the material allegations in a complaint in an action upon a bond, and an allegation that if the bond was executed as alleged it would for causes stated be inoperative, and that if the bond existed it should be treated as a mortgage, may be united in the same answer. *Reed v. Reed*, 93 N. C. 462.

And a denial in an action on a constable's official bond for wrongfully selling under execution, that the property levied upon was exempt, and an assertion that it was seized and sold on purchase-money judgments, and a plea of the general issue, are not inconsistent. *State use of Cooley v. Samuels*, 28 Mo. App. 649.

So, an answer alleging want of knowledge or information sufficient to form a belief as to the execution of a guaranty or acceptance of any benefit under it in an action in which the defendants may not have known anything of it, and an affirmative defense that if it was executed it was done in pursuance of a conspiracy to defraud the defendant, are not inconsistent, and may be included in the same answer. *Corbitt v. Harrington*, 14 Wash. 197, 44 Pac. 132.

In the above case, the principal case was distinguished and explained upon the ground that in that case it was held, in substance, that a defendant could not deny a fact of which he must have knowledge, in one part of an answer, and then in an affirmative defense admit the same fact and still claim the benefit of the denial.

For action on official bond of a treasurer, see *Amador County v. Butterfield*, 51 Cal. 528, *supra*, VI. b. 1.

As to action on an administrator's bond, see *McNamara v. Jarvis*, 2 La. Ann. 591, *infra*, VII. b. 2.

divided part thereof, and the court decided there that inconsistent defenses could be pleaded, but that these defenses were not inconsistent, because the defendant might be mistaken as to his legal title, and if he was he had the right to rely upon the title not being in the plaintiff. *Barr v. Hack*, 46 Iowa, 308, was a slander case, and the doctrine there announced was simply that which we have noticed in the decisions above.

We are at a loss to know why *Wright v. Bacheller*, 16 Kan. 259, was cited to sustain this doctrine, for there it was expressly said by the court that inconsistent pleas should not be encouraged; and while the case did not come up on instructions to the jury, the court below refused to allow the plaintiff to reply to an inconsistent averment in defendant's answer, and the supreme court held that such refusal on the part of the lower

court to allow this averment to be put in issue by a reply was error, the defendant there having denied that she voluntarily or involuntarily executed a mortgage, and afterwards averring that, if she executed the mortgage, she was forced by her husband to execute the same against her will. And the court said: "These allegations are inconsistent with the affirmative allegations of the answer, for it cannot be true that she executed a mortgage under duress which she never executed. The setting up of inconsistent defenses like these should never be encouraged." The court expressly says that they do not pass upon the question as to whether the second defense stated in the answer was sufficient, as a defense, to require a reply thereto; that they express no opinion upon that subject, but that, assuming it to be such a defense, the court below erred in

So, under New York Code of Civil Procedure, § 507, entitling a defendant to set up as many defenses as he has, a defendant in an action upon a contract for services may set up that the plaintiff refused longer to continue in the employment of the defendant and left the employment without being discharged, and also that the defendant had sufficient reason for discharging the plaintiff, although the defenses may be inconsistent with each other, and the defendant would be entitled, as matter of right, to prove, not only that the employee left its services, but also that he had not performed the conditions of his contract, and that therefore the defendant was entitled to discharge him. *Conklin v. Woodbury Dermatological Inst.* 37 App. Div. 610, 56 N. Y. Supp. 258.

And while a plea of tender in an action for services rendered would be an implied admission of the employment under the old practice, under the Code, allowing a defendant to plead as many defenses as he may have, and requiring that a pleading shall be liberally construed with a view to substantial justice, an answer denying any employment, and also alleging that the services rendered were worth a sum much less than the amount paid, and a tender of the amount thus alleged, are not so absolutely repugnant as to make the tender of a smaller sum an admission that any sum is legally due. *Clarke v. Lyon County*, 7 Nev. 75.

So, a denial of the value of legal services sued for is not inconsistent with a special plea of payment. *Collins v. Fenley*, 21 Ky. L. Rep. 958, 53 S. W. 667.

And an answer in an action on an account for services, which contains a general denial of the essential facts of the petition, and avers that the charges in the itemized account are unreasonable and unjust, does not present inconsistent defenses. *Cate v. Hutchinson*, 58 Neb. 232, 78 N. W. 500.

And a plea that the defendants had paid the plaintiffs in full of all demands in an action to recover for personal services alleged to have been performed at defendants' request, by the plaintiff as an attorney at law, is not inconsistent with a general denial contained in the same answer, under the Minnesota system of pleading. *Steenerson v. Waterbury*, 52 Minn. 211, 53 N. W. 1146.

Nor is an answer in an action for labor and services, denying that the defendant ever employed the plaintiffs, necessarily inconsistent with another defense in the same answer, that the plaintiffs were guilty of gross negligence in the management of the business, as both may

have been true; but if the defendant had denied the rendition of the services, and then alleged that they were negligently and unskillfully performed, the case would have been different. *McDonald v. American Mortg. Co.* 17 Or. 626, 21 Pac. 883.

But the allegations in an answer in an action for services rendered in performing a surgical operation upon the wife of the defendant, denying the rendition of the services, and alleging that the plaintiff undertook to treat the defendant's wife and performed an operation upon her, but that the operation was so unskillfully performed and badly managed that she died by reason thereof, and that they were worthless, detrimental, and injurious to the patient, are inconsistent within the meaning of Ky. Civ. Code, § 113, sub. 4, and the defendant should be required to elect on which defense he would rely. *Black v. Holloway*, 19 Ky. L. Rep. 694, 41 S. W. 576.

And a denial in a reply to an answer alleging that the plaintiff agreed to take his pay for work, labor, and materials in certain articles of property purchased by the defendant for a sum exceeding the demand of the plaintiff and delivered as directed by the plaintiff, because it was incorrect and not a true statement of the whole transaction, and also because the plaintiff had not sufficient knowledge thereof to form a belief, is inconsistent, and must be construed as a denial for want of sufficient knowledge or information to form a belief only, that denial in effect superseding the other. *Lewis v. Ackler*, 11 How. Pr. 163.

As to actions pertaining to contracts for services, see also *Koll v. Bush*, 6 Colo. App. 294, 40 Pac. 579; *Schmid v. Busch*, 97 Cal. 187, 31 Pac. 803, *infra*, VII. b. 1.

So, an answer in an action on insurance policies, which alleges a failure to furnish proofs of loss, and that the plaintiffs caused the premises to be burned, does not present inconsistent defenses. *Home F. Ins. Co. v. Decker*, 55 Neb. 346, 75 N. W. 841.

And if the plaintiff in an action on a fire-insurance policy fails to make and furnish preliminary proofs of loss in the manner and within the time required by the policy, such failure constitutes a defense to the action, and by going to trial on other grounds of defense set up in the answer, as well as upon grounds of want of preliminary proof, the defendant does not waive its right to insist upon the want of such proof as a defense, there being no inconsistency be-

not allowing a reply to be filed. In *Bruce v. Burr*, 67 N. Y. 237, it was held that, in an action for breach of a contract of sale, the defendant might set up a rescission of the contract on the ground of fraud or mistake, and also breach of warranty on the part of the plaintiff. It is manifest that these defenses are not inconsistent, and that they both might be true, and both or either would be a proper defense to the action; for the plaintiff may have committed a fraud in procuring the contract, and he also may have been guilty of a breach of the warranty after the contract was procured. The case of *Amador County v. Butterfield*, 51 Cal. 526, in no way sustains the contention. *Citizens' Bank v. Closson*, 29 Ohio St. 78, was an action by the bank against Closson upon a promissory note alleged to have been made by him to R. R. Fenner & Co. and indorsed

to the bank before due. Closson set up the following defenses: (1) He denied the execution of the note; (2) he alleged that if the signature to the note was his, it was obtained by a fraudulent and cunningly devised scheme or trick without his knowledge, setting forth the fact that he was induced by false and fraudulent representations of Fenner & Co. to sign certain papers, represented to be mere receipts or orders relating to a proposed agency for selling a patent invention, and that if he signed the note his signature was procured by making him believe that he was signing one of the receipts or orders, that it was obtained without consideration, and that the bank had knowledge of these facts when it purchased the note. The supreme court very properly held, and could not have held otherwise under any system of pleadings, that these defenses were all open

tween the defenses. *Farmers' Ins. Co. v. Frick*, 29 Ohio St. 460.

And a defense in an action upon a beneficiary certificate of insurance issued by an association, that the plaintiff had been suspended for nonpayment of an assessment, and another defense in the same answer that he had been suspended for nonpayment of dues, are not inconsistent, where the two suspensions alleged were at different times and for different causes, as, notwithstanding the earlier, the defendant may have made a later suspension. *Backdahl v. Grand Lodge A. O. U. W.* 46 Minn. 61, 48 N. W. 454.

Nor is a defense in an action on an insurance policy that the policy was canceled inconsistent with a defense based on violation of conditions in the policy. *H. A. Muckle Mfg. Co. v. Rutgers F. Ins. Co.* 1 Minn. Dist. R. 3.

So, in *Grady v. American Cent. Ins. Co.* 60 Mo. 117, the court suggested that it was not deemed necessary to decide that the plea of *non est factum* in an action upon an insurance policy, and the further defense that the policy was issued upon property to be occupied as a boarding house, etc., were inconsistent pleas.

But a plea by insurers in an action on an insurance policy of nonpayment of a premium as a bar to a recovery in substance denies the existence of the contract, and is inconsistent with a plea set up in a supplemental answer of misrepresentation and concealment, and will be deemed to have been waived by the supplemental plea. *Michael v. Mutual Ins. Co. of Nashville*, 10 La. Ann. 737.

And an averment in an answer in an action upon an accident insurance policy, containing a stipulation that the insurance should not extend or cover injuries of which there should be no visible mark, expressly admitting that on the day alleged in the petition the deceased accidentally cut, lacerated, and wounded one of his fingers, is repugnant to and inconsistent with a plea in the same answer that there were no visible marks of the accident on the body of the deceased, and the plea would be demurrable. *Bernays v. United States Mut. Acci. Asso.* 45 Fed. Rep. 455.

And an allegation in an answer in an action on a policy of insurance on a building alleged to have been destroyed by a cyclone or hurricane, that the building was not blown down by the immediate action of a cyclone, tornado, or hurricane, will be controlled by a special allegation in the same answer that the building was destroyed as a result of a collision with a steamboat, which, by reason of the force of a high

wind, was driven against the building, causing it to fall, as the special allegations constitute a confession that a tornado, cyclone, or hurricane caused the injury, and are therefore inconsistent with the allegation that the loss was not occasioned by a tornado, hurricane, or cyclone. *Queen Ins. Co. v. Hudnut Co.* 8 Ind. App. 22, 35 N. E. 397.

For another action against an insurance company see *State, Crow, v. Firemen's Fund Ins. Co.* 152 Mo. 1, 45 L. R. A. 363, 52 S. W. 585, *infra*, VII. b. 2. And see *Moore v. Macon Sav. Bank*, 22 Mo. App. 684, *infra*, VII. b. 2, as to denial of the instrument sued on, and an allegation of ratification of an alteration.

2. Actions pertaining to bills and notes.

A general denial in an action on a promissory note and a plea of the statute of limitations separately stated are not inconsistent with each other. *Lawrence v. Peck*, 3 S. Dak. 645, 54 N. W. 808; *Schuchman v. Heath*, 38 Mo. App. 280.

And the defendant cannot be compelled to elect between the two defenses. *Lawrence v. Peck*, 3 S. Dak. 645, 54 N. W. 808.

Though in legal theory the second defense would admit the execution of the note. *McDonald v. Southern California R. Co.* 101 Cal. 206, 35 Pac. 643, 646, *dictum*.

And a general denial in an action on an instrument for the payment of money and an allegation of payment are not inconsistent. *Green v. Hughtt School Twp.* 5 S. Dak. 452, 59 N. W. 224. But see *infra*, School Dist. No. 27 v. Holmes, 16 Neb. 486, 20 N. W. 721.

And a defendant in an action on a note should not be required to elect between a plea that he did not make the note and one that there was no consideration for the note. *Pavey v. Pavey*, 30 Ohio St. 600. But see *Brann v. Brann*, 19 Ky. L. Rep. 1814, 44 S. W. 424, *infra*.

So, a plea of payment in an action on promissory notes is not inconsistent with another plea in the same answer, denying the plaintiff's ownership. *Cavitt v. Tharp*, 30 Mo. App. 131.

And where there is no express admission of a note in an answer, but only an implied admission from silence, the insertion by amendment of an omitted denial is not necessarily inconsistent. *Spencer v. Tooker*, 12 Abb. Pr. 353.

And an admission by a defendant that he made the note in suit, but a denial that it was for his own benefit, and an assertion that it was for the benefit of the plaintiff, are not neces-

to the defendant. They are not in any sense inconsistent; for, even though the note was made as affirmed in the second defense, it would not be a legal execution of the note, and consequently does not contradict the first denial, *viz.*, the denial of the execution of the note. The case of *Pavey v. Pavey*, 30 Ohio St. 600, is exactly the same kind of a case, and is based upon the decision of the case of *Citizens' Bank v. Closson*, 29 Ohio St. 78, and the court says that it cannot be distinguished from that case. These are all the cases that are cited by Mr. Pomeroy to sustain the text, and we think it must be conceded, upon an investigation of them, that they absolutely fail to do so. Many of these cases are cited by the appellant in his reply brief. Many others, however, are cited, and an investigation of those cases convinces us that they are as far from sustain-

ing the doctrine of inconsistent defenses as those cited by Mr. Pomeroy, which we have just reviewed.

Want of time prevents us from reviewing these cases in detail, but a careful examination of them convinces us that they go no further than the cases above reviewed, with the exception, possibly, of *Stebbins v. Lardner*, 2 S. Dak. 127, 48 N. W. 847, and this case is based upon the announcement of the text above referred to by Mr. Pomeroy, and cites the cases cited by that author to sustain the theory announced by the court. In none of the cases examined has it been held that an affirmative allegation by the defendant of a fact which, if true, would necessarily compel the conclusion that some other fact which had been pleaded in the same answer was false, can be sustained; and while much loose talk has been indulged in by the

early inconsistent. *Ostrom v. Bixby*, 9 How. Pr. 57.

In the above case, *Schneider v. Schultz*, 4 Sandf. 664, and *Roe v. Rogers*, 8 How. Pr. 856, *infra*, VI. c. 4, were distinguished upon the ground that in those cases the pleas were not simply inconsistent, but one or the other of them was necessarily false.

So, pleas of *non est factum* and a denial of the assignment to plaintiff, and of want of consideration and payment in an action on promissory notes, are not inconsistent so as to warrant the court in requiring the defendant to warrant between them. *Patrick v. Boonville Gaslight Co.* 17 Mo. App. 465.

Nor is a count in an answer in an action on a promissory note alleging usury, and another alleging payment, and a third alleging extension of time to the principal, whereby the surety was discharged, as all of them might in fact have existed and been proved. *Shed v. Augustine*, 14 Kan. 282.

And an allegation in an action on a note that the defendant is ignorant whether he signed the note or not, but does not believe he signed it and therefore denies it, and another allegation that if he did sign it his signature was obtained by fraud and without consideration, are not so inconsistent that the two defenses may not be made together in the same answer. *Citizens' Bank v. Closson*, 29 Ohio St. 78.

So, a plea of want of consideration, and another that the note sued on was not the note of the alleged maker thereof, constitute distinct and independent defenses, and are not so inconsistent as to preclude their being interposed together in the same suit. *Barnes v. Scott*, 29 Fla. 285, 11 So. 48; *Hummel v. Moore*, 25 Fed. Rep. 380.

And allegations of an agreement by the payee to cancel, and another to deliver up, the note, are not subject to objection for inconsistency under the Colorado Code. *Hummel v. Moore*, 25 Fed. Rep. 380.

And a plea of failure of consideration, and another plea of compensation, in a proceeding to stay process upon promissory notes, are not inconsistent or in conflict with each other. *Phillips v. W. T. Adams Mach. Co.* 52 La. Ann. 442, 27 So. 65.

And the defendant may plead payments or partial payment and partial failure of consideration, or any other fact, to show that he is no longer liable on the note. *School Dist. No. 27 v. Holmes*, 16 Neb. 486, 20 N. W. 721, *dictum*.

And he may claim that the note is forged, and also that he has paid it, and also that it is 48 L. R. A.

barred. *McDonald v. Southern California R. Co.* 101 Cal. 206, 35 Pac. 643, 646, *dictum*.

And when an answer contains a special defense by one of the defendants in an action upon a promissory note alleging that the defendant was not the surety of the principal debtor but joined in the execution of the notes for the accommodation of the plaintiff to enable him to raise money upon them as collateral, and also alleging that if he were liable as surety, the principal maker had put in plaintiff's hands sufficient wheat to pay them, directing that the proceeds be applied upon the original note, and that they did not so apply them, though such defenses should have been separately pleaded, where no objection was taken by motion to require them to be separately stated, objection to evidence under it on the ground that it does not state facts sufficient to constitute a defense is properly overruled. *Eppinger v. Kendrick*, 114 Cal. 620, 46 Pac. 613, 44 Pac. 234.

But a verified pleading must be construed so as to make all its parts, if possible, harmonious with each other; and an answer by defendant in an action on a note setting up two defenses, the first denying that he made the note for a valuable consideration, and the second alleging that the note was made for the purpose of being deposited with the plaintiff temporarily until the happening of a certain event which had happened, and that therefore the plaintiff had no right to the note, must be construed as meaning that in his view of the law the matter set forth in the second plea did not constitute a consideration, and therefore if the second plea were to be deemed a sufficient consideration the defense would fail, if it were not sustained by evidence at the trial. *Ryle v. Harrington*, 4 Abb. Pr. 421.

And a general denial in an action upon a promissory note, and a special defense alleging that the note was executed by the defendants as sureties only, and that they did not receive any part of the consideration, are inconsistent, and the plaintiff will not be put upon proof of their allegations. *Lamberton v. Shannon*, 13 Wash. 404, 43 Pac. 336.

So, a plea of no consideration in an action upon a promissory note is inconsistent with an admission that the note was executed in part payment for a lot of land, though it is claimed that the land was of less value than the face of the note. *Ryan v. Middlesborough Town-Lands Co. (Ky.)* 52 S. W. 33.

And a denial of the execution and delivery of a note, and an affirmative answer admitting

courts concerning the pleading of inconsistent defenses, when the facts involved in the cases are scrutinized, it can easily be ascertained that the courts have never announced the rule established under the Code pleading where the answer has to be verified by oath, that the pleader will be allowed to compel the plaintiff to enter upon the investigation of a state of facts which, if admitted to be true, would subject the defendant to the penalties of perjury. There are other cases, however, that have decided this question as we are deciding it now, and the courts in those cases have spoken with no uncertain sound. It is not difficult to tell what they have decided. They base their decisions on principle, and sustain them with practical and cogent reasoning. Chief among these cases is that of *Derby v. Gallup*, 5 Minn. 119, Gil. 85. The opinion of the judge in that case, says Mr. Pomeroy, in his

notes, "is very able and difficult to be answered on principle," thus showing that the sympathy of that learned author was with this line of decisions, and that the rule he announced was based upon a false conception of the authorities quoted. In conclusion, this much, at least, must be demanded: That, however diversified the answers may be, they must all contain the essential element of truth, and if the admission of the truth of one answer necessarily proves the falsity of another, they cannot be allowed to stand, and the plaintiff will not be compelled to sustain the truth of an allegation the truthfulness of which is asserted by the defendant.

The judgment will be affirmed.

Hoyt, Ch. J., and Scott, Anders, and Gordon, JJ., concur.

the execution of the note and a mortgage given to secure it, and alleging that they were made and received without consideration and for the purpose of hindering, delaying and defrauding creditors, are inconsistent, and the admission would render proof of the execution and delivery of the note unnecessary. *Maxwell v. Bolles*, 28 Or. 1, 41 Pac. 661.

And where the defendant pleads *non est factum*, the only issue which the court can try is whether the defendant had executed the note, and the defendant will not be permitted also to allege payment, as the defenses are inconsistent, and the defense of payment will be stricken out. *Sheppard v. Starrett*, 35 Mo. 367.

So, a general denial in the answer in an action on an instrument for the payment of money is inconsistent with a plea of part payment. *School Dist. No. 27 v. Holmes*, 18 Neb. 486, 20 N. W. 721. But see *Green v. Hughtt School Twp.* 5 S. Dak. 452, 59 N. W. 224, *supra*.

And a plea of no consideration for a promissory note admits the execution of the note and puts in issue only the fact that it was given for a valuable consideration, and a plea of *non est factum* denies both the execution and delivery of the paper, and when such pleas are united in the same answer they are inconsistent, within the meaning of Ky. Civ. Code, § 113, subd. 4, and the defendant should be required to elect upon which defense he should rely. *Brann v. Brann*, 19 Ky. L. Rep. 1814, 44 S. W. 424. But see *Pavey v. Pavey*, 30 Ohio St. 600, *supra*. See also *Shannon v. Pearson*, 10 Iowa. 588, Appx.; *Robins v. Maldstone*, 7 Jur. 694, 12 L. J. Q. B. N. S. 321, 4 Q. B. 511. *Dav. & M.* 30; *Ryan v. Middlesborough Town-Lands Co. (Ky.)* 52 S. W. 33, — *infra*, VII. b. 1; *Naba v. Carlin*, 3 Mart. N. S. 373; *Ferguson v. Thomas*, 3 Mart. N. S. 75; *Kimman v. Cannefax*, 34 Mo. 147, —, *infra*, VII. b. 2.

3. Actions pertaining to sales.

A defense in an action on an account for goods sold that the balance sued for was the result of wagering contracts known as options and futures, and another that the plaintiff as defendant's agent disobeyed his orders and directions, thus causing loss, are not so inconsistent as to warrant requiring the defendant to elect between them. *Grier Commission Co. v. Dockstader*, 47 Mo. App. 42.

And an answer in an action for the purchase price of fruit trees, setting up two defenses, one that the trees were never delivered, and the

other that the order was obtained by fraudulent representations that the trees ordered were raised in one place, whereas they were raised in another, is not subject to objection for inconsistency. *Roblee v. Secrest*, 28 Minn. 43, 8 N. W. 904.

So, a defense of breach of warranty in an action for the balance of the purchase price of a machine, and an allegation that the sale was by sample, and that it was agreed that the machine delivered was to be equal in quality and description to the sample, and that it was not equal to the sample, and that the machine purchased had been returned, are not inconsistent so as to warrant requiring the defendant to elect upon which he will rely. *Gammou v. Gamfield*, 42 Minn. 368, 44 N. W. 125.

And a general denial in an action to avoid a sale of negroes on account of defects alleged to have been warranted against, and a second or amended plea averring that the auctioneer who sold the slaves declared at the time that they must be examined by the physician of the purchaser, but that the purchaser removed them without examination, are not inconsistent, and an instruction that the second plea was a waiver of the general denial, and that it admitted the liability of the defendant to refund the price of the slaves for the defects stated, is properly denied. *Andrews v. Hensler*, 6 Wall. 254, 18 L. ed. 737.

And a defense in an action for the purchase price of a machine based upon a warranty, and another based upon the fact that the machine was brought for a specific purpose made known at the time, and that it proved utterly worthless for that purpose, are not inconsistent. *Key-stone Implement Co. v. Leonard*, 40 Mo. App. 477.

Nor is an answer in an action for the purchase price of goods sold setting up a breach of warranty as to quality, and also that the sale was induced by fraudulent representations, subject to objection for inconsistency, as both pleas might be true. *Kelly v. Bernheimer*, 3 Thomp. & C. 140.

And a plea of a parol warranty of the goodness of a note taken for the purchase price of goods sold, and of the solvency of the maker, in an answer in an action for a breach of the contract of sale on the part of the defendants, is not objectionable as inconsistent with a plea in the same answer, of a right of rescission founded upon fraud or mistake. *Bruce v. Burr*, 67 N. Y. 237.

But an answer in an action on a note alleg-

ing in one paragraph that the note was given in part payment for a wheat harvesting and binding machine purchased by the defendant, and that there was a breach of warranty in the sale, and that the plaintiff did not become the owner or holder of the note until after maturity, and alleging in another paragraph that if the plaintiff became such owner it was only for the purpose of collecting it, is so inconsistent, indefinite, and illogical as to render the second paragraph demurrable. *Second Nat. Bank v. Hart*, 8 Ind. App. 19, 35 N. E. 302.

And a party cannot deny a sale, delivery, and acceptance under the Missouri system of pleading, and then in the same answer admit the sale and attempt an avoidance. *Darrett v. Donnelly*, 38 Mo. 494.

So, in *Hamilton v. Hough*, 13 How. Pr. 14, it was held that an answer to a complaint for a balance due for goods sold, denying that the plaintiff ever sold to the defendant any goods which had not been paid for, and alleging that if the plaintiff ever sold any goods to the defendant they were sold on credit, and that the term of credit had not expired, is bad; but the decision was put upon the ground that both the allegations were unauthorized, and not that they were inconsistent.

4. Actions pertaining to negligence and for assault.

A defense in an action for damages for death alleged to have been caused by negligence, denying negligence, and also alleging that if there was any negligence on the part of the defendants, the deceased was guilty of contributory negligence, is not objectionable as setting up inconsistent pleas. *Pugh v. Oregon Improv. Co.* 14 Wash. 331, 44 Pac. 547, 689; *Millan v. Southern R. Co.* 54 S. C. 485, 32 S. E. 539.

And denying the original existence of any liability in an action for damages, and setting up a release of whatever might be due on such claim, are not inconsistent so as to warrant striking out one of the defenses. *Kellogg v. Baker*, 15 Abb. Pr. 286.

So, an answer in an action by an administrator for the death of his intestate, alleging that after the commencement of the suit the defendant made a settlement with the widow of the decedent and paid to her a certain sum in full of all damages on account of the death of her husband, and agreed to pay in addition thereto the costs, and alleging payment of the costs, is not bad as setting up the distinct defenses of a compromise and settlement and a payment in release, as the allegations as to payment merely show the completion of the compromise. *Yelton v. Evansville & I. R. Co.* 134 Ind. 414, 21 L. R. A. 158, 33 N. E. 629.

But sustaining a demurrer in an action against a woman for negligently keeping a dangerous dog which injured the plaintiff, to a plea by the defendant that she was a married woman living at the time with her husband in conjugal relations, which at common law was a good ground of abatement, if error, is cured and rendered harmless where she also interposes the plea of the general issue, under which she is not only entitled to make the defense she could have made under the plea to which the demurrer was sustained, but she actually introduces proof and has the jury pass on the identical question she sought to present by the special plea. *Strouse v. Leipf*, 101 Ala. 433, 23 L. R. A. 622, 14 So. 687.

For another action pertaining to negligence, see *Banta v. Siller*, 121 Cal. 414, 53 Pac. 935, *infra*, VII. b, 1.

So, one may justify an assault under the Code 48 L. R. A.

as committed in self-defense or in defense of his possession of his real estate; but these are distinct defenses, and must be separately pleaded. *Johnson v. Gibson*, 23 N. Y. Week. Dig. 433.

And defenses in an action for an unlawful battery, consisting of a general denial of the alleged trespass and of justification of the defendant's acts, do not admit that the acts of the defendant were unlawful, and are not therefore inconsistent, either at common law or under the Missouri statute. *Rhine v. Montgomery*, 50 Mo. 566.

Under some of the earlier New York cases, decided soon after the Code was enacted, however, the rule seems to have been different.

Thus, the defendant in an action for an assault and battery cannot first deny the assault and then set up that if there was any injury to the plaintiff it was occasioned by an assault which he previously made on the defendant, and the latter allegation will be stricken out. *Schneider v. Schultz*, 4 Sandf. 664.

And a general denial in an answer to a complaint in an action for assault and battery and false imprisonment, and a further defense setting up new matter in justification of the alleged assault, cannot be set up in the same answer, as they are inconsistent. *Roe v. Rogers*, 5 How. Pr. 356.

For another action for assault under the Missouri statute, see *Rhine v. Montgomery*, 50 Mo. 566, *infra*, VII. b, 2.

5. Actions pertaining to personal property.

A denial in an action for the recovery of personal property, that the plaintiff was the owner, and that he had at any time possession thereof, and that the defendants took the property from the possession of the plaintiff, is not inconsistent with or waived by new matter set up in the same answer, to the effect that the property was taken by the defendant as sheriff by virtue of a writ of attachment. *Billings v. Drew*, 52 Cal. 565.

And a defense of *non cepit*, and an allegation of property in the defendant or in a stranger in a replevin action, are not so inconsistent that they cannot be pleaded together. *Shutter v. Page*, 11 Johns. 190.

And a general denial and an averment that the taking was justifiable, in an action for the taking of personal property, are not inconsistent either under 4 & 5 Anne, chap. 16, §§ 4, 5, or under 2 N. Y. Rev. Stat. 352, § 23, under which *non cepit* and a justification might be set up together, the one merely denying a wrongful taking, and the other, though admitting that the defendant took the property, setting up that he took it rightfully. *Foster v. Henry* (N. Y.) 5 Alb. L. J. 173.

Under the New York system of pleading a defendant in an action to recover the possession of personal property may set up a general denial together with a justification, in his answer, where they are separately pleaded, as they are not inconsistent defenses. *Hackley v. Ogmun*, 10 How. Pr. 44.

So, a reply to an answer in an action for replevin in which the answer alleged that the property was taken under a distress warrant for rent in arrear, alleging, first, that plaintiff did not hold as tenant as alleged, and, second, that no part of the supposed rent was in arrear, though subject to objection under the common law, is not so under the provisions of the Kentucky statute authorizing as many pleas, either

of law or fact, as the party may deem proper. *Roberts v. Tennell*, 4 Litt. (Ky.) 287.

And the defendant in an action for the recovery of the possession of property claimed under a chattel mortgage may by denial put the plaintiff to the proof of the execution of the chattel mortgage, and by a proper plea show that if the said alleged mortgage was in fact executed or bore his signature, it was the result of a conspiracy entered into by another with the plaintiff for the purpose of defrauding creditors, and that it was without consideration and void, such defenses not being inconsistent. *Veasey v. Humphreys*, 27 Or. 515, 41 Pac. 8.

And an answer putting in issue the allegation in the complaint that the defendant wrongfully detained and refused to deliver goods sought to be recovered, and also setting up title in the defendant under an assignment, is good. *Goodwin v. Wertheimer*, 99 N. Y. 149, 1 N. E. 404.

But a general denial in an action of replevin for the recovery of cattle which contained separate defenses, in which the defendant admitted that the plaintiffs were the owners of the cattle, and that the defendant detained them, can be considered only as a denial that the plaintiffs were entitled to immediate possession of the property, and that the defendant wrongfully detained them, and it would devolve upon the defendant to show that he had a right of possession. *Yandle v. Crane*, 13 Kan. 344.

For another action with relation to the recovery of personalty, see *Nudd v. Thompson*, 34 Cal. 39, *infra*, VII. b, 1.

So, a denial of knowledge or information sufficient to form a belief in an action for conversion, as to whether the property alleged to be converted belonged to the plaintiff, is not inconsistent with an allegation that the goods were delivered by the plaintiff to the defendant, and that the defendant claims to hold them as securities for moneys advanced thereon by him, as there may be many cases where a party pledges property of which he is not the owner. *Townsend v. Platt*, 3 Abb. Pr. 324.

And a defense in an action for the carrying away and detention of personal property, that the property was delivered to the defendant as the agent of the owner, will not be stricken out as sham because the answer contains another defense in which it is averred that the property was taken by virtue of a writ of replevin, though the two are regarded as so inconsistent that one of them must be false, where there is nothing in the record from which it can be said which is the false one. *Duffield v. Denver & R. G. R. Co.* 5 Colo. App. 25, 36 Pac. 622.

Nor is a denial by a defendant of ever having received securities alleged to have been given him as collateral inconsistent with another defense to the effect that if he did receive them they were lost without his fault, so as to narrow the issue to the question whether or not he did ever receive the securities. *Willard v. Gilles*, 24 Wis. 319.

And a general denial in an action brought against a carrier to recover the value of a certain trunk and its contents, and a special plea averring that the defendant had tendered the trunk with its contents in good condition to the plaintiff, are not subject to the objection of inconsistency under the Wyoming statute, as both pleas may be true. *Lake Shore & M. S. R. Co. v. Warren*, 3 Wyo. 134, 6 Pac. 724.

But under the early Code practice in New York a carrier by water was not permitted to answer, in an action for failure to deliver goods shipped, that he was not the owner of the vessel, and also that the property shipped was de-

livered to the plaintiff, as the two defenses are inconsistent. *Arnold v. Dimon*, 4 Sandf. 680.

And a general and specific denial of each and every allegation in the complaint in an action of trover for the conversion of certain personal property, and another allegation in the same answer stating that the property was taken by virtue of a writ of attachment, are held to be inconsistent with each other in Minnesota, and the taking of the property would be deemed admitted. *Derby v. Gallup*, 5 Minn. 119, Gil. 85.

In the above case, *Shuter v. Page*, 11 Johns. 196, and other cases under the old system of practice sustaining analogous pleas were explained and distinguished, the court saying that the cases in which similar pleas have been sustained have arisen under statutes, so far as it had examined, similar to that of 4 Anne. 16. § 4, which provides that it shall be lawful for any defendant in any action or suit with leave of the court to plead as many several matters thereto as he shall think necessary for his defense, while the Code does not authorize such pleading, or any fictitious pleading, and the decisions of the court must depend upon the construction to be given to the provisions of the Code on the subject of pleading.

So, an answer in an action against a warehouseman for the value of goods deposited for safe-keeping which were lost, setting up a denial of the alleged bailment, and that the goods were destroyed by irresistible force and without fault of the defendant, and the statute of limitations, is good, and the plea of the statute of limitations cannot be stricken out for inconsistency. *Cohrs v. Fraser*, 5 S. C. N. S. 351.

And a general denial in an action for a misappropriation of money is not modified or affected by an allegation in the answer that the money was paid to the plaintiff by a third party before the commencement of the action, by the transfer to him of a designated number of shares of the capital stock of a corporation, and by a payment in cash, as the two defenses are not inconsistent. *First Nat. Bank v. Lincoln*, 36 Minn. 132, 30 N. W. 449.

6. Actions pertaining to realty.

A defendant in an action of ejectment may deny the title of the plaintiff, and also plead the statute of limitations, as such defenses are not inconsistent, and are not such as he would be required to elect between. *Willson v. Cleaveland*, 30 Cal. 192.

And they are not so inconsistent, even under the Missouri practice, as to relieve the plaintiff from the necessity of proving title upon the theory that the plea of the statute of limitations was a confession of the plaintiff's original right. *Nelson v. Brodhack*, 44 Mo. 596, 100 Am. Dec. 328.

And a mere statutory suggestion of three years' adverse possession, made in a statutory action of ejectment with a view to the ascertainment of an allowance for the value of permanent improvements under Ala. Code, §§ 702-705, is not repugnant to, or inconsistent with, the plea of not guilty, and will not be stricken from the file on motion. *Newsom v. Guy*, 109 Ala. 305, 19 So. 443.

And an allegation by defendants in an action of ejectment in their answer, that they have had adverse possession for ten years continuously next preceding the action, claiming under an administrator's deed, does not disprove another allegation therein that they paid the purchase money to the legal representative of the former owner in good faith, in consideration of which they received from him a deed believed

at the time to be valid and effectual, but which, owing to informalities of proceedings in the probate court, was not effectual to pass title, claiming thereon a right to have purchase money and taxes paid refunded; and therefore the two defenses may be pleaded together. *Schaefer v. Causey*, 8 Mo. App. 142.

So, a defense in an action for the recovery of real estate in which the defendant's claim of title is set out in the complaint, denying such claim and averring a different one, and pleading the statute of limitations, and alleging that by mistake the deed under which they claimed appeared to convey a life estate when it was intended to convey a fee simple, asking for a correction and reformation of the deed, is competent under the present system of pleading in North Carolina authorizing a defendant to plead inconsistent defenses if separately stated. *McLamb v. McPhail* (N. C.) 35 S. E. 426.

And when an answer in such an action denies the title of the plaintiff, and also sets up the statute of limitations and several other affirmative defenses, the affirmative defenses are immaterial, and need not be specially noticed, where the question sought to be presented by them properly arises on the trial under the general denial of title. *Rhodes v. Gunn*, 35 Ohio St. 387.

And an answer in an action in ejectment denying generally every fact alleged in the petition except possession, and averring possession under a judicial sale, and setting up the statute of limitations, and giving a detailed history of the title to the land from a sale by the United States, and the execution of a deed, under a mortgage foreclosure, to the defendant, and referring to an alleged defect in the deed by the death of a party in interest before the commencement of the foreclosure, and asking that if his title should fall upon the other defenses, and by reason of the defect, he should be granted equitable relief and protection to the full amount of the note and interest and taxes and interest, and the value of the improvements which he had placed on the premises, is not inconsistent. *Goodman v. Nichols*, 44 Kan. 22, 28 Pac. 957.

So, a verified answer in an action to recover a mining claim, denying that the plaintiffs ever had title or possession, is not inconsistent with another allegation that if the plaintiffs ever had title to the claim they had abandoned and forfeited it, and the defendant should not be required to elect between them, or precluded from introducing proof of the abandonment and forfeiture. *Bell v. Brown*, 22 Cal. 671.

And a plea by the defendant in a real action that he was the owner of the entire estate, and another plea that he was the owner of an undivided part thereof, that two other designated persons were owners also, though inconsistent, will not, under Or. Code, § 72, authorizing a defendant to plead any or all the defenses he may have in the same answer, be subject to exception therefor, as he may have been mistaken as to his legal title and still be entitled to maintain his possession under special defenses. *Moore v. Willamette Transp. & Locks Co.* 7 Or. 335.

And a special plea in an action of ejectment brought by a town for possession of alluvial land claimed as a westerly extension of a street, alleged to have been dedicated to the water edge, that the defendant was not at the time of the commencement of the suit in possession of any part of the street, and has not and does not claim any interest in it, and another allegation that he was and now is in possession of a piece of land lying west of the west end of the street 48 L. R. A.

which is covered by the buildings described in the declaration, but that he was not guilty of the wrong and injury complained of, are not subject to demurrer on the ground of inconsistency in the pleas. *Scranton v. Bosarge* (Miss.) 19 So. 194.

And a demurrer to a cross complaint will not be sustained because of inconsistency where general allegations are to the effect that the defendants are the equitable owners of the land in dispute and are in possession thereof, unless his specific allegations alleged to be inconsistent show that they have no title. *Warbritton v. Demorett*, 129 Ind. 346, 27 N. E. 730, 28 N. E. 613.

But a plea of not guilty in an action in ejectment is a conclusive admission of possession, and puts in issue the title, and a disclaimer is an admission of plaintiff's title but denies the possession, and the two cannot be pleaded together, as they are inconsistent with each other. *Torrey v. Forbes*, 94 Ala. 135, 10 So. 320; *Bernstein v. Humes*, 60 Ala. 582, 31 Am. Rep. 52; *McQueen v. Lampley*, 74 Ala. 408.

And a defense in an action for the recovery of lands denying all right in the plaintiffs and insisting that the plaintiffs' ancestor never had any interest in the premises, is inconsistent with another defense in the same answer in which the defendant asserts his own right as a purchaser of the interest of one of the plaintiffs derived from such ancestor, and the defendant should be compelled to elect between them. *Fugate v. Pierce*, 49 Mo. 441.

For actions in the nature of ejectment, see also *Miller v. Chandler*, 59 Cal. 540; *Morris v. Henderson*, 37 Miss. 492; *McQueen v. Lampley*, 74 Ala. 408; *Bernstein v. Humes*, 60 Ala. 582, 31 Am. Rep. 52; —*infra*, VII. b, 1; *Farrell v. Hennessy*, 21 Wis. 633; *Orton v. Noonan*, 19 Wis. 351; *Sexton v. Rhames*, 13 Wis. 99; *Miller v. Larson*, 17 Wis. 624; *Butler v. Kauback*, 8 Kan. 671; *Ledbetter v. Ledbetter*, 88 Mo. 62, —*infra*, VII. b, 2.

So, a defense in an answer in an action to recover upon a land contract that the contract was obtained by false and fraudulent representations, and a counterclaim therein to recover damages for breach of the contract by reason of the failure of the plaintiff to grade, gravel, and sidewalk a street as agreed in the contract, are not inconsistent so that the counterclaim would constitute a waiver of the right of the defendant to rescind the contract for fraud. *South Milwaukee Boulevard Heights Co. v. Harte*, 95 Wis. 592, 70 N. W. 821.

And a counterclaim in an action to recover the second instalment upon a land contract the object of which was to recover the first instalment on the ground that the contract was induced by false and fraudulent representations and had been rescinded, is not inconsistent with a second counterclaim to recover damages for breach of the contract, so as to warrant the rejection of evidence under the first counterclaim on the ground that the defendant was estopped by the admission in the second counterclaim. *Ibid.*

So, an answer in an action for trespass denying the plaintiff's title, and also setting up a license to do the act complained of, is not subject to objection for inconsistency so as to constitute an admission of the plaintiff's title as set up in the complaint. *Booth v. Sherwood*, 12 Minn. 426, Gil. 310.

And a general denial in an action for a wrongful act consisting in the removal of a fence, and a justification and limitation of three years, are not so inconsistent as to deprive the defend-

ant of the right to invoke the statute of limitations. *McCormick v. Kaye*, 41 Mo. App. 263.

And not guiltily and justification and accord and satisfaction may be joined in trespass under the Maine system of pleading. *Granite State Bank v. Otis*, 53 Me. 133, *dictum*.

And a denial in an action for trespass that the plaintiff either owned the property upon which the trespass was claimed to have been committed, or was ever entitled to its possession, and an allegation of possession in the defendant and those under whom he claimed for a long period, and that while so in possession the plaintiff, against the will of the defendant, entered upon the lands and commenced to cut hay, which possession so wrongfully taken was the only possession the plaintiff ever had, may be pleaded together, as the inconsistency is inferential and remote. *Burnham v. Call*, 2 Utah, 433.

But where, in an action to enjoin defendants from trespassing on lands and cutting and removing timber therefrom, the defendant for an affirmative defense alleged a contract on the part of the plaintiff as administratrix whereby she sold the timber to the defendant, a reply to the affirmative matter admitting the contract of sale, but averring that it included only part of the premises, and a further reply that she had never obtained any authority from the court to enter into the contract, and had no right or authority to sell the timber, is inconsistent, and the second defense should be stricken out. *Davis v. Ford*, 15 Wash. 107, 45 Pac. 739, 46 Pac. 393.

As to trespass to title, see also *Koenigheim v. Miles*, 67 Tex. 116, 2 S. W. 81, *infra*, VII. a; *Graah v. Sater*, 6 Iowa, 302; *Child v. Allen*, 33 Vt. 476; *Wiggins v. Wiggins*, 18 Tex. Civ. App. 335, 40 S. W. 643, *infra*, VII. b, 1.

See also, as to actions for damages to realty, *McCord v. Doniphan Branch R. Co.* 21 Mo. App. 92, *infra*, VII. b, 2.

So, a denial in an answer in an action to quiet title, of all allegations of the petition necessary for the establishment of a trust in the lands, is not inconsistent with a further defense that at the time of their purchase of the land and before payment of the consideration the defendants applied to the plaintiff for information concerning the title, and received their conveyance in reliance upon the information received. *Blodgett v. McMurtry*, 39 Neb. 210, 57 N. W. 985.

And a count in an answer in an action by the holder of a tax title to quiet his title, consisting of a general denial, and another, setting up facts showing the plaintiff's title to the land to be invalid, and a third alleging that after a previous judgment was rendered and before it was vacated the plaintiff sold the land in question and appropriated the proceeds to his own use, praying for a recovery of the value of the land, are not repugnant or inconsistent or improperly joined. *Flint v. Dulany*, 37 Kan. 332, 15 Pac. 203.

Nor is an answer in an action for the cancellation of a deed alleged to be a forgery as a cloud upon the plaintiff's title, containing a general denial and affirming the genuineness of the deed, and another allegation that the defendant's husband, since deceased, was the owner of the property and deeded it to the plaintiff without consideration, in trust to hold the naked legal title for the benefit of such husband of the defendant and to reconvey to him or any other person at his request, and that the deed in suit was made pursuant to such trust, subject to objection for inconsistency, and the defendant cannot be required to elect upon which

defense he will rely. *Keane v. Kyne*, 2 Mo. App. 317.

So, an admission in an answer in an action by a landlord against a tenant to recover rent, that the defendant is indebted for rent, is not inconsistent with a counterclaim for repairs made by the defendant for which the plaintiff agreed to pay him. *Hausman v. Mulheran*, 68 Minn. 48, 70 N. W. 866.

And an allegation in the answer in an action to recover rent under a lease alleging a parol contract to lease the building from month to month, and a further defense that the said building, by reason of the acts and omissions of the plaintiff, became untenable, whereby the defendants were evicted, are not inconsistent with each other. *Kline v. Hanke*, 14 Mont. 361, 36 Pac. 454.

Nor are defenses to a suit for rent, of want of consideration for the lease, or, in case of that defense failing, of the right to an accounting because the lessor had resumed possession of and used the leased property, or by way of cross petition for judgment for a sum agreed on for the lessor's violation of his covenant in the lease, inconsistent, and no election by defendant can be required. *Hooven & A. Co. v. National Cordage Co.* 27 Ohio L. J. 18.

As to actions for rent, see also *Knight v. M'Donnell*, 12 Ad. & El. 438, 4 Jur. 939, 4 Perry & D. 168, *infra*, VII. b, 1; *Van Holten v. Lewis*, 1 McCord, L. 12, *supra*, IV. c.

So, while ordinarily a general denial in an answer would seem to be inconsistent with any allegation in avoidance of the facts set out in the complaint, the defendant in an action to foreclose a mortgage may unite in the same answer a general denial, and a plea that the defendant was made a party solely on the ground that he has or claims to have some interest in or lien upon the mortgaged premises accruing subsequently to the lien of the mortgage, and an allegation that the lien on the mortgaged premises existed under a judgment against the mortgagor prior to the attaching of the lien under the mortgage, and that the claims for which the mortgage were given had been paid. *Woods v. Reiss*, 78 Hun, 80, 29 N. Y. Supp. 263.

And a denial by the defendants in an action to foreclose a mortgage, that they are junior lienors, and an allegation that they are senior lienors, are not so inconsistent with an allegation of payment as to warrant the granting of an order to make the pleading more definite and certain. *Moody v. Beldon*, 21 N. Y. Civ. Proc. Rep. 89, 15 N. Y. Supp. 119.

And an allegation in an answer in an action brought to enforce a mechanic's lien that the defendant has no knowledge or information sufficient to form a belief as to whether or not the material mentioned was furnished by the plaintiff, is not, under *Wag. (Mo.) Stat. p. 1010*, providing that different consistent defenses may be separately stated in the same answer. Inconsistent with another allegation that certain work done upon the building was done so unskillfully and in such an unworkmanlike manner as to cause the defendant great damage, asking judgment therefor, and denying that the plaintiff at any time gave him notice that he held the claim against the property. *McAdow v. Ross*, 53 Mo. 109.

In the above case, *Fugate v. Pierce*, 49 Mo. 441, *supra*, was distinguished upon the ground that in that case the two positions maintained by the defendant were entirely irreconcilable, and could not both stand together, and were clearly within the prohibition of the law.

But a general denial in an answer in an action to foreclose a mortgage is inconsistent with

an allegation that the defendant executed the mortgage under duress, and such allegations should not be encouraged; and in such case where it was the intention of the plaintiff in replying to put at issue all the material allegations of the defendant's answer he should be allowed to amend his reply so as to be able to litigate the question of duress upon its merits. *Wright v. Bacheller*, 16 Kan. 259.

And a plea in such an action claiming title to the mortgaged premises, and another alleging that the defendant has a mortgage on the premises for a certain sum, praying that in case the court finds his title invalid he may have a decree for the amount due on his mortgage, are inconsistent with each other, and on application made at the proper time it is the duty of the court to require the defendant to elect upon which he will rely. *Shellenbarger v. Biser*, 5 Neb. 195.

As to actions for foreclosure, see also *Siter v. Jewett*, 33 Cal. 92, *infra*, VII. b, 1; *Adair v. Adair*, 78 Mo. 630; *Dickson v. Cole*, 34 Wis. 621, *infra*, VII. b, 2.

7. Actions for libel or slander.

The earlier decisions in some of the Code states, probably in an effort to assimilate Code practice with the common law, gave a much more strict construction to pleas on the question of inconsistency than the later ones, particularly in actions for libel and slander.

Thus, a defendant in an action for slander, who denies uttering the words charged, cannot justify by alleging their truth, as the pleas are inconsistent. *Ormsby v. Douglass*, 2 Abb. Pr. 407; *Meyer v. Schultz*, 4 Sandf. 664; *Jackson v. Stetson*, 15 Mass. 48; *Alderman v. French*, 1 Pick. 1, 11 Am. Dec. 114.

When a defendant in an action for slander intends to justify the speaking of the slanderous words, he must set up facts which will show the plaintiff guilty of the act imputed to him, and a denial of every allegation in the complaint, and an allegation that if he did speak the slanderous words alleged the same are true, cannot be combined in the same answer. *Sayles v. Wooden*, 6 How. Pr. 84.

And if they are combined the admission in the latter plea is admissible and legal evidence for the plaintiff on the general issue relieving the plaintiff from proving the speaking of the words. *Jackson v. Stetson*, 15 Mass. 48; *Alderman v. French*, 1 Pick. 1, 11 Am. Dec. 114.

So, while a defendant in an action for slander could admit or deny or set up new matter in avoidance, he could not deny that he uttered the defamatory words alleged, and then aver that if he did utter them he uttered them with reference to the nonperformance of a certain contract whereby great injury and injustice had been done to him by the plaintiff. *Porter v. McCreedy*, Code Rep. N. S. 88.

And an answer in an action for slander, which first denies that the defendant ever spoke the alleged slanderous words, and then asserts that if it be proved that he did speak them he will then prove certain facts in justification, is bad. *Lewis v. Kendall*, 6 How. Pr. 59.

The provision of N. Y. Code, § 165, permitting the defendant to allege mitigating circumstances, was limited to cases in which he pleaded the truth of the matter charged as defamatory. *Meyer v. Schultz*, 4 Sandf. 664.

And a plea in an action for slander that the words were spoken privately or confidentially or in the course of legal proceedings, which would, if true, excuse him whether the words were true or not, is inconsistent with another plea setting forth the truth of the words alleged to have

been spoken, as the effect of this defense is that he spoke the words because he knew them to be true. *Jackson v. Stetson*, 15 Mass. 48.

A more liberal rule, however, was adopted by the later cases after the theory of the Code had become more thoroughly understood.

Under the rule subsequently adopted, a denial in an action of slander of having spoken the words charged and an averment of their truth, are consistent defenses which may be separately stated in the same answer, as it does not necessarily follow that the defendants spoke the words because they are true. *Payson v. Macomber*, 3 Allen, 69; *Barr v. Hack*, 46 Iowa, 308; *Cole v. Woodson*, 32 Kan. 272, 4 Pac. 321; *Jones v. McDowell*, 4 Bibb, 188; *Rooney v. Tierney*, 82 Ky. 252; *Horton v. Ranner*, 6 Bush, 596; *Buhler v. Wentworth*, 17 Barb. 649; *Weston v. Lumley*, 33 Ind. 486; *Kelly v. Craig*, 9 Humph. 215; *Peters v. Ulmer*, 74 Pa. 403.

And he may also plead the statute of limitations. *Kelly v. Craig*, 9 Humph. 215.

And a defendant in an action for slander, who sets up the defense of not guilty and also a justification, should not be compelled to elect upon which defense he will stand. *Horton v. Banner*, 6 Bush, 596; *Ormsby v. Douglass*, 2 Abb. Pr. 407, 5 Duer, 665; *Cole v. Woodson*, 32 Kan. 272, 4 Pac. 321.

Especially where the answer is verified, as it may be true, not only that he did not speak the words charged, but also that the plaintiff committed the offense which they impute. *Ormsby v. Douglass*, 2 Abb. Pr. 407, 5 Duer, 665; *Murphy v. Carter*, 1 Utah, 17.

And where, in an action for libel and slander, the defendant has asserted several inconsistent pleas in the same answer, and among them one justifying by asserting the truth of the supposed libelous matter, that plea will not be taken as a circumstance tending to show malice, on the ground that the plea was inconsistent with the evidence. *Express Printing Co. v. Copeland*, 64 Tex. 354.

And where, in an action for slander, the plea of not guilty is filed, together with pleas of justification, the plaintiff must prove the speaking of the words alleged, and the pleas cannot be used to convict the defendant, as he will not be bound to make his defense until he is proved guilty. *Farnan v. Childs*, 66 Ill. 547; *Sumner v. Shipman*, 65 N. C. 623; *Ricket v. Stanley*, 6 Blackf. 169; *Wheeler v. Robb*, 1 Blackf. 330, 12 Am. Dec. 245.

So, the rule under Ky. Code, § 151, providing that in cases for slander and libel the defendant may allege both the truth of the matter charged as defamatory and any mitigating circumstances legally admissible in evidence to reduce the damages, and whether he proves the justification or not he may give in evidence the mitigating circumstances, is that the defendant may, if he chooses, deny the speaking of the defamatory matter charged, and in a second paragraph admit the publication and allege its truth, and in still another he may admit the words, and, without alleging them to be true or admitting that they were false, justify by alleging such facts as are relied upon to excuse the publication. *Harper v. Harper*, 10 Bush, 447.

And a defendant in an action for slander may, under the New York Code, deny the speaking of the alleged slanderous words, and allege that the words were spoken under such circumstances and with such explanations describing them that they were not slanderous. *Hollenbeck v. Clow*, 9 How. Pr. 289.

Mitigating circumstances may be pleaded in an action for libel or slander in connection

with a general denial, and with or without a plea of justification. *Dolevin v. Wilder*, 7 Robt. 319.

So, while, previous to the amendment of the New York Code in 1852, a plea of justification in an action for slander admitting and justifying the speaking of the words, was inconsistent with a previous denial, it is no longer necessary to make the admissions in a plea of justification, and the pleas are no longer inconsistent, as by N. Y. Code, § 140, providing that all the forms of pleading heretofore existing are abolished, and hereafter the forms of pleading in civil actions in courts of record and rules by which the sufficiency of the pleading is to be determined, are those prescribed by that act, the rule limiting the defendant to consistent answers, and requiring him to confess the speaking of the words if he justified in an action for slander, was abolished. *Stiles v. Comstock*, 9 How. Pr. 48.

And a defendant in an action for slander under New York Code, § 165, authorizing the defendant in such actions to allege both the truth of the matter charged as defamatory and mitigating circumstances to reduce the amount of damages, and prove the mitigating circumstances whether he proves the justification or not, may allege in his answer the truth of the charge in justification, and also facts tending to prove its truth in mitigation of damages, and is entitled to have evidence given thereunder submitted to the jury in mitigation of damages, though it fails to prove the justification. *Bisbey v. Shaw*, 12 N. Y. 67.

And he may deny any or all of the allegations of the plaintiff, and then by a separate statement of the same answer allege the truth of the statements contained in the libelous publication; and he may also, as a third defense, allege that the publication was privileged; but he cannot in the same defense deny the allegations of the plaintiff, and set up new matter to avoid their effect. *Buddington v. Davis*, 6 How. Pr. 401.

And a denial by the defendant in an action for slander that he had any recollection or belief of having spoken the alleged words, and an allegation that if he did speak them the charge was true, are not inconsistent. *Butler v. Wentworth*, 9 How. Pr. 282.

So, the general bad character of the plaintiff in an action for slander may be given in evidence in mitigation of damages under the plea of not guilty, though the defendant also pleaded a justification of the truth of the words and gave evidence in support of that plea, where it would have been proper to put in such evidence if there had been no other plea than that of not guilty. *Hamer v. McFarlin*, 4 Denio, 509.

And an answer in an action for slander in charging plaintiff with keeping a house of ill fame may, under N. Y. Code Proc. § 165, as amended in 1849, providing that in actions for libel and slander the defendant may in his answer allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, deny the statements in the complaint, and also allege as a partial defense lewd and lascivious conduct on the part of the plaintiff's family, though it does not amount to a justification of the charge, and evidence of such conduct is admissible thereunder to reduce the amount of damages. *Bush v. Prosser*, 11 N. Y. 347.

So, under the Utah system of pleading, permitting the defendant with leave of court to plead as many several matters as he shall think necessary for his defense, a plea of justification by the defendant in an action for libel does not

admit the publication of the libel and utterance of the slanderous words, where the answer also contains a general denial, and should not be received as evidence of such publication, and does not supersede the necessity of the plaintiff's proving his declaration. *Murphy v. Carter*, 1 Utah, 17.

In Kentucky, however, a defendant in a slander case may be compelled to elect between a denial of speaking the slanderous words and an averment of their truth. *Lane v. Bryant*, 100 Ky. 138, 36 L. R. A. 709, 37 S. W. 584.

But an answer admitting the publication of slanderous words and alleging their truth cannot be put in evidence against a defendant in a slander suit after the right to make that defense has been lost by electing to rely on a denial when compelled to make an election between the defenses. *Ibid*.

In the above case it was said that the case of *Harper v. Harper*, 10 Bush, 447, *supra*, is no longer the law.

So, in Missouri, formerly, a defendant in an action for slander had to confess the matters stated in the petition, and avoid them or traverse it; and he could not deny the words spoken and set up a justification; and where he did so he was held to the defense of the general denial, and no evidence was permitted to be given on the subject of justification. *Coble v. McDaniel*, 33 Mo. 363.

A verified answer in justification of a charge for slander admitted the speaking of the slanderous words, and the defendant in an action for slander could not deny and justify the speaking of the words at the same time, as the two defenses were inconsistent. *Atteberry v. Powell*, 29 Mo. 429, 77 Am. Dec. 579.

Under the Missouri Code, however, the defendant in an action for slander may in his answer deny the speaking of the words alleged, and also justify, the denial and the justification not being inconsistent, as proof of the one does not disprove the other. And there is no inconsistency between a general denial in an action for slander and facts pleaded in mitigation. *Wood v. Hilbish*, 23 Mo. App. 389.

8. Miscellaneous actions.

A denial in an answer in an action to recover moneys alleged to have been wagered on horse races, that the plaintiff had as alleged lost the amount sued for through the defendant, and an averment that at the time and in the transaction mentioned in the petition the defendants had lost through the plaintiff the amount for which judgment is asked in a counterclaim, are not inconsistent under Ky. Civ. Code, § 113, providing that a pleading may contain statements of as many causes of action, matters of estoppel and avoidance, and as many traverses as there may be grounds for in behalf of the pleader, provided the pleading does not contain inconsistent statements. *Elias v. Gill*, 13 Ky. L. Rep. 798, 18 S. W. 454.

And an allegation in an answer in an action to recover money alleged to have been deposited with the defendant, made on information and belief that if any such certificate of deposit as in the complaint is alleged was ever issued the same has been paid, is an allegation of payment, and is not inconsistent with another allegation in the answer that the defendant had no personal knowledge and no information sufficient to form a belief, and therefore denied that the deposit was made as stated in the complaint. *Doran v. Dinsmore*, 20 How. Pr. 504; *Doran v. Dinsmore*, 33 Barb. 86.

So, allegations in an answer in an action brought to recover money alleged to have been

paid on account of a subscription to stock of a corporation, admitting the organization of the company and denying each and every other allegation, and, by way of further answer, alleging that the money sought to be recovered was not paid on account of the par value of the stock, but pursuant to an agreement whereby the plaintiff with other promoters of the company agreed to pay on the call of the treasurer a sum equal to 3 per cent of the amount of his subscription to the capital stock, which was to be used as a promoter's fund to meet the expenses of the organization, and that the same was used for that purpose, though they might be construed as inconsistent, are not under the New York Code subject to objection on that account. *MacColl v. American Union L. Ins. Co.* 89 Hun. 490, 35 N. Y. Supp. 364.

But an allegation in an answer in an action brought by an administrator to recover moneys alleged to be in defendant's hands belonging to the estate, that the whole sum deposited by the deceased was paid to the administrator, which was afterwards deposited with him as bailee of the administrator, is entirely inconsistent with another allegation therein that the defendant held the money as bailee of the deceased, and had paid it out on various orders of the administrator; and the defendant will be required to elect between them. *Smith v. Culligan*, 74 Mo. 389.

So, an allegation in an answer in an action on an account that the plaintiff and defendant met with three of their neighbors and made a settlement of all matters between them up to the date of the commencement of the action, is so inconsistent with another allegation that there were then existing unsettled differences between them that could form a set-off or counterclaim, as to warrant requiring the defendant to elect upon which he will rely. *Ferguson v. Prince*, 2 Kan. App. 7, 41 Pac. 988.

And an answer in an action for an account between partners in which the plaintiff alleged a loan of money to the firm, which first denies the allegations of the complaint and then admits them, and alleges that the loans were paid, is inconsistent, and admits the making of the loans, and amounts to no more than an affirmative allegation of payment. *Rodgers v. Clement*, 162 N. Y. 422, 56 N. E. 901.

And an allegation in an answer setting up a partnership account between the parties, and alleging a balance due the defendant, and praying for an account, and another in the same answer alleging that the whole partnership account is barred by the statute of limitations, are so inconsistent as to warrant requiring the defendant to elect upon which allegation he will stand, and strike the other from the record. *Auld v. Butcher*, 2 Kan. 136.

But where the general issue is pleaded in an action against persons alleged to be partners, together with an additional plea denying the partnership, it is error to strike out the plea denying the alleged partnership. *Rowland v. Dalton*, 36 Miss. 702.

So, an incumbent of an office, whose demurrer to a complaint disputing his title thereto has been sustained by the trial court, is not debarred from setting up, by way of answer, a different claim of title to the office than the one already considered, in case of the reversal and remanding of the cause by the supreme court, if he in good faith believes he has a different title, and has not yet addressed an answer to the complaint. *State ex rel. Worrell v. Peelle*, 124 Ind. 515, 8 L. R. A. 228, 24 N. E. 440.

But a plea in an answer in an action against an officer of a corporation for failure to file

reports expressly admitting that the corporation was a corporation organized under the laws of the state is inconsistent with a subsequent allegation in the same answer denying that the corporation had any corporate existence within the state, because it was organized to do all its business without the state, and the latter allegation may be stricken out on motion. *Tabor v. Commercial Nat. Bank*, 27 U. S. App. 111, 62 Fed. Rep. 383, 10 C. C. A. 429.

So, a judgment in a prior action may be set up by way of estoppel in bar with the general issue in the same answer, as they are not inconsistent or incompatible pleas. *Shafer v. Stonebraker*, 4 Gill & J. 354.

And an answer denying the existence of the original judgment sued on, sought to be revived as pleaded, and admitting its existence and averring satisfaction thereof in a separate plea, is not subject to demurrer for repugnancy under a statute permitting a defendant to plead as many matters of fact in several pleas as he may deem necessary for his defense. *Tucker v. Edwards*, 7 Colo. 209, 3 Pac. 233.

In *Ketcham v. Zerega*, 1 E. D. Smith, 553, an answer in an action on a judgment denying knowledge or information sufficient to form a belief as to the recovery of the judgment, and denying that the judgment if so recovered still stands in full force and effect and in no way satisfied or annulled, was sustained; but the objection seems to have been that the pleading was hypothetical, and not that it was inconsistent.

For another particular action not included in the above subdivisions as to particular actions, see *Merchants' Nat. Bank v. McNaughton*, 1 Abb. N. C. 293, note, *infra*, VII. b. 1.

VII. Effect of inconsistency as a waiver or admission.

a. The prevailing rule.

The rule adopted by the great weight of authority, and in nearly if not all the states except Minnesota, Missouri, Wisconsin, Kansas, and Louisiana, is that pleas must be construed separately and distinctly, except when connected by a reference to each other, and the plaintiff on the trial of an issue on one plea in an answer cannot take advantage of an inconsistent averment or admission contained in another plea. *Clements v. Cribbs*, 19 Ala. 241; *St. Louis, A. & T. R. Co. v. Whitley*, 77 Tex. 126, 13 S. W. 833; *Fowler v. Davenport*, 21 Tex. 629; *Swift v. Kingsley*, 24 Barb. 541.

And that an allegation in one plea cannot be insisted upon by the adversary as an admission of a fact for a purpose distinct from the proof of the issue upon that plea, as every issue is to be distinctly tried. *Morris v. Henderson*, 37 Miss. 492; *Heinrichs v. Terrell*, 65 Iowa, 25, 21 N. W. 171; *Express Printing Co. v. Copeland*, 64 Tex. 334; *Siter v. Jewett*, 33 Cal. 92.

Thus, an admission in an answer in the nature of a confession and avoidance does not operate to admit matters formerly denied in other counts of the answer. *Treadway v. Cedar Falls & S. City R. Co.* 40 Iowa, 526; *Quigley v. Merritt*, 11 Iowa, 147; *Harrington v. Macmorris*, 5 Taunt. 233, 1 Marsh. 33.

And the rule is the same where the admission is contained in a notice of set-off as it is when it is contained in the answer itself. *Harrington v. Macmorris*, 5 Taunt. 233, 1 Marsh. 33.

And the burden of proof still remains with the plaintiff. *Quigley v. Merritt*, 11 Iowa, 147.

The pleading on which a party goes to trial

is the one by the admissions of which he is bound; he is not bound by admissions made in a former pleading superseded by the pleading upon which he goes to trial by amendment, where such admissions are not contained in the amended pleading. *Mecham v. McKay*, 37 Cal. 154.

So, pleading one defense cannot be deemed a waiver of another in the same answer, though inconsistent. *Bell v. Brown*, 22 Cal. 671; *Billings v. Drew*, 52 Cal. 585; *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076, 47 Pac. 360; *Noonan v. Bradley*, 9 Wall. 394, 19 L. ed. 757.

And an averment in a cross-complaint, though inconsistent with a denial in an answer, cannot be used to destroy its effect. *Meyers v. Merillion*, 118 Cal. 352, 50 Pac. 662; *Nye v. Spencer*, 41 Me. 272; *Buhne v. Corbett*, 43 Cal. 264.

And a denial in an answer is not waived or overcome by such an averment of substantially the same facts as those which the answer denies. *Meyers v. Merillion*, 118 Cal. 352, 50 Pac. 662.

A defendant in an action, having pleaded the general issue, is entitled to a trial thereon, and special pleas in justification of the acts complained of by the plaintiff are not a waiver of that right. *Nye v. Spencer*, 41 Me. 272.

And are not evidence against the party pleading them upon issues tendered in other defenses contained in the same answer consisting of denials only. *McDonald v. Southern California R. Co.* 101 Cal. 206, 35 Pac. 643, 646, *dictum*; *Nudd v. Thompson*, 34 Cal. 39.

And one plea cannot be given in evidence to sustain another, or to sustain the allegations in the declaration. *Farnan v. Childs*, 66 Ill. 547; *Duncan v. Magette*, 25 Tex. 245.

So, the statements in a special plea held bad on demurrer are not evidence for the plaintiff on the general issue, though the jury are to assess the damages as well as try the case on the general issue. *Montgomery v. Richardson*, 5 Car. & P. 247; *Firmin v. Crucifix*, 5 Car. & P. 97.

And judgment cannot be rendered on the pleadings where the material allegations of the complaint are denied in the answer, even though the answer sets up a special defense separately stated, which admits the allegations formerly denied. *Botto v. Vandamenc*, 67 Cal. 332, 7 Pac. 753; *Amador County v. Butterfield*, 51 Cal. 526.

And the fact that two defenses are inconsistent would not justify the court in denying the defendants the benefit of both defenses by returning a verdict for the plaintiff without consideration of any part of the defense. *Kline v. Hanke*, 14 Mont. 361, 36 Pac. 454.

Nor is the mere fact that the materiality of one of them can only appear by assuming that the other is false, enough to deprive the defendant of the right to set up both. *Mott v. Burnett*, 2 E. D. Smith, 50.

While the plea in one action may in certain cases be conclusive evidence in another, it cannot be used as evidence on another issue on the same record. *Knight v. McDouall*, 12 Ad. & El. 438, 4 Perry & D. 168, 4 Jur. 939.

Thus, a reply by a plaintiff in an action on a promissory note in which a set-off is interposed by the defendant denying the indebtedness charged generally and specifically is not waived by another count alleging payment of the set-off, and it remains incumbent upon the defendant to prove his set-off. *Shannon v. Pearson*, 10 Iowa, 588.

And an answer in an action by an indorsee of a promissory note that the note was given without consideration, and also that the plain-

tiff advanced a designated sum and no more upon the security of the note, and that such sum had been paid, amounts to an admission as to the sum alleged to have been advanced only. *Robins v. Maldstone*, 7 Jur. 694, 12 L. J. Q. B. N. S. 321, 4 Q. B. 811, Dav. & M. 30.

And where, in an action for rent, the defendant pleads *non tenore* and also tender of rent for a portion of the alleged term for which rent is claimed, and the defendant makes proof of tender in support of the latter plea, the plea of tender, and the evidence, taken together, do not amount to an admission of the tenancy, and is not evidence for the plaintiff of the tenancy as alleged, where nothing was said at the time of the tender about the terms of the holding or the time when rent became due. *Knight v. McDouall*, 12 Ad. & El. 438, 4 Perry & D. 168, 4 Jur. 939.

So, a denial in an action for a wrongful discharge under a contract for services, of the wrongful discharge, and an allegation that the plaintiff was not discharged but quit voluntarily, do not preclude the defendant from setting up any other defenses or contesting the demand upon other grounds, or prevent him from denying that the plaintiff rendered good or satisfactory services. *Koll v. Bush*, 6 Colo. App. 294, 40 Pac. 579.

But a denial in an action for compensation for services rendered that any sum was due the plaintiff from the defendant pursuant to the contract for services or otherwise will be treated as a denial only that any sum of money was due under the contract, where the answer does not deny that a valid contract was entered into, but merely sets up a written contract which is not materially different from the one stated in the complaint, except that the work was to be paid for by a conveyance of land, and in effect admitting the value of the work to be performed, and that it had not been satisfied by a transfer of land or otherwise; and the plaintiff can rest upon the contract set up and the admissions made by the defendant. *Schmid v. Busch*, 97 Cal. 187, 31 Pac. 893.

So, setting up title in himself by a defendant in an action to recover possession of goods alleged to have been fraudulently sold does not waive the right of the defendant to insist upon the absence of proof of demand and refusal to give up the goods. *Goodwin v. Wertheimer*, 39 N. Y. 149, 1 N. E. 404.

And judgment should not be rendered on motion on an allegation in an answer in an action for the claim and delivery of personal property denying the plaintiff's title and the wrongful withholding, and averring that the goods are the property of the defendants, setting up also as a distinct answer an averment in the nature of a counter statement, rather than a confession and avoidance. *Nudd v. Thompson*, 34 Cal. 39.

So, an admission of possession contained in a special defense in an answer in an action of ejectment must be confined to that defense, where the answer also contains a general denial, putting in issue all the material averments of the complaint; and this is so irrespective of the question whether the matters contained in that plea could or could not have been proved under the general denial. *Miller v. Chandler*, 59 Cal. 540.

And where the defendant in an action for the recovery of land pleads a general denial, and also sets up a claim for improvements made on the premises, the plaintiff will not be permitted to put the second plea in evidence to prove possession of the premises in the defendant, as it

is incumbent on the plaintiff to establish that upon the plea of the general issue. *Morris v. Henderson*, 37 Miss. 492.

And where, in an action for trespass, defendant files a general denial, and later files a further answer admitting the trespass but pleading in justification, the words "admitting the trespass," in the answer, are to be taken only as expressing the legal effect of the justification, and as independent of the plea of denial, and as not dispensing with the necessity of the plaintiff's first making out his case. *Grash v. Sater*, 6 Iowa, 302.

It is always competent for defendant, in trespass, to put the plaintiff on proof of his title under the general issue, however many special defenses he may set forth on the record; and the special pleas have no effect as admissions by way of estoppel with relation to any facts averred or admitted in them, as to the rights of the parties in the trial, unless the issues upon such special pleas become subjects of litigation, and then they estop only as admissions that operate to preclude proof in contradiction of the averment, or to dispense with proof of what is admitted by the pleadings. They in no manner operate as estoppels outside of the purpose of the principal issue taken upon such pleas themselves. *Child v. Allen*, 33 Vt. 476.

So, the effect of a general denial in an action to foreclose a mortgage is not destroyed by a separate plea on the part of the defendant setting up title in himself, as such defense does not expressly admit the deraignment of title in the plaintiff. *Siter v. Jewett*, 33 Cal. 92.

And judgment will not be rendered in an action for the breach of an official bond, on an allegation in the answer therein that the principal in the bond kept the public money in question in a safe in the room provided for that purpose, and that the safe was broken into and the money stolen, where it also contained a denial, separately stated, of all the allegations in the complaint. *Amador County v. Butterfield*, 51 Cal. 526.

And in *Merchants' Nat. Bank v. Macnaughton*, 1 Abb. N. C. 293, note, it was held that a defense consisting of a denial that the plaintiffs were a corporation will not be stricken out, and cannot be deemed frivolous merely because another defense charges that the defendant had dealt with them.

So, a plea in an action for damages for a collision with a horse and carriage by a person riding a bicycle, that at the time of the collision the horse and wagon were not under the control of the defendant, but were in charge of an independent contractor, is not superseded by another allegation that the horse and wagon were at the time owned by the defendant, and were being driven by him along the highway, and that the accident occurred from the negligence of the plaintiff, and not through any fault of the defendant, or of his servants and employees, so as to warrant the trial of the case upon the theory that the driver must have been the servant of the defendants. *Banta v. Siller*, 121 Cal. 414. 53 Pac. 935.

In the above case, *Bell v. Brown*, 22 Cal. 678, *supra*, II., was explained, the court saying that the language in that case relied on is correct when applied to the averments of any single separate defense, but is not applicable to the whole of an answer which contains different, distinct, and separate defenses.

See also, on the question of the operation of one plea as an admission as against another, cases from other parts of this note cited *infra* at the end of VII. b.

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b. Exceptions to the rule.

The courts of a number of the states, notably Minnesota, Missouri, Wisconsin, Kansas, and Louisiana, have adopted an apparently contrary rule allowing pleas containing admissions to operate as a waiver or admission as against other pleas less favorable to the plaintiff.

Thus, the statutory rule that a defendant may plead as many defenses and counterclaims as he has, although they may be based on inconsistent legal theories, does not affect the principle that an admission in an answer will not be affected by a repugnant denial in another part of the same answer. *South Milwaukee Boulevard Heights Co. v. Harte*, 95 Wis. 592, 70 N. W. 821.

And it is not affected by the fact that the fact admitted was stated by way of confession and avoidance. *Dickson v. Cole*, 34 Wis. 626.

Where allegations are made by a defendant in his answer which are against himself, and which limit, modify, or overturn other allegations inconsistent therewith which are in favor of himself, he is bound by the allegations against himself. *Bierer v. Fretz*, 32 Kan. 330, 4 Pac. 284; *Mitchell v. Ripley*, 5 Kan. App. 818, 49 Pac. 153.

A general denial is always qualified or limited by any admissions or inconsistent allegations in the pleading. *Hannem v. Pence*, 40 Minn. 127, 41 N. W. 637; *Rhinehart v. Whitehead*, 64 Wis. 47, 24 N. W. 401; *Nagel v. Mignot*, 8 Mart. (La.) 488; *Vavasour v. Bayon*, 11 Mart. (La.) 641; *Dean v. Jackson*, 1 Mart. N. S. 127.

If a fact be expressly admitted in any part of an answer, such fact is to be taken as true against the defendant, and the plaintiff is relieved from the necessity of proving it, though it may be controverted in some other part of the answer. *Dickson v. Cole*, 34 Wis. 626; *Hartwell v. Page*, 14 Wis. 52; *Wiley v. Keokuk*, 6 Kan. 94.

Whenever a defendant admits anything in his answer it will be presumed that the admission is intended to modify and control anything else that may be found in the answer in apparent conflict therewith. *Butler v. Kaulback*, 8 Kan. 671.

And where an answer in an action constitutes a mere denial of the plaintiff's right, and does not indicate the character of the defense if inconsistencies exist therein, the rule against inconsistent defenses should be applied to the admission of evidence. *Fugate v. Pierce*, 49 Mo. 441.

Thus, an answer containing a general denial, and also an averment that the instrument sued upon was made without consideration and in bad faith, admits the making of the assignments. *Barnum v. Kennedy*, 21 Kan. 181; *Nagel v. Mignot*, 8 Mart. (La.) 495.

And rigid rules requiring proof of the loss of the instrument by a fortuitous event would be dispensed with. *Nagel v. Mignot*, 8 Mart. (La.) 493.

And where a general denial and an allegation of performance of the contract in question are united in the same answer, the former will be disregarded. *Nagel v. Mignot*, 8 Mart. (La.) 488; *Vavasour v. Bayon*, 11 Mart. (La.) 641; *Dean v. Jackson*, 1 Mart. N. S. 127.

So, a plea of the general issue in an action for a money demand is waived by plea of payment or satisfaction. *Judice v. Brent*, 6 Mart. N. S. 226; *M'Micken v. Brent*, 6 Mart. N. S. 249; *Bryans v. Dunseth*, 1 Mart. N. S. 412; *Davis v. Millaudon*, 17 La. Ann. 97, 87 Am. Dec. 517.

And the inconsistency is not avoided by the

defendant's declaration that he did not intend to waive the benefit of the latter plea. *Davis v. Millaudon*, 17 La. Ann. 97, 87 Am. Dec. 517.

And an averment by the defendant in an action on a note that the obligation has been discharged, dispenses with proof of its execution, though the answer also contained a general denial. *Naba v. Carlin*, 3 Mart. N. S. 373.

So, a plea denying all and singular the allegations contained in the plaintiff's petition, and another plea alleging that the contract was a synallagmatic one, and two copies of it were not made according to law, are inconsistent so that evidence to establish the execution of the instrument is unnecessary. *Ferguson v. Thomas*, 3 Mart. N. S. 75.

And an answer in an action to recover upon a lost note averring that the defendant did not make any such note as that described in the petition, but that he did execute a note to plaintiff which by its description is the same described in the petition, with the additional description that it was made payable at a certain place and contained a stipulation that the plaintiff was not to trade it off, alleging that he had done so, admits the execution of the note sued upon. *Kinman v. Cannefax*, 34 Mo. 147.

So, an allegation in an answer in an action on an administrator's bond that the sureties were discharged in consequence of the gross negligence of the plaintiff necessarily admits the liability of the defendant if negligence is not shown and is a waiver of an allegation therein that the name of one of the sureties was signed thereto without authority, and that a third person was substituted for another who did not sign the bond though his name was inserted in the body of it. *McNamara v. Jarvis*, 2 La. Ann. 591.

And a general denial by insurance companies of knowledge of the acts of their agents in forming a combination to maintain rates in violation of a statute is not sufficient to raise an issue on that question, when the special defenses in the answer amount to a practical admission of such violation and challenge the constitutionality of the statute. *State, Crow, v. Firemen's Fund Ins. Co.* 152 Mo. 1, 45 L. R. A. 363, 52 S. W. 595.

And admissions in an answer in an action of ejectment may be availed of by the plaintiff though in another part the answer contained a general denial. *Farrell v. Hennessy*, 21 Wis. 633.

And an admission in an answer in such an action of title in the grantor of the plaintiff, previous to the date of his deed, may be availed of by the plaintiff though the answer contained also a general denial. *Orton v. Noonan*, 19 Wis. 351; *Sexton v. Rhames*, 13 Wis. 99.

And a general denial of plaintiff's title to land in controversy in an action for the recovery of its possession is overcome by a special answer admitting the right of the plaintiff by showing the circumstances under which the defendant entered. *Miller v. Larson*, 17 Wis. 624.

So, an admission in an action of ejectment that the plaintiff was the original owner of the property in controversy, and that the defendant held under him, operates as a modification of a general denial contained in the same answer, and relieves the plaintiff from the necessity of offering evidence to prove his title, and makes it incumbent upon the defendant to show that something had transpired whereby he had succeeded to the rights of the plaintiff. *Butler v. Kaulback*, 8 Kan. 671.

A defendant in an action of ejectment may plead a general denial, and also in the same au-

swer an equitable defense, and rely on that as an independent defense, but he should frame his pleading so as to show that he relies upon both defenses; if he unqualifiedly and absolutely pleads title or right to the possession out of himself and in the plaintiff but for the equities, the plaintiff should not be required to offer any evidence, especially if he waives damages, rents, and profits. *Ledbetter v. Ledbetter*, 88 Mo. 62.

So, under a general denial in an action for damages done to plaintiff's land in constructing a railroad over it, and a plea of confession and avoidance, the confession will be taken as true, and under it the plaintiff will be entitled to a verdict of some damages unless the defendant proved the matter of avoidance; but in such case the plaintiff will not, upon the mere admissions contained in the pleadings, be entitled to recover more than nominal damages, unless the pleading in terms admits the damages which the plaintiff claims, or some other damages. *McCord v. Doniphan Branch R. Co.* 21 Mo. App. 92.

And a plea of the statute of limitations in an action for the enforcement of a vendor's contract security for the purchase money of land, sold by him, which would go to rescind the contract and leave the title in the plaintiff, is waived by a plea in the same answer of payment, and a refusal on the part of the vendor to deliver a deed, concluding with a prayer for general relief which would be equivalent to a prayer for compelling the vendor to complete the contract. *Adair v. Adair*, 78 Mo. 630.

And an express averment in an answer in an action for the recovery of an alleged surplus in the hands of the defendant arising from lands, a mortgage upon which had been transferred to him to secure a debt, that he purchased the land in his own right and for his own use, relieves the plaintiff of the necessity of proving that fact in the first instance, notwithstanding the fact that the answer further averred that he did so because the plaintiff had theretofore released to him the claim on the notes and mortgage or the proceeds thereof. *Dickson v. Cole*, 34 Wis. 621.

As to effect of inconsistent plea as an admission, see also *Clarke v. Lyon County*, 7 Nev. 75, *supra*, VI. c. 1; *Lamberton v. Shannon*, 13 Wash. 404, 43 Pac. 336; *Maxwell v. Bolles*, 28 Or. 1, 41 Pac. 661, *supra*, VI. c. 2; *Rhine v. Montgomery*, 50 Mo. 566, *supra*, VI. c. 4; *Yandle v. Crane*, 13 Kan. 344; *First Nat. Bank v. Lincoln*, 36 Minn. 132, 30 N. W. 449, *supra*, VI. c. 5; *Nelson v. Brodhack*, 44 Mo. 596, 100 Am. Dec. 328; *Schaefer v. Causey*, 8 Mo. App. 142; *Booth v. Sherwood*, 12 Minn. 426, Gil. 310, *supra*, VI. c. 6; *Jackson v. Stetson*, 15 Mass. 48; *Alderman v. French*, 1 Pick. 1, 11 Am. Dec. 114, *supra*, VI. c. 7; *Rodgers v. Clement*, 162 N. Y. 422, 56 N. E. 901; *Jesus College v. Gibbs*, 1 Younge & C. Exch. 160; *Whittemore v. Stephens*, 48 Mich. 574, 12 N. W. 858, *supra*, IV. a; *Nadenbousch v. Sharer*, 2 W. Va. 285, *supra*, IV. c; *Kelly v. Singer Mfg. Co.* 4 Pa. Dist. R. 440, *supra*, II; *Chew v. Close*, 9 Phila. 211, *supra*, IV. a.

As to waiver of one plea by inserting another inconsistent one, see also *Shelby County v. Bickford*, 102 Tenn. 395, 52 S. W. 772; *Weiden v. Texas Continental Meat Co.* 65 Tex. 487; *Lewis v. Acker*, 11 How. Pr. 163; *Farmers' Ins. Co. v. Frick*, 29 Ohio St. 466; *Michael v. Mutual Ins. Co.* 10 La. Ann. 737, *supra*, VI. a. 1; *Andrews v. Hensler*, 6 Wall. 254, 18 L. ed. 737, *supra*, VI. c. 3; *Billings v. Drew*, 52 Cal. 565, *supra*, VI. c. 5; *South Milwaukee Boule-*

ward Heights Co. v. Harte, 95 Wis. 592, 70 N. W. 821, *supra*, VI. c. 6.

c. Explanation of the apparent conflict.

It is to be noted that in nearly if not all of the cases set forth *supra*, VII. b, the inconsistency was of fact and not by implication of law, and the admissions were formal and explicit, and it is thought that the true rule, at least outside of the five states there mentioned, and probably in them also, is that a less favorable defense can be treated as an admission or as a waiver of a more favorable one when and only when the inconsistency is one of fact and the admission was formal and explicit and might have been avoided, but that it cannot be so treated when the admission is by implication of law or is unavoidable in order to present all the defenses which the party was entitled to make.

Thus, a defendant pleading several pleas in his answer will not, under the Wyoming statute, be concluded from proving the truth of one plea by any implied admission contained in another, or by any implication of law arising therefrom. *Lake Shore & M. S. R. Co. v. Warren*, 3 Wyo. 134, 6 Pac. 724.

In the above case, the rulings of the supreme courts of Wisconsin, Minnesota, and Kansas were explained and distinguished, the court saying that the admissions in one plea which those courts have held conclusive against the defendant as against another plea were express.

So, where a defendant pleads specially, not as a defense, but solely with the view to having affirmative relief against a plaintiff, notice of which purpose the latter has from the pleading itself, the special plea does not cut off the defendant's right to rely on the general issue. *Morris v. Housley* (Tex. Civ. App.) 34 S. W. 659.

And an admission by a defendant in his answer that he executed the instrument set forth in the complaint cannot be relied upon by the defendant as proof of such execution, where in another portion of the answer all the material allegations of the complaint had been denied, and the admission was a mere confession for the purpose of avoidance, as the plaintiff cannot dismember a special plea and take the confession as a general admission in the suit. *Troy & R. R. Co. v. Kerr*, 17 Barb. 581.

So, where the law authorizes a defendant to plead several pleas he may use each plea in his defense, and the admissions unavoidably contained in one cannot be used against him in another. *Glenn v. Sumner*, 132 U. S. 152, 33 L. ed. 301, 10 Sup. Ct. Rep. 41; *Whitaker v. Freeman*, 12 N. C. (1 Dev. L.) 271.

But a clear and explicit admission in one defense in an answer of an allegation of a complaint denied in another defense in the same answer is available to the plaintiff, and relieves him from the necessity of proving the allegations in his complaint so admitted, when the admission was not unavoidable to him for the purpose of presenting the defense in which the admission was made. *McLaughlin v. Alexander*, 2 S. Dak. 226, 49 N. W. 99.

In the above case it was said that in a proper case it may be a serious question whether an exception should not be made as suggested by Mr. Justice Gray in *Glenn v. Sumner*, 132 U. S. 152, 33 L. ed. 301, 10 Sup. Ct. Rep. 41, *supra*, as to an admission not unavoidably made in order to entitle a party to properly present a defense.

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So, while an admission in one plea cannot be used to prove or disprove another plea, where it appears from the whole conduct of a cause that a particular fact is admitted between the parties, the jury may draw the same conclusion as to that fact as if it had been proved in evidence. *Stracy v. Blake*, 1 Mees. & W. 168, Tyrw. & G. 528.

And while special pleas of defendant are not admissible in evidence to prove facts therein alleged where a general denial is interposed, facts admitted in the pleading and not denied in other pleas are established against the party, though their construction and effect are for the court. *Bauman v. Chambers*, 91 Tex. 108, 41 S. W. 471.

And defenses which are inconsistent to the extent of being untrue are not sufficient to put the plaintiff upon proof. *Allen v. Olympia Light & P. Co.* 13 Wash. 807, 43 Pac. 55. And see *SEATTLE NAT. BANK v. JONES*.

A party who formally and explicitly admits by his pleading that which establishes the plaintiff's right will not be suffered to deny its existence or to prove any state of facts inconsistent with that admission, though in his answer he also denied any knowledge or information sufficient to form a belief as to a fact material to the plaintiff's case. *Paige v. Willet*, 38 N. Y. 28; *Willet v. Metropolitan Ins. Co.* 2 Bosw. 678; *Myrick v. Bill*, 3 Dak. 284, 17 N. W. 268; *Baird v. Morford*, 29 Iowa, 531.

And the rule is the same where one of the counts is by way of answer and defense to the allegations in the petition, and the other by way of the cross-demand. *Baird v. Morford*, 29 Iowa, 531.

And the general denial will be stricken out on motion, unless so amended as not to deny the allegations afterwards admitted. *Willet v. Metropolitan Ins. Co.* 2 Bosw. 678.

But the technical rule which supposes that special defenses confess and avoid when in fact they do not confess at all should not be adopted in determining the consistency or inconsistency of defenses. *McAdow v. Ross*, 53 Mo. 199; *Nelson v. Brodhack*, 44 Mo. 596, 100 Am. Dec. 328.

And a positive denial in an action for assault and battery is not waived by a subsequent plea of justification in the same answer. *Rhine v. Montgomery*, 50 Mo. 566.

And a general denial by the plaintiff in reply to an answer alleging the alteration of the instrument sued on and a plea of ratification of an agreement for an extension of time and of the alteration set up in the answer, if they admit the making of the agreement and of the alteration as set up in the answer, do not admit the validity and legal effect of such agreement and alteration, and are not therefore inconsistent. *Moore v. Macon Sav. Bank*, 22 Mo. App. 684.

So, a plea of no consideration for an assignment of a promissory note to the plaintiff is nullified by an admission in the same answer that the note was given for town lots, and that the plaintiff succeeded to the rights, properties, and liabilities of his assignor. *Ryan v. Middleborough Town-Lands Co.* (Ky.) 52 S. W. 33.

And a plea of not guilty in a statutory action in the nature of ejectment admits possession of the defendant and denies plaintiff's right thereto, and a disclaimer denies that the defendant was in possession when the action was brought, and therefore a plea of not guilty is incompatible with the disclaimer, and the two cannot be pleaded together, and the former will be deemed a waiver of the latter. *Bernstein v. Humes*, 60 Ala. 582, 31 Am. Rep. 52; *McQueen v. Lampley*, 74 Ala. 408.

But a plea in trespass to try title by virtue of a conveyance of land by the defendant, that the land was defendant's homestead when the conveyance was made, presents no defense, and will not stand the test of a general demurrer, and therefore will not operate to prevent the defendant from showing under his plea of not guilty that the conveyance was in fact a mortgage and void because given on a homestead. *Wiggins v. Wiggins*, 16 Tex. Civ. App. 335, 40 S. W. 643.

VIII. Inconsistency, how taken advantage of.

While inconsistency between defenses may be taken advantage of by treating the least favorable one as an admission and as nullifying the more favorable ones where the inconsistency is of fact, it is also frequently taken advantage of by a motion to require the pleader to elect upon which defenses he will rely, by motion to strike out one of the defenses and by demurrer.

The fact that two defenses in an answer are inconsistent does not, at least unless they are inconsistent in fact, authorize the plaintiff to disregard them or either of them at the trial.

If he desires to present the question he should move to strike out the one or the other, or apply for an order compelling the defendant to elect as to which particular defense he will rely on. *Buhne v. Corbett*, 43 Cal. 264; *Spencer v. Tooker*, 12 Abb. Pr. 353.

He is not entitled to judgment on the pleadings because several defenses set up in the answer are inconsistent with each other. *Botto v. Vandament*, 67 Cal. 332, 7 Pac. 753.

The appropriate and most usual course is to require the pleader to elect upon which defense he will rely. *Munn v. Taulman*, 1 Kan. 254, 81 Am. Dec. 508; *Dunn v. Bozarth* (Neb.) 80 N. W. 811; *Lynch v. Richter*, 10 Wash. 486, 39 Pac. 125; *Noonan v. Bradley*, 9 Wall. 394, 10 L. ed. 757.

And see *Conway v. Wharton*, 13 Minn. 158, Gil. 145, *infra*; *Arnold v. Dimon*, 4 Sandf. 680, *supra*, IV. a.

And where a defendant sets up separate and distinct defenses in his answer which are inconsistent with each other, the court should require him to elect upon which of the defenses he will rely, and the evidence upon the trial should be confined to the defense upon which he elects to stand. *Ferguson v. Prince*, 2 Kan. App. 7, 41 Pac. 988.

He should be allowed to elect between them, and to amend by striking out the defense which he discards, and the allowance of such an amendment does not prejudice the rights of the plaintiff or furnish him with grounds for appeal. *Breunich v. Weselman*, 100 N. Y. 609, 2 N. E. 385.

And where a defendant is required to elect between two inconsistent defenses, and the record states that he elected to stand upon the first one, but it appears that the issue tendered in the second defense was in fact the real issue tried, the court on appeal will treat the case as involving the issue made by the second defense only. *Smith v. Culligan*, 74 Mo. 389.

As a general rule an objection that an answer presents inconsistent defenses is waived by a failure to move to require the defendant to elect upon which he will rely. *Dunn v. Bozarth* (Neb.) 80 N. W. 811; *Lynch v. Richter*, 10 Wash. 486, 39 Pac. 125.

And in such case the plaintiff cannot take advantage of such defect by way of request for instructions. *Lynch v. Richter*, 10 Wash. 486, 39 Pac. 125.

Requiring a defendant to elect between two

defenses which are not inconsistent, however, is prejudicial error. *Grier Commission Co. v. Dockstader*, 47 Mo. App. 42.

See also, as to requiring the pleader to elect, *Parks v. McClellan*, 44 N. J. L. 552; *Riley v. Riley*, 20 N. J. L. 114; *LeConte v. Pendleton*, 1 Johns Cas. 104; *Trotter v. Mills*, 6 Wend. 312. —*supra*, IV. 3; *Societa Italiana Di Beneficenza v. Sulzer*, 138 N. Y. 468, 34 N. E. 133, *supra*, VI. a.; *Bell v. Brown*, 22 Cal. 671, *supra*, VI. b. 1; *Kelly v. Bernheimer*, 3 Thomp. & C. 140; *Springer v. Dwyer*, 50 N. Y. 19; *Cook v. Finch*, 19 Minn. 407, Gil. 350; *Bird & M. Map Co. v. Jones*, 27 Kan. 177; *Black v. Holloway*, 19 Ky. L. Rep. 694, 41 S. W. 576, —*supra*, VI. c. 1; *Lawrence v. Peck*, 3 S. Dak. 645, 54 N. W. 808; *Pavey v. Pavey*, 80 Ohio St. 600; *Patrick v. Boonville Gaslight Co.* 17 Mo. App. 465; *Shed v. Augustine*, 14 Kan. 282; *Brann v. Brann*, 19 Ky. L. Rep. 1814, 44 S. W. 424. —*supra*, VI. c. 2; *Grier Commission Co. v. Dockstader*, 47 Mo. App. 42, *supra*, VI. c. 3; *Willson v. Cleaveland*, 30 Cal. 195; *Keane v. Kyne*, 2 Mo. App. 317; *Hoooven & A. Co. v. National Cordage Co.* 27 Ohio L. J. 18, —*supra*, VI. c. 6; *Horton v. Banner*, 6 Bush, 596; *Ormsby v. Douglass*, 2 Abb. Pr. 407, 5 Duer, 665; *Lane v. Bryant*, 100 Ky. 138, 36 L. R. A. 708, 37 S. W. 584, —*supra*, VI. c. 7; *Smith v. Culligan*, 74 Mo. 389; *Ferguson v. Prince*, 2 Kan. App. 7, 41 Pac. 988; *Auld v. Butcher*, 2 Kan. 136, —*supra*, VI. c. 8.

In a number of the courts, however, motions to strike out one of the inconsistent defenses have been sustained, notwithstanding the fact that such a course deprives the pleader of the right to elect upon which he will rely.

Thus, under the rules prescribed by the circuit court in South Carolina the proper method of objection to inconsistent defenses is by motion to strike one of the inconsistent defenses from the record. It should be made before trial. *Cohrs v. Fraser*, 5 S. C. N. S. 351.

And the same rule obtains in Alabama. *Cleveland v. Chandler*, 3 Stew. (Ala.) 482.

And in California if inconsistent defenses are set up the defect may be reached by motion to strike out one of them. *Uridias v. Morrell*, 25 Cal. 31; *Klink v. Cohen*, 13 Cal. 623.

Or in some cases by demurrer. *Klink v. Cohen*, 13 Cal. 623.

And in Iowa an objection that a set-off is pleaded with a general denial in an answer where they are in a clearly defined and distinct division thereof should be taken by demurrer or motion to strike out, and cannot be taken after issue is joined by a replication. *Pike v. King*, 16 Iowa, 49.

Error in refusing to strike out inconsistent pleas in a reply to affirmative matter in an answer, however, is cured by the action of the court in disregarding that portion of the reply, and trying the case upon the theory that it was entirely irrelevant and immaterial. *Davis v. Ford*, 15 Wash. 107, 45 Pac. 739, 46 Pac. 303.

And where an answer in an action for recovery for services alleged to have been rendered alleging that when defendant heard of the employment of the plaintiff it discharged him and offered to pay him what his services were worth, also contains a general denial, the defendant is not prejudiced by an order striking out all but the general denial, as all the evidence which could have been received thereunder is admissible under the general denial. *People's Nat. Bank v. Gelsthardt*, 55 Neb. 232, 75 N. W. 582.

So, striking out a plea in an answer on the ground that it is inconsistent with another plea therein is not reversible error though errone-

ous, where no evidence was rejected on account of its absence, and the defendant litigated every question of fact so far and as fully as it could have done if the pleading had remained. *Grand Chute v. Winegar*, 15 Wall. 355, 21 L. ed. 170.

The Minnesota statute does not in terms authorize a defense to be stricken out for inconsistency, and in most cases in which one defense is inconsistent with another the better practice would be to require the court to compel the defendant to elect upon which defense he will stand rather than to strike it out. *Conway v. Wharton*, 13 Minn. 158, Gil. 145.

As to striking out pleas as inconsistent or contradictory, see also *Lay v. Filmore*, 75 Miss. 493, 23 So. 184; *Marx v. Gross*, 26 Jones & S. 221, 9 N. Y. Supp. 719; *Wright v. Card*, 16 R. I. 719, 19 Atl. 709;—*supra*, VI. c. 1; *Shepard v. Starrett*, 35 Mo. 367, *supra*, VI. c. 2; *Kellogg v. Baker*, 15 Abb. Pr. 286, *supra*, VI. c. 4; *Duffield v. Denver & R. G. R. Co.* 5 Colo. App. 25, 36 Pac. 622, *supra*, VI. c. 5; *Newsom v. Guy*, 109 Ala. 305, 19 So. 448, *supra*, VI. c. 6; *Rowland v. Dalton*, 36 Miss. 702; *Tabor v. Commercial Nat. Bank*, 27 U. S. App. 111, 62 Fed. Rep. 383, 10 C. C. A. 429, *supra*, VI. c. 8. And see *Willett v. Metropolitan Ins. Co.* 2 Bosw. 678, *supra*, VII. b. 1.

The question whether or not inconsistency between different defenses in an answer may be reached by demurrer seems to depend upon the language of the statute providing for demurrer and prescribing the grounds therefor.

Thus, in Indiana it has been held that a plea which contains repugnant allegations respecting material matter is bad on general demurrer, as the contradictory averments destroy each other. *Barber v. Summers*, 5 Blackf. 339.

And a demurrer has been held proper in other courts. See *Klink v. Cohen*, 13 Cal. 623; *Pike v. King*, 16 Iowa, 49, *supra*.

And in *Furniss v. Ellis*, 2 Brock. 14, Fed. Cas. No. 5,162, it was held that where in an action of assumpsit the defendant both pleads the general issue and demurs, and the plaintiff takes issue on the plea but refuses to join in the demurrer, it amounts to a discontinuance under the Virginia statute authorizing the court to nonsuit the plaintiff, as pleading the general issue with the demurrer amounts to pleading double, but is not a positive inconsistency.

Upon the other hand, however, it has been held that repugnancy in an answer is matter of form and cannot be noticed on general demurrer. *Com. v. Myers*, 1 Va. Cas. 188; *Munn v. Taulman*, 1 Kan. 258, 81 Am. Dec. 508.

And that a demurrer cannot reach the order of pleading by the defendant if a plea in abatement and a plea in bar be pleaded together. *Cleveland v. Chandler*, 3 Stew. (Ala.) 489.

So, an objection that an answer contains inconsistent allegations and denials cannot be made by demurrer, where the grounds upon which a party may demur are specified and enumerated in the statute and such objection is not included; and when such objection exists in such case it should be taken advantage of by motion to strike out, or to require the party pleading to elect between the inconsistent pleas. *Caldwell v. Ruddy*, 2 Idaho, 5, 1 Pac. 330.

And a demurrer to an answer containing a general denial, and also matter specially pleaded, is too broad, unless in the special pleas there is an express or implied admission of all the material allegations of the petition. In the absence of such admission the demurrer should go to the new matter alone. *State ex rel. Davis v. Rogers*, 79 Mo. 286.

A demurrer to an answer will not be sustained 48 L. R. A.

for mere inconsistency, indefiniteness, or repugnancy, if some fact or facts are averred positively, and the indefiniteness, inconsistency, or repugnancy is not such as to render the averment meaningless. *Second Nat. Bank v. Hart*, 8 Ind. App. 19, 35 N. E. 302.

As to demurrer for repugnance, see also *Second Nat. Bank v. Hart*, 8 Ind. App. 19, 35 N. E. 302, *supra*, VI. b. 2; *Wright v. Card*, 16 R. I. 719, 19 Atl. 709; *Bernays v. United States Mut. Accl. Asso.* 45 Fed. Rep. 455, *supra*, VI. c. 1; *Strouse v. Leips*, 101 Ala. 433, 23 L. R. A. 622, 14 So. 667, *supra*, VI. c. 4; *Scranton v. Bosarge* (Miss.) 19 So. 194, *supra*, VI. c. 6; *Martin v. Woods*, 6 Mass. 6; *William v. Harris*, 2 How. (Miss.) 627; *Byas v. Wylie*, 1 Comp. M. & R. 686, 3 Dowl. P. C. 524, 5 Tyrw. 377, 1 Gale, 50; *Robins v. Crutchley*, 2 Wils. 118; *Barber v. Summers*, 5 Blackf. 339, *supra*, IV. a.

The proper mode of interposing the objection that a defense set up in an amended answer is inconsistent with the defense in the original answer is by appealing from the order permitting the defense to be made. *Bruce v. Burr*, 67 N. Y. 237.

It is not the province of the judge to order a correction of errors or removal of defects in pleas consisting of inconsistencies between the pleas in an answer, upon its own motion, though on application he may permit it to be done; and it is error for the court, upon its own motion, to declare defenses inconsistent and contradictory and direct the defendant to elect upon which he will rely. *Ten Broeck v. Orchard*, 79 N. C. 518.

If inconsistent defenses are set up in an answer, advantage must be taken of it by motion or demurrer; otherwise the defect is waived; and at the trial a party may rely upon both defenses. *Conway v. Clinton*, 1 Utah, 215; *Urias v. Morrell*, 25 Cal. 31.

Or he may, as under the old system of pleading, rely on the matter of his last defense unaffected by the statements in a prior, separate, and distinct defense. *Klink v. Cohen*, 13 Cal. 623.

Repugnancy between pleas in an answer is ground for not receiving them, and if they have been received it is too late to object to them on that ground. *Com. v. Myers*, 1 Va. Cas. 188, *dictum*.

And objection to inconsistency of pleas in an answer cannot be made for the first time in the appellate court on appeal. *Peoria & P. U. R. Co. v. Barton*, 38 Ill. App. 469.

When the court rules that two defenses in an answer are inconsistent, the defendant is at liberty to stand upon an exception taken to the ruling, and need not antagonize the court by insisting further on its right to establish both defenses, and will not be prejudiced by a failure to offer evidence bearing upon the one stricken out. *Conklin v. Woodbury Dermatological Inst.* 37 App. Div. 610, 56 N. Y. Supp. 258.

And going to trial upon an issue made by a plea in an answer is not a waiver of exception to the ruling of the court striking out another plea for repugnancy. *Tucker v. Edwards*, 7 Colo. 209, 3 Pac. 233.

Overruling an exception to an answer in an action of trespass to try title, pleading a general denial and not guilty, and also containing a plea in reconvention, if erroneous, is not prejudicial error where no evidence was offered under the plea. *Koenigheim v. Miles*, 67 Tex. 116, 2 S. W. 81.

The circuit courts of the United States are

governed, on the question of the sufficiency and scope of pleading with reference to consistency and repugnancy in actions at law, by the practice of the courts in the state in which they are held. *Glenn v. Sumner*, 132 U. S. 152, 33 L. ed. 301, 10 Sup. Ct. Rep. 41.

IX. Conclusion.

This is a practice question, and one in which radical changes have been made by statute at different times. This, with a conservative tendency upon the part of the courts to import the principles of the old procedure into the new after a change, has given rise to apparently radical conflicts of authority, and it has been repeatedly held under the same system of pleading and without apparent qualification, upon the one hand, that a defendant may set up all the defenses he may have, whether consistent or inconsistent, and, upon the other hand, that he may set up all the defenses he may have provided they are not inconsistent. Comparing these apparently conflicting cases, however, unqualified as they are, with rules laid down in some of the most carefully considered cases, as to what is inconsistency, and as to different kinds of inconsistency, and as to the test of inconsistency which will vitiate a pleading, will show, it is thought, that the rule that there are two kinds of inconsistency,—inconsistency of fact consisting of absolute contradiction in matters of fact, and inconsistency by implication

of law consisting of an incompatibility arising from the union of denials and admissions by implication of law for the purpose of avoidance,—and that all inconsistency is permissible, at least in equity and under reform procedure, except absolute inconsistency of fact of such a character that if one statement be true another must be false. Even the Missouri cases under a statute permitting only consistent pleas, and those of the other states holding that pleas must be consistent, with the possible exception of those of Louisiana, are reconciled by this rule, those cases having defined the prohibited inconsistency to be inconsistency of fact. And this theory also reconciles the apparent conflict of authority as to what inconsistency will act as an admission, and dispense with proof of the admitted facts, as the rule under both classes of cases would be that to have this effect the inconsistency would have to be one of fact, such that if the admission were true the denial must be false.

While absolute inconsistency in fact in a pleading may be treated as establishing the facts alleged in it most favorable to the opposite party, inconsistency may also be taken advantage of by motion to compel the pleader to elect between the inconsistent pleas, by motion to strike out, and by demurrer, motion to compel an election appearing to be the favored method.

F. H. B.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Thomas C. HINDMAN, *Plff. in Err.*,

v.

FIRST NATIONAL BANK OF LOUISVILLE *et al.*

(98 Fed. Rep. 562.)

A false certificate by the cashier of a bank, stating that an insurance company had on deposit subject to check certain amounts of paid-up capital and net surplus, made to assist the company to obtain a license and authorized by the board of directors, who knew it to be false, and the publication of the same statement in the public press, to which the bank was privy, for the purpose of securing a large bank deposit and of selling stock held by the bank as collateral, render the bank liable for deceit to a person who bought worthless stock of the insurance company in reliance on this statement.

(November 13, 1899.)

ERROR to the Circuit Court of the United States for the District of Kentucky to review a judgment in favor of defendant in an action brought to hold it liable for losses incurred by plaintiff in purchasing stock of an insurance company upon representations made by defendant. *Reversed.*

Before Taft and Lorton, Circuit Judges, and Ricks, District Judge.

NOTE.—As to right to rely on published statements by banks, see *Gerner v. Mosher* (Neb.) 46 L. R. A. 244.

48 L. R. A.

Statement by Taft, Circuit Judge:

This is a writ of error brought to review the judgment of the circuit court of Kentucky sustaining the demurrer to the reformed and amended petition of Thomas C. Hindman against the First National Bank of Louisville and others seeking to recover damages for loss sustained by the plaintiff in the purchase of eighty shares of the capital stock of the Columbian Fire Insurance Company, which purchase was induced, the petition alleges, by certain fraudulent misrepresentations of the bank and other defendants. The petition originally was ordered by the court to be reformed. A demurrer was filed to the reformed petition, and was sustained. The plaintiff then asked leave to amend, which was granted. The amendment was filed, and a new demurrer filed. This was sustained, and judgment entered for the defendant. (C. C.) 86 Fed. Rep. 1013. The reformed petition makes parties defendant the First National Bank of Louisville, C. B. Sullivan, A. W. Hart, and James S. Ray. Ray is made a defendant simply as receiver of the Columbian Insurance Company, and not as a party to the transactions charged against the other defendants. The petition, after setting up the necessary jurisdictional facts as to the diverse citizenship of the plaintiff and defendants, avers that in January, 1893, certain persons duly organized the Columbian Fire Insurance Company under the laws of Kentucky, and applied to the insurance commissioner of that state to do business as such

therein, with a capital of \$200,000 and a surplus of \$50,000; that the commissioner entered upon an investigation of the affairs of the company; that the incorporators falsely represented that the capital had been paid in full, and that in addition the company had \$48,000 surplus in cash, free from debts and liabilities, and that the whole sum of \$248,182.90 was on deposit in the First National Bank of Louisville, and subject to check; that the commissioner applied to the bank for confirmation of this statement; that the board of directors of the bank, knowing the object of the inquiry, caused the bank cashier to make a sworn certificate to the insurance commissioner that the insurance company had on deposit \$248,000 of capital paid in and net surplus; that the statement was untrue, and was made for the fraudulent purpose of enabling the insurance company to deceive the commissioner and secure a license to do business, when it was not lawfully entitled to one; that it was done in pursuance of a conspiracy between the bank and the officers of the insurance company, C. B. Sullivan, A. W. Hart, and others; that, to give the false appearance of such a deposit as was certified, the insurance company and the bank pretended to make certain discounts of promissory notes of notoriously insolvent persons, each of which had been given, as the bank knew, in payment of the maker's subscription to the stock of the insurance company; that the bank had gone through the form of discounting the notes on the indorsement or guaranty of the insurance company, and of placing the proceeds to the credit of the latter on the bank's books; that many of the said notes were not discounted in good faith; that the proceeds thereof were never intended to be, and were never in fact, subject to checks of the insurance company, and the bank had at all times retained a lien on the fund thus apparently standing to the credit of the insurance company. The petition proceeds:

"Plaintiff says that the said First National Bank united with said insurance company and other named defendants, except Ray, in this said fraud, for the purpose of obtaining the benefit that would result to it from having said insurance company keep a large deposit with said bank; it having been previously agreed and understood between said bank and said insurance company that the latter would, if licensed to do business, keep a large amount of cash on deposit with said bank at all times. Plaintiff says that in compliance with this agreement said insurance company did thereafter at all times during its existence keep a large amount of cash on deposit in said bank, which deposit was of great value and benefit to said bank. Plaintiff says that said insurance company, having in the fraudulent manner herein recited, obtained license to do business in Kentucky and in other states, commenced at once to engage in the fire-insurance business throughout the various states in which it was licensed. Plaintiff says that said defendants, except Ray, further represented to the plaintiff and to the public, by publica-

tions, that the said company had said cash capital and surplus amounting to \$248,182.90, which publications were made in the public prints and scattered over the country, and which were seen and relied upon by plaintiff, and falsely represented that there were no mortgages upon the same or liens upon the same, and that the stock had been paid for at \$125 a share, and that the company was organized and ready for business, and made representations to the effect that the said company was a bona fide company, with a sound capital, properly organized; and plaintiff alleges that all the parties named in the caption hereof co-operated with said insurance company and said bank and the officers thereof, and the other defendants except Ray, in setting said company on foot, and publishing that said cash capital and surplus of \$250,000 had been paid up in cash, bona fide, in accordance with said representation. . . . And this plaintiff alleges that by the representations and publications of the defendants, and by the issue of the said statement by said bank to the said Duncan, and the licensing of said company by said Duncan, insurance commissioner, he was deceived, . . . and while deceived by the false representations and deceit and false and fraudulent conspiracy of said defendants in setting on foot and floating said company, and while ignorant of the fraud practised upon him and the public, and when he believed the representations and publications aforesaid to be true, and the false and fraudulent insurance company to be a bona fide and genuine insurance company, properly licensed, purchased on February 6, 1893, eighty shares of the capital stock of the said Columbian Fire Insurance Company of America at the price of \$125 a share, making a total of \$10,000, . . . all of which said shares were paid for in cash by said plaintiff, and were issued to him on the 6th day of February, 1893.

"Plaintiff says that it was the purpose of all the said defendants, except Ray, to put stock of said insurance company on the market to be sold, to make up said capital stock, which was short, as hereinbefore alleged, and that the defendants A. W. Hart and C. B. Sullivan, representing themselves and the said other defendants, and acting in collusion with all the other defendants, except Ray, represented to the plaintiff that the said stock thus sold to him had been paid for, bona fide, in cash by the original subscriber therefor, which representation was false, and known to them and the other defendants to be false, and that said original certificates would be taken up, and new certificates issued in lieu thereof to the plaintiff; and plaintiff alleges that, as a matter of fact, the shares of stock which were so canceled, and in place of which the certificates filed herewith were issued to him, were shares of stock which had been originally issued to C. B. Sullivan, and for which he had subscribed and not paid, and which had never been paid for by him or any person whomsoever, and alleges that said stock which was thus sold to him was a part of the stock used as col-

lateral in the pretended discounting of notes, by which, on the guaranty or indorsement of the insurance company, money was placed to the credit of said insurance company, to make up the fictitious capital thereof, by the First National Bank, and said bank participated in said frauds, and got the benefit of said payment made by said plaintiff for his stock. All of the defendants, except Ray, knew of the shortage in said capital stock, and fraudulently conspired and contrived the setting on foot of the said insurance company, and the selling of said stock to this plaintiff; and plaintiff alleges that said stock, at the time of the sale to him, and at all times during the existence of the company, was absolutely worthless, and known to be so by all said defendants, who knew that said company started in said fraudulent manner, and was unsound. Plaintiff alleges that said company continued in business as a fire insurance company for about fourteen months, but by reason of its not having its capital stock as aforesaid, and of the aforesaid shortage in its capital stock, it was forced to make an assignment on February 27, 1894, and did so assign, and became and was at all times from its inception insolvent, and the stock was and is absolutely worthless."

By amendment to the petition, plaintiff further averred as follows:

"Plaintiff alleges that it was a part of the plan and design of said defendants, among whom was said bank, to have said stock put in the name of parties who did not intend in good faith to take the same, and this was the case with the said stock of C. B. Sullivan, which was sold to plaintiff; and the purpose of so doing was to put off upon plaintiff and sell to him the stock in the said fraudulent insurance company, the said Hindman, plaintiff, to pay cash therefor, and under said plan the said plaintiff was in reality the first allottee of said stock; the said C. B. Sullivan, as plaintiff alleges, being in league with and co-operating with the said bank and other defendants to so sell stock which he had never intended to pay for himself, and to put on foot said insurance company without the alleged capital and surplus, and without the capital paid in as required by law, and knowing that the same had not been paid in. Wherefore plaintiff prays as heretofore, and for all proper relief."

Judge Barr, who presided in the circuit court, sustained the demurrer on the ground that the misrepresentations set forth were addressed to the original allottees of the stock, and not to the plaintiff, who was a purchaser from an original allottee; following in this the authority of the case of *Peek v. Gurney*, L. R. 6 H. L. 378.

Messrs. Barnett, Millex, & Barnett, A. M. Rutledge, and W. W. Thum, for plaintiff in error:

A similar petition seems to have been approved in the case of *Murray v. McGarigle*, 69 Wis. 483. 34 N. W. 522.

To organize an insurance stock company by the giving of notes, which are discounted, and the proceeds of which are placed to the

credit of the insurance company, the company remaining contingently bound, is absolutely unlawful under the Kentucky statutes.

To induce persons to take stock in such a scheme by representing that a bona fide corporation has been formed, and that it has its capital and surplus paid up in money, and is in all respects in accordance with the laws of the state, is a fraud. For several persons to co-operate in maintaining such an enterprise is a conspiracy. For some of the persons to make representations by prospectuses or by verbal statements directly to the taker or buyer of stock, and for the others, either corporations or individuals, to forward the scheme by making false representations to the insurance commissioner, and thereby to secure a license for a bubble company, so that it can be launched and begin business, is to make the second parties responsible for the acts and declarations of the first, and to make all parties liable in damages for injury inflicted upon one who subscribes for or buys stock previously or subsequently in the bubble company thus brought into existence, launched, and made to operate as though it were a real company.

2 Pom. Eq. Jur. §§ 880 *et seq.*; *Ellerbe v. National Exch. Bank*, 109 Mo. 446, 19 S. W. 241; *Salmon v. Richardson*, 30 Conn. 360, 79 Am. Dec. 255; *Morse v. Swits*, 19 How. Pr. 286; *Bush v. Sprague*, 51 Mich. 41, 16 N. W. 222; *Warren v. Barker*, 2 Duv. 156; *Dent v. McGrath*, 3 Bush, 176; *Hornblower v. Crandall*, 78 Mo. 581; *Simons v. Vulcan Oil & Min. Co.* 61 Pa. 202, 100 Am. Dec. 628; *Vreeland v. New Jersey Stone Co.* 29 N. J. Eq. 195; *Chester v. Dickerson*, 54 N. Y. 1. 13 Am. Rep. 550; *Cross v. Sackett*, 2 Bosw. 617; *Cazeaux v. Mali*, 25 Barb. 583; *Morgan v. Skiddy*, 62 N. Y. 319; *Miller v. Barber*, 66 N. Y. 558; *Bradley v. Poole*, 98 Mass. 169. 93 Am. Dec. 144; *New Sombra Phosphate Co. v. Erlanger*, 25 Week. Rep. 436; *Cook, Stock & Stockholders*, § 176, note 1; *Salem Mill Dam Corp. v. Ropes*, 6 Pick. 23, 9 Pick. 187; *Bray v. Farwell*, 81 N. Y. 600; *Fry v. Lexington & B. S. R. Co.* 2 Met. (Ky.) 314; *Lail v. Mt. Sterling Coal R. Co.* 13 Bush. 34; *Hain v. Northwestern Gravel Road Co.* 41 Ind. 196; *Central Turnp. Corp. v. Valentine*, 10 Pick. 142.

It is not necessary that a bad motive should enter into the perpetration of a fraud.

Pom. Eq. Jur. § 880; *Peek v. Gurney*, L. R. 6 H. L. 373.

One party uniting in the common object may not be present when the fraudulent representations are made to the buyer of stock; may not know that they are actually made; yet if the buyer has been induced thereby to take the stock, and that one party be united in a common effort, and perform and act in consummation of the fraud, either previously or subsequently, he is equally guilty and equally liable.

Savile v. Roberts, 1 Ld. Raym. 374; *Tappan v. Powers*, 2 Hall, 277; *Parker v. Huntington*, 2 Gray, 124; *Boven v. Matheson*, 1 Allen, 499; *Kimball v. Harman*, 34 Md. 401; 6 Am. Rep. 340; *Hauser v. Tate*, 85 N. C. 81.

39 Am. Rep. 689; *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172; *Nudd v. Burrows*, 91 U. S. 426, 437, 23 L. ed. 286, 289; *United States v. Gooding*, 12 Wheat. 469, 6 L. ed. 696; *Sundry Goods, Wares, & Merchandises v. United States*, 2 Pet. 358, 365, 7 L. ed. 450, 453; *Lincoln v. Clafin*, 7 Wall. 132, 19 L. ed. 106; *Buffalo Lubricating Oil Co. v. Standard Oil Co.* 106 N. Y. 669, 12 N. E. 825; *Morton v. Metropolitan L. Ins. Co.* 34 Hun, 366, Affirmed in 103 N. Y. 645; *Reed v. Home Sav. Bank*, 130 Mass. 443, 39 Am. Rep. 468; *Krulervitz v. Eastern R. Co.* 140 Mass. 575, 5 N. E. 500; *Western News Co. v. Wilmarth*, 33 Kan. 510, 6 Pac. 786; 2 *Thomp. Corp.* §§ 1474, 1475.

A corporation, and a national bank, like other corporations, is liable in tort for the frauds of its officers; invariably liable when those frauds are within the scope of the general business of the bank; and also liable when those frauds, being outside the general business of the bank, are yet such as the bank enables its officers to commit, and authorizes and ratifies.

Nevada Bank v. Portland Nat. Bank, 59 Fed. Rep. 338; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. ed. 1005; *First Nat. Bank v. Graham*, 100 U. S. 699-702, 25 L. ed. 750, 751; *Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 14 L. ed. 502; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 202, 16 L. ed. 73; *Etting v. Bank of United States*, 11 Wheat. 59, 6 L. ed. 419; *Bissell v. Michigan S. & N. I. R. Cos.*, 22 N. Y. 258; *Randolph v. Allen*, 41 U. S. App. 117, 73 Fed. Rep. 23, 19 C. C. A. 353; *Newton v. Newton Nat. Bank*, 27 U. S. App. 712, 66 Fed. Rep. 701, 14 C. C. A. 71; *Brokaw v. New Jersey R. & Transp. Co.* 32 N. J. L. 328; *Owens v. Montgomery & W. Pt. R. Co.* 37 Ala. 560; *Stiles v. Cardiff Steam Nav. Co.* 33 L. J. Q. B. N. S. 310; *Goodspeed v. East Haddam Bank*, 22 Conn. 530, 58 Am. Dec. 439; *Reed v. Home Sav. Bank*, 130 Mass. 443, 39 Am. Rep. 468; *Buffalo Lubricating Oil Co. v. Standard Oil Co.* 106 N. Y. 669, 12 N. E. 825; *Salt Lake City v. Hollister*, 118 U. S. 256-263, 30 L. ed. 176-178, 6 Sup. Ct. Rep. 1055.

A corporation may be held liable for conspiracy as for other torts.

Buffalo Lubricating Oil Co. v. Standard Oil Co. 106 N. Y. 669, 12 N. E. 825; *Morton v. Metropolitan L. Ins. Co.* 34 Hun, 366, 103 N. Y. 645; *Reed v. Home Sav. Bank*, 130 Mass. 443, 39 Am. Rep. 468; *Krulervitz v. Eastern R. Co.* 140 Mass. 575, 5 N. E. 500; *Western News Co. v. Wilmarth*, 33 Kan. 510, 6 Pac. 786.

The act of the bank in making a false and fraudulent return and sworn certificate to the insurance commissioner was a part of the scheme to consummate the conspiracy and fraud by which the plaintiff lost his money; and it would have been liable even if the plaintiff had subscribed for the stock and put up his money and been deceived by the representations of the other conspirators before December 31, 1892, and before the making of the affidavit of the cashier of the bank to the insurance commissioner.

18 L. R. A.

If the cashier's act gives existence to the bogus company, those persons who have acted upon the declaration of any of the conspirators, who have joined in the unlawful purpose, are injured by the act of the bank whether they subscribed for their stock either prior or subsequently thereto; for there would have been no such company but for such action, and there would have been no resulting loss; and all parties participating in the scheme are equally guilty.

James v. Crosthwait, 97 Ga. 673, 36 L. R. A. 631, 25 S. E. 754; *Wilson v. Pauly*, 37 U. S. App. 642, 72 Fed. Rep. 129, 18 C. C. A. 475; *Chemical Nat. Bank v. Armstrong*, 31 U. S. App. 75, 65 Fed. Rep. 573, 13 C. C. A. 47, 28 L. R. A. 239; 4 *Thomp. Corp.* §§ 4777, 4779, 4824-4826; *Squires v. First Nat. Bank*, 59 Ill. App. 134; *Bank of Kentucky v. Schuykill Bank*, 1 Pars. Sel. Eq. Cas. 180; *Badger v. Bank of Cumberland*, 26 Me. 428; *Robinson v. Bealle*, 20 Ga. 275; *Hagerstown Bank v. London Sav. Fund Soc.* 3 Grant, Cas. 135; 5 *Thomp. Corp.* §§ 6279-6353; *Manhattan Bank v. Walker*, 130 U. S. 267, 32 L. ed. 959, 9 Sup. Ct. Rep. 519; *Den ex dem. Stewart v. Johnson*, 18 N. J. L. 87; *Apthorpe v. Comstock*, 2 Paige, 482; *Bridge v. Eggleston*, 14 Mass. 245, 7 Am. Dec. 209; *Bush v. Sprague*, 51 Mich. 49, 16 N. W. 222.

Representations to a public officer by sworn statement, in compliance with a statute, or with a nonstatutory public duty, is such publication as the public have a right to rely upon.

Bartholomew v. Bentley, 15 Ohio, 659, 45 Am. Dec. 596; *Cazeaux v. Mali*, 25 Barb. 578; *Cross v. Sackett*, 2 Bosw. 618; *Clarke v. Dickson*, 6 C. B. N. S. 459; *Morgan v. Skiddy*, 62 N. Y. 319; *Davidson v. Tulloch*, 3 Macq. H. L. Cas. 783; 2 *Thomp. Corp.* §§ 1472, 1473; *Morse v. Swits*, 19 How. Pr. 275; *Salmon v. Richardson*, 30 Conn. 368, 79 Am. Dec. 255; *Booth v. Wonderly*, 36 N. J. L. 251; *Westervelt v. Demarest*, 46 N. J. L. 37, 50 Am. Rep. 400.

Messrs. Dodd & Dodd and Humphrey & Davis, for defendants in error:

The liability of a corporation for torts of its agents is limited to the acts done by the agents of the corporation (1) in the course of its business, (2) of their employment; both of which requisites are made necessary to the liability of the corporation for the act of the agent.

Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 209, 210, 16 L. ed. 75; *Salt Lake City v. Hollister*, 118 U. S. 261, 30 L. ed. 177, 6 Sup. Ct. Rep. 1055; *Denver & R. G. R. Co. v. Harris*, 122 U. S. 607, 30 L. ed. 1147, 7 Sup. Ct. Rep. 1286; *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 109, 37 L. ed. 102, 13 Sup. Ct. Rep. 261; *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 265; *Western Bank of Scotland v. Addie*, L. R. 1 H. L. Sc. App. Cas. 157; 5 *Thomp. Corp.* § 6321.

Before the plaintiff can hold the First National Bank, he must show that some officer of that bank has done something or said something about a matter within the competence of the bank, and within the general scope of authority of the officer.

Weckler v. First Nat. Bank, 42 Md. 581, 20 Am. Rep. 95.

The bank here sued is not alleged to have had anything to do with the business of the insurance company.

The First National Bank could not have taken any stock in the Columbian Fire Insurance company, and would have had no power to aid in its establishment.

California Nat. Bank v. Kennedy, 167 U. S. 365, 42 L. ed. 199, 17 Sup. Ct. Rep. 831; *Flannagan v. California Nat. Bank*, 56 Fed. Rep. 960, 23 L. R. A. 836; *McCutcheon v. Merz Capsule Co.* 37 U. S. App. 586, 71 Fed. Rep. 792, 19 C. C. A. 108, 31 L. R. A. 415; *Farmers' & M. Nat. Bank v. Smith*, 40 U. S. App. 690, 77 Fed. Rep. 129, 23 C. C. A. 80; *Dresser v. Traders' Nat. Bank*, 165 Mass. 120, 42 N. E. 567; *Norton v. Derry Nat. Bank*, 61 N. H. 590, 60 Am. Rep. 335; *Commercial Nat. Bank v. Pirie*, 49 U. S. App. 596, 82 Fed. Rep. 799, 27 C. C. A. 171.

No representation was ever made to the plaintiff upon which he had any right to rely.

Bigelow, Fr. 536; Peck v. Gurney, L. R. 6 H. L. 378; 1 Thomp. Corp. § 472; *Hunnevell v. Duxbury*, 154 Mass. 286, 13 L. R. A. 733, 28 N. E. 207.

Representations made after a purchase has been consummated are not actionable.

Farmers' Stock Breeding Assn. v. Scott, 53 Kan. 534, 36 Pac. 978.

The plaintiff has not shown any damage.

Peck v. Derry, L. R. 37 Ch. Div. 591.

Taft, Circuit Judge, delivered the opinion of the court:

The so-called reformed petition and its amendment are inartificially drawn, and are full of redundancy and evidential averments, but we think that they state with sufficient clearness the following case: Several of the defendants other than the bank organized a fire insurance company under the laws of Kentucky. Before the company could do business under the laws of Kentucky, it was necessary for it to procure a license from the state insurance commissioner. The license could only issue upon proof that the capital (\$200,000) of the insurance company had been paid in in cash. But a little over \$100,000 of the capital had been paid in cash and deposited in the defendant bank. To make up the needed remainder, the defendant bank accepted notes of various subscribers to the stock for the amount of their respective subscriptions, with the stock pledged as collateral therefor. The notes were indorsed by the insurance company. Though the proceeds of the notes were credited to the latter on the books of the bank, the amount of them was not, according to the understanding between the bank and the insurance company, subject to check. In order to start the insurance company in business, and thereby secure for itself a large deposit account, and for the further purpose of selling the stock of the insurance company pledged to it as collateral, the defendant bank, through its board of directors, assisted the insurance company to obtain a license by directing its

cashier to certify to the insurance commissioner that the insurance company had on deposit with it, subject to check, \$200,000 paid-up capital and \$48,000 net surplus. The license was issued upon the faith of this certificate. In further pursuance of its purposes the defendant bank united with the other defendants in procuring the publication in newspapers of general circulation in Kentucky and elsewhere of statements similar to those contained in the cashier's affidavit. The plaintiff, induced by such publications and by the statements in the cashier's affidavit, and relying thereon, bought eighty shares of the stock of the insurance company, which the bank then held as collateral security for a note of one of the defendants given for his stock subscription. Plaintiff paid \$10,000 for the stock. The stock was worthless when he bought it, and has never been worth anything since. The insurance company, owing to the fact that it never had the amount of capital required by law, became wholly insolvent, and was wound up under the laws of Kentucky. The statement of the cashier was plainly false, and known to be so by the bank, for it clearly implied that the capital and surplus were in cash over and above all liabilities.

The argument of counsel for the defendant in error is: First. That the statement of the cashier, in so far as it certified that the insurance company's deposit was for capital and net surplus, was *ultra vires*, and could not be made ground for holding the bank for deceit. Second. It is contended that neither the cashier's affidavit nor the newspaper publications were addressed to the plaintiff, and he had no right to rely on them; that the former was directed to the insurance commissioner only, and the latter to the possible subscribers to the stock, and not to one who, like the plaintiff, bought stock already issued.

First, it is to be observed that the question here is not of the authority of the cashier, as was the case in *First Nat. Bank v. Marshall & I. Bank*, 54 U. S. App. 510, 83 Fed. Rep. 725, 28 C. C. A. 42. The petition specifically avers that the certificate was made by order of the board of directors. This was the governing body of the bank, and although, of course, in a certain sense, it is an agency or representative of the bank, it is for all practical purposes the bank. *Goodspeed v. East Haddam Bank*, 22 Conn. 530, 540, 541, 53 Am. Dec. 439; *Burrill v. Nahant Bank*, 2 Met. 163, 35 Am. Dec. 395; *Bank Comrs. v. Bank of Buffalo*, 6 Paige. 502; *Pollard v. Vinton*, 105 U. S. 7, 12, 26 L. ed. 998, 1000; *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 114, 37 L. ed. 97, 103, 13 Sup. Ct. Rep. 261; *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 610, 30 L. ed. 1146, 1148, 7 Sup. Ct. Rep. 1286. The question here, therefore, is whether a national bank can make itself liable in an action for deceit by causing a knowingly false statement to be made concerning the financial condition of one of its customers. In England it is said that a corporation may be held liable for the commission of any wrongful act within the scope of its

incorporation. *Green v. London General Omnibus Co.* 7 C. B. N. S. 290; *Edwards v. Midland R. Co.* L. R. 6 Q. B. Div. 287; Clerk & L. Torts, 49. By this is meant, not that the charter must specifically authorize the wrongful act, but only that it must be committed by the corporation in pursuance of a power lawfully conferred, though wrongfully and tortiously exercised. The same view is taken by Mr. Justice Campbell, speaking for the Supreme Court of the United States in *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 202, 16 L. ed. 73, as follows: "The result of the cases is, that for acts done by the agents of a corporation, either in *contractu* or in *delicto*, in the course of its business and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances."

The limits of a corporation's liability for a wrong are somewhat less strictly laid down in later cases in our supreme court. In *First Nat. Bank v. Graham*, 100 U. S. 699, 702, 25 L. ed. 750, 751, Mr. Justice Swayne, speaking for the Supreme Court, said: "Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application. . . . An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation, or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance, and for libel."

In *Salt Lake City v. Hollister*, 118 U. S. 256, 260, 30 L. ed. 176, 177, 6 Sup. Ct. Rep. 1035, Mr. Justice Miller, speaking for the court, said:

"The truth is that with the great increase in corporations in very recent times, and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name, and by corporation officers who were competent to exercise all the corporate powers. When such acts are not founded on contract, but are arbitrary exercises of power, in the nature of torts, or are quasi criminal, the corporation may be held to a pecuniary responsibility for them to the party injured."

The latest expression of the court on this subject is found in *Washington Gaslight Co. v. Lanaden*, 172 U. S. 534, 544, 43 L. ed. 543, 547, 19 Sup. Ct. Rep. 296, in which it is said: "The result of the authorities is, as we think, that, in order to hold a corporation liable for the torts of any of its agents, the act in question must be performed in the course and within the scope of the agent's employment in the business of the principal. The corporation can be held responsible for acts which are not strictly within the corporate powers, but which were assumed to be performed for the corporation and by the corporate agents who were competent to employ the corporate powers actually exercised."

It is not necessary for us to consider or discuss the difference, if any, between these 48 L. R. A.

measures of corporate liability for torts, because we think that the case made by the petition is within the most conservative of them. It is also a part of a bank's business to sell at as high a price as may be the collateral held by it to secure its bills receivable. If the bank, in order to increase its deposits or to sell its collateral, makes or causes to be made false statements concerning the financial condition of one of its customers and depositors to a third person, for the purpose of misleading that person to his injury, we think the bank is liable in deceit if loss ensues. The relation of a bank to its depositors and customers is one which gives it exceptional opportunity to acquire most reliable information of their business and financial affairs. It is a common practice for the cashier of one bank to apply to the cashier of another to learn the financial standing of customers of the latter bank, or, indeed, of any person doing business in the city of the latter bank. When the answers made are not made for the benefit or in the business of the second bank, but are merely matters of courtesy between the two cashiers, the second bank is not responsible for their inaccuracy or falsity. This was found to be the state of the case in *First Nat. Bank v. Marshall & I. Bank*, 54 U. S. App. 510, 83 Fed. Rep. 725, 28 C. C. A. 42. But the *ratio decidendi* of that case was that if the false answer to the query had been made by the cashier, with the privity of the president, in the business and for the benefit of the bank, the bank would have been liable. It is the usual practice for depositors and customers of a bank to refer others to the bank for information as to their financial responsibility. To give such information to third persons or to the public at the instance of the customer or depositor is certainly not beyond the scope of banking powers. It is argued that, while the bank might properly certify to the amount on deposit to the credit of one of its depositors, it has no power to certify how much of the deposit is for capital and how much for net surplus. This is too refined. The bank's relation to the insurance company as a customer might very well enable it to learn with reasonable certainty how and for what purpose the money deposited had been paid in, and whether it was net capital or surplus, or was likely to be reduced by outstanding liabilities, and to give this information to whom it might concern, with the consent of the depositor. It certainly had the amplest knowledge of the fact that the insurance company was a large debtor of the bank,—so large as to make the statement that it had a paid-in cash capital and net surplus of \$248,000 utterly false. If it made such a statement to the insurance commissioner to obtain a license, and was privy to the publication of the same statement in the public press, as is alleged, all for the purpose of securing a large bank deposit and of selling stock held by it as collateral, it seems to us that this was done in the course of the business of the bank, and was "within the scope of its incorporation." In *Barwick v. English Joint Stock Bank*, L. R. 2 Exch.

259, the action was for deceit against a bank. The plaintiff furnished feed to the horses of a government contractor, who was a customer and depositor of the bank, on the written assurance of the manager of the bank that if the plaintiff would do so the bank would pay him out of the first money received by the contractor from the government after the bank had satisfied any claim of its own. The bank then held a note of the contractor for \$12,000, but the manager did not disclose this. The court held that the case should be left to the jury to say whether the manager had not given the plaintiff to understand that there was a probability that out of the government payment there would be enough to pay plaintiff, when he knew there was not. This case shows clearly that a bank's statement concerning the financial condition of its customer is an act within its corporate capacity, at least when made to further the business interests of the bank. The petition charges the bank, not only with falsely making the false statement to the insurance commissioner, but also with conspiring with the other defendants to repeat the statements to the public in the newspapers in furtherance of the two purposes already stated. It is now well settled that a corporation may be held for torts in which express malice or intent to defraud is a necessary element. *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259; *Goodspeed v. East Haddam Bank*, 22 Conn. 530, 58 Am. Dec. 439; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 202, 16 L. ed. 73; *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 114, 37 L. ed. 97, 103, 13 Sup. Ct. Rep. 261; *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 610, 30 L. ed. 1146, 1148, 7 Sup. Ct. Rep. 1286. It is a necessary corollary from these cases that a corporation may be held for a conspiracy with others resulting in injury to a third person. The point is expressly adjudged by the court of appeals of New York in *Buffalo Lubricating Oil Co. v. Standard Oil Co.* 106 N. Y. 669, 12 N. E. 825; same case in supreme court, 42 Hun. 153. See also, to same effect, *Moore v. Bricklayers' Union*, No. 1, 23 Ohio L. J. 48, affirmed by supreme court of Ohio, without report, 31 Ohio L. J. 208; *Dodge v. Bradstreet Co.* 59 How. Pr. 104. If a bank may make a false statement concerning the financial condition of one of its customers for its own benefit, and may conspire with another to accomplish its business purposes, it follows that it may conspire with others to circulate the statement already made by it to deceive the public, and that any one of the public to whom the statement is addressed, and who acts upon it to his injury, may hold the bank for his loss.

The second ground urged in favor of the demurrer was that the statements concerning the financial condition of the insurance company were not addressed to the plaintiff, but only to the insurance commissioner, on the one hand, or to the probable subscribers to the stock of the insurance company, on the other. The plaintiff, it is said, was not the insurance commissioner, and was not a subscriber to the stock, but was a purchaser

from an original subscriber. In the case of *Peck v. Gurney*, L. R. 6 H. L. 377, one who misled by false statements in a prospectus issued by the directors of an intended company, had bought shares therein from an original allottee and suffered severe losses, attempted to hold the directors for his injury. It was held that a prospectus was addressed to the original allottees; that when the allotment was completed the office of the prospectus was exhausted, and one purchasing from an original allottee could not rely on it and hold those issuing it for his loss. The case has not met with entire concurrence by the courts of this country. Dissent from its conclusion is based on the view that one issuing a prospectus or statement calculated to mislead others to their injury ought to be charged with liability to any person or class of persons whose action on the faith of it he might reasonably and naturally anticipate, and that purchasers from original allottees are quite as likely to act on the prospectus as the allottees themselves. We do not find it necessary, however, to discuss the principles of *Peck v. Gurney* in deciding this case, for we think it clear that the averments of the petition make it unnecessary. The newspaper statements of the condition of the insurance company, repeated from the cashier's statement to the insurance commissioner, to all of which the bank is alleged to have been privy, were not issued or addressed to original subscribers to the stock. The petition and its amendment in effect aver that the original subscriptions were made by defendants and others engaged in promoting the company, and that the purpose of the company and the bank was not so much to secure original subscribers, as to sell the stock which had been pledged to the bank to secure payment of the original subscriptions, and which the bank was therefore especially interested in selling. The false statements are thus averred to have been made for the very purpose of reaching and influencing purchasers like the plaintiff, and *Peck v. Gurney* has no application. Even if it be conceded that the plaintiff had no right to rely on the certificate to the insurance commissioner, the repetition of the contents of the certificate in newspaper publications by the bank and others for the very purpose of misleading probable purchasers of the stock is quite sufficient to hold the bank and the other defendants.

A third objection to the sufficiency of the petition and its amendment is that it shows no damage to plaintiff, and fraud without damage gives no action. The contention is that the measure of the recovery in such a case is the difference between the price paid and the value of the stock when bought (*Peck v. Derry*, L. R. 37 Ch. Div. 591), and that there is no averment in the petition that the stock was not worth what plaintiff paid for it when he bought it. For subsequent losses due to misfortune or mismanagement defendants cannot, it is said, be made responsible in this action. This objection must fail for the reason that the petition ex-

pressly alleges that the stock was worthless when plaintiff bought it.

The judgment of the Circuit Court is reversed, with directions to overrule the de-

murrer to the reformed petition and its amendment, and to require the defendants to answer. The costs of the proceeding in error should be paid by defendants.

CONNECTICUT SUPREME COURT OF ERRORS.

Thomas W. CORBETT, *Plff. in Err.*,
v.

Harry MATZ *et al.*

(.....Conn.....)

1. A finding of facts made after the end of the term at which judgment was rendered, when the court had no power to modify or change the judgment, and after the time for an appeal has expired without an appeal being taken, cannot be made by the court a part of the judgment nor of the record of judgment, nor the foundation of a writ of error to reverse the judgment, although there are statutory provisions (such as Gen. Stat. §§ 1107, 1111) to the effect that any party is entitled to have a finding of the facts on which judgment is founded appear on the record and become part of the judgment.

2. The special finding of facts provided for by Pub. Acts 1897, chap. 194, § 6, is not for the purpose of spreading those facts upon the records as part of the judgment, but is only to be made after judgment has been rendered, to become part of an appeal, and it cannot be made in the absence of an appeal and after the expiration of the time for taking one.

3. The sufficiency of facts found to support a judgment may be raised by writ of error, when the facts are made part of the record of the judgment.

(February 13, 1900.)

ERROR to the City Court of New Haven to review a judgment foreclosing a mortgage. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. B. Stoddard and J. P. Goodhart, for plaintiff in error:

The act of making a finding of facts by the court is a ministerial act, and not judicial.

Johnson v. Higgins, 53 Conn. 238, 1 Atl. 616.

By the statute, § 1111, the court is directed to make a record of their proceedings, and cause the facts on which they found their final judgment to appear of record and such finding, if requested by either party, shall specially set forth such facts.

There is no time fixed when such finding shall be made, and there is no statute of limitations applying to this case.

Taylor v. Gillette, 52 Conn. 218.

The finding of facts is often essential as a basis for a writ of error.

Rules of Practice, p. 91, § 3; *Zaleski v.*

NOTE.—As to getting omitted facts into record, see *Hoadley v. Savings Bank* (Conn.) 44 L. R. A. 321.

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Clark, 45 Conn. 405, note; *Selleck v. Rusco*, 46 Conn. 370.

The statute, § 3087, provides that a writ of error may be brought within three years after the final judgment.

It would appear that at any time within the statutory limit a party desiring to bring a writ of error would be entitled to a finding of facts upon which to base his writ of error. Any other rule would deprive a person of his statutory three years' time in which to commence his action.

Johnson v. Higgins, 53 Conn. 236, 1 Atl. 616.

The practice has always been that the judge makes his finding after the term expires, and he can amend his finding at any time, even after the session of the supreme court has commenced.

Comstock's Appeal, 54 Conn. 119, 6 Atl. 190.

The supreme court can remand the case for a further finding.

Schlesinger v. Chapman, 52 Conn. 273.

A mandamus lies against a judicial officer to perform ministerial acts.

Smith v. Moore, 38 Conn. 105; *Taylor v. Gillette*, 52 Conn. 218.

Messrs. E. P. Arvine, George E. Beers, and E. P. Arvine, Jr., for defendants in error:

A finding is a document which owes its origin and its effect entirely to statute.

Woolf v. Chalker, 31 Conn. 124, 81 Am. Dec. 175; *Campbell v. Boyreau*, 21 How. 223, 16 L. ed. 96.

The finding provided for by Pub. Acts 1897, chap. 194, is one filed in response to a written request made within a prescribed number of days after judgment and as a step in an appeal, and that this statute has no relation to this case.

The paper signed by Judge Dow can therefore be a part of the record only in case it comes within § 1111. The manifest object of § 1111 is to secure a judgment specific enough so that redress for errors may be had in the court above.

The general rules of practice in force when the judgment was entered (Rule XVII. § 5) expressly provide that the finding may be embraced in the judgment or decree.

Perkins v. Brazos, 66 Conn. 248, 33 Atl. 980; *Thresher v. Dyer*, 69 Conn. 409, 37 Atl. 979.

In the case at bar the facts upon which the decree rests were expressly found and recited in that decree as follows: "Upon due hearing of all the parties appearing, as on file, the court finds that all the allega-

tions in the complaint are true, and that the sum of \$5,222.91-100 is due from the defendants to the plaintiff on the day therein mentioned."

When the judge found these facts he exhausted his power under § 1111, and when that judgment file was signed, the record of the city court was made up.

It cannot be contradicted on a writ of error.

1 Swift, Digest, *791; *Wetmore v. Plant*, 5 Conn. 544; *Burgess v. Tuccedy*, 16 Conn. 42.

Nor can the writ reach errors not appearing on the face of the record.

Gould, Pl. 5th ed. p. 542; Stephen, Pl. p. 144.

Any further alleged finding of fact was a bald attempt to modify the judgment, and comes within the general rules as to amending judgments. A judgment cannot be set aside or changed after the term in which it was granted has gone by.

Hall v. Paine, 47 Conn. 429; 1 Swift, Digest, *785; 5 Enc. Pl. & Pr. p. 1049; 15 Enc. Pl. & Pr. p. 209.

In the absence of special rules, the request for a finding must be made during the trial.

McGarock v. Woodlief, 20 How. 221, 15 L. ed. 884.

The power of the judge was exhausted when the judgment was signed.

Sturdevant v. Stanton, 47 Conn. 579.

The finding, even if the court had authority to make it, is not part of the record.

Ibid.; *Thresher v. Dyer*, 69 Conn. 409, 37 Atl. 979; *Kashman v. Parsons*, 70 Conn. 304, 39 Atl. 179; *Lord v. Litchfield*, 36 Conn. 131, 4 Am. Rep. 41.

The finding cannot be read as a bill of exceptions.

A bill of exceptions is "a statement in writing of the objection made by a party to his (the judge's) decision."

Gould, Pl. 5th ed. p. 532; Stephen, Pl. p. 121.

Even if it were a bill of exceptions, it was not signed in time.

Muller v. Ehlers, 91 U. S. 249, 23 L. ed. 319; *Wright v. Sharp*, 1 Salk. 289; 3 Enc. Pl. & Pr. p. 485; *Hunnicut v. Peyton*, 102 U. S. 333, 26 L. ed. 113; *United States v. Jones*, 149 U. S. 262, 37 L. ed. 726, 13 Sup. Ct. Rep. 840; *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 36 L. ed. 102, 12 Sup. Ct. Rep. 450; *Woolf v. Chalker*, 31 Conn. 124, 81 Am. Dec. 175; *Hoey v. Hoey*, 36 Conn. 387.

Hall, J., delivered the opinion of the court:

The defendants in error obtained a judgment of foreclosure in the city court of New Haven on the 20th of April, 1899, in an action in which the plaintiff in error appeared as a defendant, filed an answer, and was fully heard. The judgment file of that date, and in due form, states that the court found all the allegations of the complaint true. There was no continuance of the case for any purpose, and no further action taken upon it during that term. Under the city char-

ter a new term of the court began on the first Monday of the following July. In the present writ of error brought to reverse that judgment the errors assigned are in effect that the facts found by the city court, and appearing upon the record of that court, are insufficient to support the judgment rendered, inasmuch as they show that the mortgage foreclosed was invalid because the debt which it secured was a conditional, and not an absolute, liability.

Writs of error upon matters of law reach only those errors which appear of record. As proof that the facts, which are alleged to be insufficient to support the judgment, appear upon the record, the plaintiff in error relies upon a finding of facts and an amendment thereto signed by the judge of the city court in the month of November following the date of the judgment, and directed by him to be made a part of the record.

If by such action of the trial judge the facts thus found are made part of the record of the judgment rendered at the previous term of the court, the question of the sufficiency of such facts to support the judgment may be raised by writ of error. *Goodrich v. Stanley*, 23 Conn. 79; *Tolland v. Willington*, 26 Conn. 518; *Seymour v. Balden*, 28 Conn. 444. Section 3, p. 91, Court Rules (1899), says, if the facts required to be found under §§ 1107, 1111, of the General Statutes are insufficient to support the judgment, that constitutes an error apparent upon the record.

But if the facts thus found by the trial judge are not a part of the record of the trial court, the question of the validity of the mortgage which was the subject of the foreclosure suit cannot be considered in this proceeding, since it is not claimed that the judgment is erroneous without those facts, or that, in the absence of those facts, the record discloses that the trial court, by any ruling or decision, held that a mortgage given under the circumstances detailed in the finding was valid.

Apparently plaintiff's counsel rely upon the provisions of § 6 of chap. 194 of the Public Acts of 1897, as well as upon §§ 1107 and 1111 of the General Statutes, as authorizing the finding made in November, and as empowering the judge to add those facts to the record of the trial court.

But the provisions of § 6 of the Acts of 1897, requiring a judge to make a special finding of facts, and which are the same as those of § 4 of the Public Acts of 1882, have reference only to the preparation of a statement of facts to be made after judgment has been rendered, and to become a part of an appeal to this court. Such a finding is for the purpose of enabling the parties to present to this court by appeal the questions which were raised and decided in the trial court, and the judge is only required to make it at the request of the party giving notice of the appeal, which must be done within the time fixed by the statute.

This act makes no provision for a finding in the absence of an appeal and after the ex-

piration of the time for taking one. *Johnson v. Higgins*, 53 Conn. 238, 1 Atl. 616; *Thresher v. Dyer*, 69 Conn. 409, 37 Atl. 979.

It was no part of the purpose of this statute to enable the parties to an action to have spread upon the records of the trial court, as a part of the judgment, the facts conclusively determined in the action between them, and a special finding merely for the purpose of an appeal does not have that effect. That object, as well as "the inclusion of such facts in the judgment for the purpose of presenting the question whether the judgment is the true voice of the law upon the facts found," is amply provided for by §§ 1107 and 1111 of the General Statutes. *Kushman v. Parsons*, 70 Conn. 295, 39 Atl. 179; *Thresher v. Dyer*, 69 Conn. 409, 37 Atl. 979.

We do not mean to say that a special finding of facts obtained for the purpose of an appeal may not, when the appeal is not pursued, be made the basis of a writ of error, when the finding is made a part of the judgment, by a court or judge having at the time control of its own judgment, and competent to erase or modify it. But such a finding becomes a part of the record of the trial court by force of § 1111, rather than of the act of 1897.

In this case, the plaintiff in error made no attempt to appeal to this court from the judgment of the city court, and, as the time for taking such an appeal had long since passed when the finding was made, it is not a finding provided for by the law of 1897. But if it could be so regarded it would avail the plaintiff nothing in this action if the facts so found are inconsistent with those contained in the judgment file. The judgment file is the only formal written statement which expresses the decision rendered. (Court Rules, 1899, §§ 94-96.) No allegation of the writ of error can be entertained which contradicts the record.

The judge of the city court after the expiration of the time for taking an appeal, and after the expiration of the term in which the judgment was rendered, had, therefore, no power to annul, modify, or supplement that judgment by incorporating in it, as its foundation, the facts set forth in the finding, unless he was authorized to do so by the provisions of §§ 1107 and 1111 of the General Statutes.

Section 10, chap. 13, of the Revision of 1875, p. 444, provided only that courts of equity should cause the facts upon which their decrees were founded to appear on the record. By § 30 of the practice act (Pub. Acts 1879) this was amended so as to read as in § 1111 of the General Statutes: "All courts shall keep a record of their proceedings and cause the facts on which they found their final judgments and decrees to appear on the record, and such finding, if requested by any party, shall specially set forth such facts." Section 197 of Rules of Court 1899, p. 55, provides that when all the material allegations put in issue are

found for the plaintiff or defendant, the finding of the issues for the plaintiff or defendant, as the case may be, is "equivalent to a finding that all his material allegations which were put in issue" are true, and will be a sufficient compliance with Gen. Stat. § 1111, in the absence of a request for a special finding. The making of either a general or special finding of facts as the foundation of its judgment thus becomes a "duty thus cast upon the court to be discharged in every civil action, whether the judgment is or is not to be made the subject of appellate proceedings." *Scholfield Gear & Pulley Co. v. Scholfield*, 70 Conn. 500, 40 Atl. 182.

Section 3, p. 91, of Court Rules 1899, provides that the finding of facts required by §§ 1107 and 1111 of the General Statutes should ordinarily form part of the judgment file.

The finding intended by these provisions, whether it be general or special, is to become a part of the judgment of the trial court, that the parties may have spread upon the record the material facts within the issues, which have been finally determined, and that they may, if they desire, be enabled to present the question "whether the judgment is the true voice of the law" upon those facts. To comply with these requirements the finding of facts, made under § 1111, whether general or special, should either be incorporated in the judgment file, or should be made a part of it by reference contained in the judgment file itself, or should be expressly made a part of the judgment by the terms of the finding.

A finding thus made a part of the judgment may, as we have already said, become the basis of a writ of error, and it may also become the foundation for an appeal by one who, having complied with the conditions imposed by the statute of 1897, is, at the time the finding is made, entitled to an appeal. But a finding of facts made when no appeal has been taken, and after the right of appeal is gone, cannot become a part of the judgment, nor of the record of judgment, nor the foundation of a writ of error to reverse the judgment, unless the court or judge at the time of making it possessed the power to render the judgment of which it is to become a part, or to modify or change the judgment after it has been rendered.

The judge of the city court had no power under §§ 1107 and 1111 to make the facts set forth in the finding the foundation of the judgment which is sought to be reversed, because he had no control over that judgment when the finding was made. The case was finally disposed of by the judgment rendered on the 20th of April. The judgment file of that date expresses the intention of the judge "to perform thereby his final act in reference to the cause, and to embody therein his ultimate conclusion as to the law." While after that time he may have retained the power to modify the judgment or direct an amendment of the record, he possessed no such power after the expira-

governed, on the question of the sufficiency and scope of pleading with reference to consistency and repugnancy in actions at law, by the practice of the courts in the state in which they are held. *Glenn v. Sumner*, 132 U. S. 152, 33 L. ed. 301, 10 Sup. Ct. Rep. 41.

IX. Conclusion.

This is a practice question, and one in which radical changes have been made by statute at different times. This, with a conservative tendency upon the part of the courts to import the principles of the old procedure into the new after a change, has given rise to apparently radical conflicts of authority, and it has been repeatedly held under the same system of pleading and without apparent qualification, upon the one hand, that a defendant may set up all the defenses he may have, whether consistent or inconsistent, and, upon the other hand, that he may set up all the defenses he may have provided they are not inconsistent. Comparing these apparently conflicting cases, however, unqualified as they are, with rules laid down in some of the most carefully considered cases, as to what is inconsistency, and as to different kinds of inconsistency, and as to the test of inconsistency which will vitiate a pleading, will show, it is thought, that the rule that there are two kinds of inconsistency,—inconsistency of fact consisting of absolute contradiction in matters of fact, and inconsistency by implication

of law consisting of an incompatibility arising from the union of denials and admissions by implication of law for the purpose of avoidance,—and that all inconsistency is permissible, at least in equity and under reform procedure, except absolute inconsistency of fact of such a character that if one statement be true another must be false. Even the Missouri cases under a statute permitting only consistent pleas, and those of the other states holding that pleas must be consistent, with the possible exception of those of Louisiana, are reconciled by this rule. Those cases having defined the prohibited inconsistency to be inconsistency of fact. And this theory also reconciles the apparent conflict of authority as to what inconsistency will act as an admission, and dispense with proof of the admitted facts, as the rule under both classes of cases would be that to have this effect the inconsistency would have to be one of fact, such that if the admission were true the denial must be false.

While absolute inconsistency in fact in a pleading may be treated as establishing the facts alleged in it most favorable to the opposite party, inconsistency may also be taken advantage of by motion to compel the pleader to elect between the inconsistent pleas, by motion to strike out, and by demurrer, motion to compel an election appearing to be the favored method.

F. H. B.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Thomas C. HINDMAN, *Plff. in Err.*,
v.

FIRST NATIONAL BANK OF LOUIS-
VILLE *et al.*

(98 Fed. Rep. 562.)

A false certificate by the cashier of a bank, stating that an insurance company had on deposit subject to check certain amounts of paid-up capital and net surplus, made to assist the company to obtain a license and authorized by the board of directors, who knew it to be false, and the publication of the same statement in the public press, to which the bank was privy, for the purpose of securing a large bank deposit and of selling stock held by the bank as collateral, render the bank liable for deceit to a person who bought worthless stock of the insurance company in reliance on this statement.

(November 13, 1899.)

ERROR to the Circuit Court of the United States for the District of Kentucky to review a judgment in favor of defendant in an action brought to hold it liable for losses incurred by plaintiff in purchasing stock of an insurance company upon representations made by defendant. *Reversed.*

Before *Taft* and *Lurton*, Circuit Judges, and *Ricks*, District Judge.

NOTE.—As to right to rely on published statements by banks, see *Gerner v. Mosher* (Neb.) 46 L. R. A. 244.
48 L. R. A.

Statement by *Taft*, Circuit Judge:

This is a writ of error brought to review the judgment of the circuit court of Kentucky sustaining the demurrer to the reformed and amended petition of Thomas C. Hindman against the First National Bank of Louisville and others seeking to recover damages for loss sustained by the plaintiff in the purchase of eighty shares of the capital stock of the Columbian Fire Insurance Company, which purchase was induced, the petition alleges, by certain fraudulent misrepresentations of the bank and other defendants. The petition originally was ordered by the court to be reformed. A demurrer was filed to the reformed petition, and was sustained. The plaintiff then asked leave to amend, which was granted. The amendment was filed, and a new demurrer filed. This was sustained, and judgment entered for the defendant. (C. C.) 86 Fed. Rep. 1013. The reformed petition makes parties defendant the First National Bank of Louisville, C. B. Sullivan, A. W. Hart, and James S. Ray. Ray is made a defendant simply as receiver of the Columbian Insurance Company, and not as a party to the transactions charged against the other defendants. The petition, after setting up the necessary jurisdictional facts as to the diverse citizenship of the plaintiff and defendants, avers that in January, 1893, certain persons duly organized the Columbian Fire Insurance Company under the laws of Kentucky, and applied to the insurance commissioner of that state to do business as such

therein, with a capital of \$200,000 and a surplus of \$50,000; that the commissioner entered upon an investigation of the affairs of the company; that the incorporators falsely represented that the capital had been paid in full, and that in addition the company had \$48,000 surplus in cash, free from debts and liabilities, and that the whole sum of \$248,182.90 was on deposit in the First National Bank of Louisville, and subject to check; that the commissioner applied to the bank for confirmation of this statement; that the board of directors of the bank, knowing the object of the inquiry, caused the bank cashier to make a sworn certificate to the insurance commissioner that the insurance company had on deposit \$248,000 of capital paid in and net surplus; that the statement was untrue, and was made for the fraudulent purpose of enabling the insurance company to deceive the commissioner and secure a license to do business, when it was not lawfully entitled to one; that it was done in pursuance of a conspiracy between the bank and the officers of the insurance company, C. B. Sullivan, A. W. Hart, and others; that, to give the false appearance of such a deposit as was certified, the insurance company and the bank pretended to make certain discounts of promissory notes of notoriously insolvent persons, each of which had been given, as the bank knew, in payment of the maker's subscription to the stock of the insurance company; that the bank had gone through the form of discounting the notes on the indorsement or guaranty of the insurance company, and of placing the proceeds to the credit of the latter on the bank's books; that many of the said notes were not discounted in good faith; that the proceeds thereof were never intended to be, and were never in fact, subject to checks of the insurance company, and the bank had at all times retained a lien on the fund thus apparently standing to the credit of the insurance company. The petition proceeds:

"Plaintiff says that the said First National Bank united with said insurance company and other named defendants, except Ray, in this said fraud, for the purpose of obtaining the benefit that would result to it from having said insurance company keep a large deposit with said bank; it having been previously agreed and understood between said bank and said insurance company that the latter would, if licensed to do business, keep a large amount of cash on deposit with said bank at all times. Plaintiff says that in compliance with this agreement said insurance company did thereafter at all times during its existence keep a large amount of cash on deposit in said bank, which deposit was of great value and benefit to said bank. Plaintiff says that said insurance company, having in the fraudulent manner herein recited, obtained license to do business in Kentucky and in other states, commenced at once to engage in the fire-insurance business throughout the various states in which it was licensed. Plaintiff says that said defendants, except Ray, further represented to the plaintiff and to the public, by publica-

tions, that the said company had said cash capital and surplus amounting to \$248,182.90, which publications were made in the public prints and scattered over the country, and which were seen and relied upon by plaintiff, and falsely represented that there were no mortgages upon the same or liens upon the same, and that the stock had been paid for at \$125 a share, and that the company was organized and ready for business, and made representations to the effect that the said company was a bona fide company, with a sound capital, properly organized; and plaintiff alleges that all the parties named in the caption hereof co-operated with said insurance company and said bank and the officers thereof, and the other defendants except Ray, in setting said company on foot, and publishing that said cash capital and surplus of \$250,000 had been paid up in cash, bona fide, in accordance with said representation. . . . And this plaintiff alleges that by the representations and publications of the defendants, and by the issue of the said statement by said bank to the said Duncan, and the licensing of said company by said Duncan, insurance commissioner, he was deceived, . . . and while deceived by the false representations and deceit and false and fraudulent conspiracy of said defendants in setting on foot and floating said company, and while ignorant of the fraud practised upon him and the public, and when he believed the representations and publications aforesaid to be true, and the false and fraudulent insurance company to be a bona fide and genuine insurance company, properly licensed, purchased on February 6, 1893, eighty shares of the capital stock of the said Columbian Fire Insurance Company of America at the price of \$125 a share, making a total of \$10,000, . . . all of which said shares were paid for in cash by said plaintiff, and were issued to him on the 6th day of February, 1893.

"Plaintiff says that it was the purpose of all the said defendants, except Ray, to put stock of said insurance company on the market to be sold, to make up said capital stock, which was short, as hereinbefore alleged, and that the defendants A. W. Hart and C. B. Sullivan, representing themselves and the said other defendants, and acting in collusion with all the other defendants, except Ray, represented to the plaintiff that the said stock thus sold to him had been paid for, bona fide, in cash by the original subscriber therefor, which representation was false, and known to them and the other defendants to be false, and that said original certificates would be taken up, and new certificates issued in lieu thereof to the plaintiff; and plaintiff alleges that, as a matter of fact, the shares of stock which were so canceled, and in place of which the certificates filed herewith were issued to him, were shares of stock which had been originally issued to C. B. Sullivan, and for which he had subscribed and not paid, and which had never been paid for by him or any person whomsoever, and alleges that said stock which was thus sold to him was a part of the stock used as col-

rel. Frey v. Warden of County Jail, 100 N. Y. 20; *Re Snow*, 120 U. S. 274, 30 L. ed. 653, 7 Sup. Ct. Rep. 556; *Hamilton's Case*, 51 Mich. 174, 16 N. W. 327; *Re Dill*, 32 Kan. 668, 49 Am. Rep. 505, 5 Pac. 39; *Garvey's Case*, 7 Colo. 384, 49 Am. Rep. 358, 3 Pac. 903; *People ex rel. Stokes v. Riseley*, 38 Hun, 280.

The statute authorized a fine, in the discretion of the court, and it must be tested by the same measure under the Constitution as if it were the required penalty.

Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935; *Re Claasen*, 140 U. S. 205, 35 L. ed. 411, 11 Sup. Ct. Rep. 735; *Mackin v. United States*, 117 U. S. 348, 29 L. ed. 909, 6 Sup. Ct. Rep. 777; *Parkinson v. United States*, 121 U. S. 281, 30 L. ed. 959, 7 Sup. Ct. Rep. 896.

So long as an act rests in bare intention it is not punishable by our law.

Broom, *Legal Maxims*, 309.

By the common law intent unaccompanied by unlawful act was not punishable.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; *Kennard v. Louisiana ex rel. Morgan*, 92 U. S. 480, 23 L. ed. 478.

In subjecting a man to a fine or imprisonment for what others think of him, or because of his reputation, the statute deprives him of property, of liberty, without due process of law.

1 Bishop, *Crim. Law*, 1088; *Huntsman v. State*, 12 Tex. App. 619; *Greene v. Briggs*, 1 Curt. C. C. 311, Fed. Cas. No. 5,764; *State v. Kartz*, 13 R. I. 528; *State v. Beswick*, 13 R. I. 211, 43 Am. Rep. 26.

Alvey, Ch. J., delivered the opinion of the court:

The appeal in this case is brought into this court from a judgment of one of the justices of the supreme court of this District, sitting in special term, rendered on habeas corpus, whereby the appellee was discharged from imprisonment, to which he had been committed in execution of a sentence of the police court of this District.

It appears that the appellee was arrested, charged with being a suspicious person, and was taken before the police court, and, upon information filed in that court he was tried and convicted, and was sentenced to pay a fine of \$40, and in default of payment thereof to stand committed to the workhouse for the period of four months. Upon that conviction and sentence, he applied for the writ of habeas corpus, and upon return thereto, and hearing by the judge, the prisoner was discharged; and the intendant of the workhouse of the District, acting in behalf of the District, has taken this appeal.

By the information upon which the appellee was tried and convicted, a copy of which is filed with the petition for the writ of habeas corpus, the appellee was charged in the police court with being, on the 1st day of October, 1899, at and within the District of Columbia, and ever since that date, and still was, at the date of the filing of the information, a suspicious person in and about the

streets, avenues, alleys, roads, and highways, to wit: Four-and-a-half street, southwest, contrary to and in violation of the act of Congress entitled "An Act to Amend an Act for the Preservation of the Public Peace and the Protection of Property in the District of Columbia," approved July 8, 1898.

By the return of the intendant of the workhouse to the writ of habeas corpus, it is stated, "that the petitioner, said George Frazier, was convicted in the police court of the District of Columbia on the 24th day of October, 1899, of the charge of being a suspicious character, contrary to and in violation of the act of Congress, approved July 8, 1893, entitled 'An Act to Amend,' " etc.

By the amendatory act of Congress referred to, approved July 8, 1898, the § 8 of the act of Congress of July 29, 1892, was stricken out and the following substituted in its place, *viz.*: "That all vagrants; all idle and disorderly persons; persons of evil life or evil fame; persons who have no visible means of support; persons repeatedly drunk in or about any of the streets, alleys, roads, highways, or other public places within the District of Columbia; persons repeatedly loitering in or around tippling houses; all suspicious persons; all public prostitutes; and all persons who lead a lewd or lascivious life, shall, upon conviction thereof, be fined not to exceed forty dollars, or shall be required to enter into security for their good behavior for a period of six months."

The arrest and conviction of the appellee appear to have been upon mere suspicion, and he is only charged with being a suspicious person without any relation whatever to crime committed in the past, or crime intended to be committed in the future. The suspicion of which he is the object is wholly undefined, and in no manner connected with any criminal act or conduct either of the past or that might occur in the future.

By whom the suspicion is to be entertained does not appear; whether it be by one policeman or by several, seems not to be regarded as material; or whether it be a suspicion entertained by one or more citizens is by no means certain. It may be conceded that the fair construction of the statute requires that the suspicion must be in reference to some of the species or kinds of vices enumerated in the particular section of the statute, containing the provision upon which the prosecution is founded; but then the question is, With reference to what particular vice or vices of those mentioned in the statute must the suspicion be taken to relate? General suspicion, without even reference to a propensity or intent to commit some particular crime or offense against the law or police of the government must be conceded to be wholly inoperative and without effect as a definition of crime. Mere suspicion is no evidence of crime of any particular kind, and it forms no element in the constitution of crime.

Suspicion may exist without even the knowledge of the party who is the object of the suspicion, as to the matter of which he is suspected. The suspicion may be generated

in the mind of one or more persons without even colorable foundation of truth for the suspicion; and yet the party, the object of the suspicion, may, under the statute upon which the prosecution against the appellee was founded, be seized and imprisoned, tried and convicted, merely because some persons or police officer may have concluded (whether upon reasonable grounds or not) that he was a suspicious person. Of what suspected, and what degree of suspicion exists, must always be the first thought that occurs upon such a charge as that made in this case. But here the party is charged, in an abstract way, with being a suspicious person merely, there being no act or conduct of his, mentioned in the statute, to which the suspicion could relate. How is he to meet such charge? Suspicion, as a conception of the mind, is well defined as the imagination of the existence of something upon little or no evidence; doubt; mistrust; and so the adjective term "suspicious" descriptive of the quality or condition of a person, as well the party suspecting as the party suspected, is defined, as apt to imagine with little or no reason; distrustful; liable or open to suspicion; exciting suspicion; giving reasons or grounds to suspect or imagine ill.

In the return of the intendant of the workhouse to the writ of habeas corpus, it is stated, as we have seen, that the prisoner was convicted and sentenced upon a charge of being a suspicious character. This is not the same thing as a charge of being a suspicious person. The element of character is general reputation as to what the party is supposed to be. Character is in itself such reputation as is generally accredited to the party in the minds of others, for good or evil, based upon his general conduct and habits of life, in relation to those to whom he is best known.

A suspicious character, however, does not constitute crime, nor does it justify the government in treating the party having such reputation as a criminal, without connecting him with some criminal act or conduct. But, assuming that the return of the intendant was amendable, so as to make it conform to the information, and conviction thereon, it would seem to be clear that the offense as described in the statute, and in the information, is not such as will justify seizure and imprisonment of the party accused. Under the Constitution of the United States, articles 4 and 8 of the Amendments, every person is intended to be secure in his person against unreasonable searches and seizures, and against cruel and unusual punishments; and it would clearly be a cruel and unnatural punishment to impose fine and imprisonment upon a party, because he might happen to be regarded by some persons as a suspicious person, without anything more.

In the legislation of England, in regard to the police of that Kingdom, we find a great variety of regulations prescribed from time to time, dating back to the earlier reigns and all those in succession, down to modern times, to meet the requirements of the then existing states of society. But much of that

legislation has become obsolete, and, from its severe restrictions upon the liberties of the people, and the cruel and unnatural punishments inflicted, it has long since ceased to be applicable to modern society, and could not at this day be tolerated. (The history of that legislation is clearly stated by Mr. Justice Stephen in the third volume of his History of the Criminal Law of England, chap. 32, pp. 263-274, and in 2 Broom & Hadley, Com. 467.)

The statutes now in force in England for the arrest and punishment of persons charged with idleness, disorderly conduct, and vagrancy, etc., are 5 Geo. IV., chap. 83, passed in 1824, and the amendatory acts of 1 & 2 Vict. chap. 38; 31 & 32 Vict. chap. 52; and 32 & 33 Vict. chap. 99. The statute of 5 Geo. IV. chap. 83, was a revision of pre-existing statutes upon the subject, and that statute would seem to have furnished a general outline for legislation of the same class in this country. By the 4th section of that statute, among other provisions, it is enacted "that persons found in or upon any dwelling house, warehouse, outhouse, etc., inclosed yard, garden, etc., for any unlawful purpose, suspected persons or reputed thieves, frequenting any river, canal, or navigable stream, dock or basin, or any quay, wharf, or warehouse near thereto, or any street, etc., leading thereto, or any place of public resort, or avenue leading thereto, or any place adjacent, with intent to commit felony; and persons apprehended as idle and disorderly persons resisting officers in their apprehension, and being subsequently convicted of the offense charged,—shall be deemed rogues and vagabonds, and may be punished by a single justice, on the oath of one witness, with imprisonment in the house of correction, with hard labor, for any time not exceeding three calendar months."

This statute of George IV., as will be observed, does what our act of Congress fails to do; it requires the suspicion imputed to the party charged to have relation to or connection with certain acts and conduct of the party, and intention to commit crime. Without such relation or connection the party could not be charged and convicted as being a rogue and vagabond. But that statute, with the definitions and limitations to which we have referred, encountered severe opposition and criticism at the time, because it gave arbitrary, dangerous, and undefined powers to a single justice, and by the indirect and malevolent exercise of which gave rise to the most vexatious imprisonment and subsequent litigation. It was found, says Mr. Chitty (1 Chitty, Gen. Pr. 623), "that under that act the mere suspicion of a propensity to commit a trifling offense was punishable by a single magistrate, with three calendar months' imprisonment, without the power of obtaining release upon finding the most satisfactory sureties for his good behavior." The dangerous and arbitrary provisions of that statute have, however, been modified by subsequent statutes upon the subject. But our act of Congress of July 8, 1898, being more arbitrary than the English

statute of George IV., subjects a party to seizure and conviction, to be followed by pecuniary fine or imprisonment, upon being charged with being a suspicious person merely.

In support of the prosecution and conviction (the case arising as it does upon habeas corpus, and therefore collaterally), it is contended that there was no power or jurisdiction in the court below to discharge the prisoner from the operation of the judgment and sentence of the police court; that the judgment and sentence of that court are final, and that the discharge of the prisoner from imprisonment in the workhouse, to which he had been committed in execution of judgment, was unwarranted and without the authority of law. This contention is entirely correct upon the assumption that the police court had full power and jurisdiction to take cognizance of the case, and to try and convict the accused, and to enter the judgment and sentence against him that we find stated in the record. It is argued that because the police court has jurisdiction to hear and determine prosecutions for the class of offenses enumerated in the act of Congress, among which this alleged offense is described, that therefore the court had jurisdiction in this particular case against the prisoner to proceed to try and pass judgment against him; and that the finding and judgment of the court must be accepted, in this collateral proceeding on habeas corpus, as final and conclusive; as well upon the question of jurisdiction of the court as upon the question of the guilt of the party. But this proposition, as applied to this particular case, cannot be accepted without material qualification. The judgment and sentence of the police court are assailed in this case upon the ground that the act of Congress, under which the prisoner was convicted and sentenced, is, in respect to the particular offense charged, unconstitutional, or is so indefinite, as to this particular offense, as to be void and without effect. If this position is well taken it affects the foundation of the whole proceeding. For, as said by the Supreme Court in *Ex parte Siebold*, 100 U. S. 371, 376, 377, 25 L. ed. 717, 719: "An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but it is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great a moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on habeas corpus by a superior court or judge having authority to award the writ. We are satisfied that the present is one of the cases in which this court is authorized to take such jurisdiction. We think so, because, if the laws are unconstitutional and void, the circuit court acquired no jurisdiction of the causes. Its authority to indict

and try the petitioners arose solely upon these laws."

And so in the case of *Re Coy*, 127 U. S. 731, 32 L. ed. 274, 8 Sup. Ct. Rep. 1263, the Supreme Court, by Mr. Justice Miller, said: "As the laws of Congress are only valid when they are within the constitutional power of that body, the validity of the statute under which a prisoner is held in custody may be inquired into under a writ of habeas corpus as affecting the jurisdiction of the court which ordered his imprisonment. And if their want of power appears on the face of the record of his condemnation, whether in the indictment or elsewhere, the court which has authority to issue the writ is bound to release him." And to the same effect is the case of *Nielsen, Petitioner*, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; indeed, many other cases might be cited in which the same doctrine is fully maintained.

We are, of course, sensible of the fact that it is only in cases where legislative power has been clearly transcended in declaring that to be law which is not within legislative competency, that courts are justified in declaring any particular provision of an act of Congress void and without effect; and especially so where the act relates to matters within the District of Columbia, over which Congress has full and exclusive legislative power. But there are certain fundamental rights of person and property, even in this District, that are beyond the power of Congress to disregard or violate. The rights secured to persons and property by the 4th and 8th Amendments to the Constitution are among such rights. The power of Congress to legislate for this District, in matters of police, is certainly very large, and necessarily so; but there are certain fundamental maxims of a free government that would seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that power to violate and disregard them lurked under any general grant of legislative authority, or ought to be implied from any general impressions that may be found in any of the articles of the Constitution. *Wilkinson v. Leland*, 2 Pet. 627, 657, 7 L. ed. 542, 553; *Terrett v. Taylor*, 9 Cranch, 43, 3 L. ed. 650. It has been recently well said by the Supreme Court that "the legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts." *Lawton v. Steele*, 152 U. S. 133, 139, 38 L. ed. 385, 389, 14 Sup. Ct. Rep. 499. And if so in respect to the rights of private property, *a fortiori* should it be so in respect to the personal rights of the citizens.

From what we have said in the preceding part of this opinion, the necessary conclusion is, that the particular provision of the amendatory act of July 8, 1898, declaring

that "all suspicious persons" could be arrested and prosecuted as criminals, and upon conviction be fined and imprisoned, is nugatory and without effect, and therefore the police court was without jurisdiction to try, convict, and sentence to imprisonment the appellee. Of course, this decision has refer-

ence only to the particular provision of the act of Congress upon which the prosecution against the accused was based, and to none other.

It follows that *the judgment of the court below must be affirmed*; and it is so ordered.

ILLINOIS SUPREME COURT.

Thomas Edwin ALLAIRE, by Next Friend,
Appt.,
v.

St. LUKE'S HOSPITAL *et al.*

(184 Ill. 359.)

An infant has not before birth such an independent existence that a negligent injury to him will sustain an action in his favor after he is born.

(*Boggs, J., dissents.*)

(February 19, 1900.)

APPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

Statement by the Court:

The amended declaration in this case, omitting the caption, is in the words and figures as follows: "The said plaintiff, Thomas Edwin Allaire, an infant of tender age, by Ada A. Allaire, his next friend, and Philetus Smith, his attorney, by leave of the court first had, for amended declaration, complains of the said defendants, both bodies politic and corporate, and doing business at the city of Chicago, in said county, under and by virtue of the laws of said state, in a plea of trespass on the case, for that heretofore, to wit, on or about the second day of February A. D. 1896, at and in the said city, said defendants were possessed of and using a certain building there situate as a hospital for the care, curing, and treatment of sick persons, and of ladies therein during the time before, at, and after accouchement and parturition and of convalescence thereafter, and for the care, careful treatment, and medical diligence in the safe delivery of infants *in ventre sa mère*, all for hire and reward in that behalf. The said Ada A. Allaire, then within ten days, as near as may be, for the natural birth of plaintiff, as the said defendants then and there well knew and had knowledge, then and there, on said last-named day, at the request and solicitation of the said defendants, for hire and reward in that behalf to be paid by her, be-

came and was a patient of said defendants in the said building, therein to be carefully kept, cared for, housed, and medically treated until the birth of plaintiff, and during her convalescence thereafter, and for such hire and reward so to be paid then and there became and was such patient of defendants, for the use and benefit of plaintiff, in that he also should receive from said defendants all due care and treatment, and should be safely delivered by birth, in the course of nature, without personal harm. And thereupon it then and there became and was the duty of defendants to carefully and comfortably house, shelter, and keep the said Ada A. Allaire in said building, and to extend to and bestow upon her person great care and diligence before, during, and after plaintiff's birth,—all this for the well-being of the said Ada A. Allaire, as also for the benefit of the plaintiff, to the end and purpose that he also should receive great and due care from said defendants, and be naturally born of his mother, without injury or harm to his person. And the plaintiff further avers that before, on, and after the day first aforesaid, at and in the said building, the said defendants were possessed of and using a certain elevator, so called, for the conveyance of patients therein through a shaft from one floor of said building to other floors therein, and the said Ada A. Allaire, then being such patient, as aforesaid, on said day last named, and in obedience to defendants' request and direction so to do, entered into such elevator, and upon the floor thereof, and then and there sat down upon a common, all-wooden chair on said floor, that had there been placed in its then position by defendants, to be carried and elevated thereon from the second floor of said building to the floor of the obstetrical department thereof above said second floor, she then and there being assured by defendants that it was and would be perfectly safe for her to be seated in said chair in its then position, to be carried upward in said elevator, and that no harm could come to her for so doing; defendants then and there well knowing that said Ada A. Allaire was then and there near to confinement for the natural birth of plaintiff. And thereupon it became and was the duty of defendants to have and keep said elevator and shaft, and each and every part thereof,

NOTE.—The cases upon this subject have heretofore been very rare, and those that have occurred are practically all set out in the report as given above. As shown by the dissenting opinion, there is an argument on both sides

of the question, and the litigation involving the point is likely to be more prolific in the future, so as to make this decision an important one.

in a proper, safe, and secure condition, and keep the said mother of plaintiff and the plaintiff safely and without personal harm or injury in the use and enjoyment thereof, and to so place and condition the said mother therein and upon said floor and chair as that neither she nor the plaintiff, then *in ventre sa mère*, should in any way be injured or personally harmed while therein, and being carried thereby to said floor above, whither the said mother was then and there directed by defendants; yet the defendants did not nor would regard their duty in that behalf, but, on the contrary thereof, negligently and carelessly, at the place and on the day last named, and when and while the said mother of plaintiff, with all due care on her part, was then and there so conditioned and seated in said chair, and being rapidly carried upward in said elevator, failed and neglected to have and keep said shaft, elevator, and chair in a safe and secure condition and position, and to have and keep the car of the said elevator inclosed, and then and there carelessly, negligently, and heedlessly failed to properly load and operate said elevator, and did then and there so carelessly and negligently operate the same that when and while the said Ada A. Allaire was so being rapidly carried upward therein and thereon the top of said chair suddenly and with great force struck a projection in and on the side of said shaft, whereby said chair, with said mother thereon sitting, was instantly and with great power crushed to the floor of said elevator car, the said car then and there being uninclosed and open, and said mother of plaintiff and the plaintiff then and there with great force and violence thrown and hurled from and off said chair to the floor of said car and to the edge of said floor opposite said chair, and by reason thereof and the swift upward motion of said elevator car the left limb of said mother was then and there and thereby thrown and caught between the edge of said floor and a projection in said shaft, and was then and thereby greatly cut, mangled, bruised, and the bones thereof broken, and said mother greatly and grievously bruised, hurt, jammed, and wounded in her left hip, thigh, side, and body, and other great personal injuries, by reason of said negligence of defendants, said Ada A. Allaire then and thereby received and sustained, and that said mother, by reason of her said personal injuries, and the manner, way, and time in which the same were so received and sustained, was then and there put in great terror and fear that death was then for herself and plaintiff unborn, so that and thereby, and as the direct, proximate, and natural cause of said injuries to his said mother, said plaintiff was then and there, and by reason of defendants' said negligence, greatly injured, strained, bruised, wounded in his left limb, left side, left hip, left arm, and left hand, so that at his birth, on the sixth day of February, A. D. 1886, his left foot, left limb, left side, and left hand were and became, and hitherto have been and still are, wasted, withered and atrophied, and his said foot smaller than natural by

more than one half, and made thereby to turn inward and the sole thereof upward, and his said limb shorter than natural by more than 4 inches, and his said hip, side, and arm, by reason of said negligence and injuries, became and are made shrunken, atrophied, and paralytic, and his said limb without flesh thereon, and from thence hitherto have so been and still are, and said plaintiff thereby greatly and sadly crippled for life; and in endeavoring to be cured and healed of his said injuries has laid out and expended the sum of two thousand dollars (\$2,000) and more (the said Ada A. Allaire having heretofore, for a valuable consideration, settled with the said defendants for and released them from all damages for said injuries to herself alone); to the damage of plaintiff in the sum of fifty thousand dollars (\$50,000), and therefore he brings his suit," etc. The general demurrer was filed by the defendants, which was sustained by the court, and judgment was rendered for the defendants. An appeal was thereupon taken to the appellate court, where the judgment of the lower court has been affirmed. The present appeal is from such judgment of affirmation.

Mr. Philetus Smith, for appellant:

If actual parturition be indispensable before a cause of action can accrue, then it would matter not how wilful and wicked the injury to the child *in utero* might be.

Whenever a child *in utero* is so far advanced in prenatal age as that, should parturition occur at such age, such child could and would live separable from the mother and grow into the ordinary activities of life. It would have a right of action for any personal injuries wantonly or negligently inflicted upon it at such age.

American Text-Book of Obstetrics, ed. 1895, p. 925; 2 Witthaus & Becker's Medical Jurisp. (1894) pp. 378 *et seq.*; *Theilsson v. Woodford*, 4 Ves. Jr. 227.

Life is the immediate gift of God, a right inherent by nature in every individual; and it begins, in contemplation of law, as soon as the infant is able to stir in its mother's womb.

1 Bl. Com. 130.

A child *in utero* is considered as living for its own benefit, but not to a fixed period of time.

Blasson v. Blasson, 2 De G. J. & S. 865.

A child quick *in utero* is a person in being. *Phillips v. Herron*, 55 Ohio St. 478, 45 N. E. 720; *Turley v. Turley*, 11 Ohio St. 173; *McArthur v. Scott*, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 852.

Under Lord Campbell's act so called, 9 and 10 Vict. chap. 93, an infant may claim compensation for the death of a relative, though the death occurred while the infant was *in ventre sa mère*.

The George & Richard, L. R. 3 Adm. & Eccl. Rep. 466; *Blake v. Midland R. Co.* L. R. 18 Q. B. Div. 93. See also *Nelson v. Galveston, H. & S. A. R. Co.* 78 Tex. 621, 11 L. R. A. 391, 14 S. W. 1021.

To kill a child in its mother's womb is now no murder, but a great misprision; but if the child be born alive, and die by reason of the potion or bruises it received in the womb, it seems by the better opinion to be murder in such as administered or gave them.

4 Cooley's Bl. Com. p. 197.

Mr. Lyndem Evans, for appellees:

There is no statute nor any common-law authority to sustain this action.

Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 422; *Walker v. Great Northern R. Co.* Ir. 28 L. R. C. L. 69; Francis, *Legal Maxims*, Preface.

The alleged analogy in chancery is inapplicable.

Grotius, de Equitate, § 3; *Heard v. Stanford*, Cas. t. Talb. 173; Pom. Eq. Jur. § 425; Story, Eq. Jur. § 616; 10 & 11 Wm. III., chap. 16; *Palmer v. Cracroft*, 2 Vern. 580.

The alleged analogy from criminal law is inapplicable.

Hale, P. C. 433; *Rex v. Enoch*, 5 Car. & P. 539; *Rex v. Brain*, 6 Car & P. 349; *Rex v. Poulton*, 5 Car. & P. 329; 4 Bl. Com. 198; Year Books, 1 Edw. III. 23, pl. 18; Fitzherbert, Abr. pl. 4; 1 Fleta, Com. chap. 35, § 3; Crim. Code, § 3.

The alleged analogy from civil, ecclesiastical, and admiralty law is inapplicable.

Wharton, Neg. ed. 1874, §§ 9a, 10; Benedict, American Admiralty, 58, §§ 111-113.

The declaration fails to show any legal duty of the defendants, as a hospital, to the plaintiff, or any breach thereof.

Fcoffees of Heriot's Hospital v. Ross, 12 Clark & F. 507; *Union P. R. Co. v. Artist*, 19 U. S. App. 612, 60 Fed. Rep. 365, 9 C. C. A. 14, 23 L. R. A. 581; *Holliday v. St. Leonard*, 11 C. B. N. S. 192; *Gooch v. Association for Relief of Aged Indigent Females*, 109 Mass. 56; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Hughes v. Monroe County*, 147 N. Y. 49, 39 L. R. A. 33, 41 N. E. 407; *Williamson v. Louisville Industrial School of Reform*, 95 Ky. 251, 23 L. R. A. 200, 24 S. W. 1065; *Dornes v. Harper Hospital*, 101 Mich. 555, 25 L. R. A. 602, 60 N. W. 42; *Joel v. Woman's Hospital*, 89 Hun, 73, 35 N. Y. Supp. 37.

Per Curiam:

In deciding this case the appellate court delivered the following opinion:

"The action is not given by any statute, and, if maintainable, it must be so by the common law, and therefore the question is whether, at common law, the action can be maintained. Had the plaintiff, at the time of the alleged injury, in contemplation of the common law, such distinct and independent existence that he may maintain the action, or was he, in view of the common law, a part of his mother? If the former, it would seem the action can be maintained, but, if the latter, not: because, if a part of his mother, the injury was to her, and not to the plaintiff.

"Appellant's counsel has argued the case learnedly, and with not a little industry, but has cited only two cases in which it was at-
48 L. R. A.

tempted to maintain actions involving the question presented here, namely, *Dietrich v. Northampton*, 138 Mass. 14, 52 Am. Rep. 422 (decided in 1884), and *Walker v. Great Northern R. Co.* Ir. L. R. 28 C. L. 69 (decided in 1891). In the former case the facts were that the mother, when advanced four or five months in pregnancy, slipped, and fell, by reason of a defect in the highway, the consequence of which was a miscarriage. The plaintiff was alive when delivered, but was too little advanced in fetal life to survive its premature birth. The action was brought by the administrator of the deceased infant under a statute authorizing an action for the benefit of the mother or next of kin. The trial and supreme courts both held that the action could not be maintained, the latter court saying: 'Taking all of the foregoing considerations into account, and, further, that, as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff's intestate within its meaning.' In *Walker v. Great Northern R. Co.*, the statement of claim was, substantially, that Annie Walker, mother of the plaintiff, while quick with child, became a passenger on the defendant's railway, and was so received by the defendant, and that the defendant so carelessly and negligently conducted itself in carrying said Annie Walker and in managing its railway that the plaintiff was thereby injured, crippled, and deformed. A demurrer was sustained to the statement of claim, all the judges concurring in the opinion that it was defective in not showing a contractual relation between the plaintiff and the railway company, but merely averring a contract between the mother of the plaintiff and the company. The question, however, whether such an action could be maintained by an infant in its mother's womb at the time of the alleged injury could, under any circumstances, be maintained, was discussed elaborately, and with great learning, both by court and counsel. O'Brien, Ch. J., after discussing the question, expressly declined to commit himself by an opinion, leaving it, as he said, 'an open question,' so far as he was concerned. Harrison, J., while basing his decision on the insufficiency of the statement of claim, says, in his opinion: 'When the accident occurred, on the 12th of June, the plaintiff was still unborn, and had no existence apart from her mother, who was the only person whom the defendants contracted to carry on their line,' etc. Johnson, J., in his opinion, says: 'As matter of fact, when the act of negligence occurred the plaintiff was not in case,—was not a person, or a passenger, or a human being. Her age and her existence are reckoned from her birth, and no precedent has been found for this action.' Again, commenting on the claim of liability, the same learned judge says: 'If it did not spring out of contract, it must, I apprehend, have arisen (if at all), from the relative situation and circumstances of the defendants

and plaintiff at the time of the occurrence of the act of negligence. But at that time the plaintiff had no actual existence,—was not a human being, and was not a passenger,—in fact, as Lord Coke says, the plaintiff was then *pars viscerum matris*, and we have not been referred to any authority or principle to show that a legal duty has ever been held to arise towards that which is not *in esse* in fact, and has only a fictitious existence in law, so as to render a negligent act a breach of that duty.' O'Brien, J., in his opinion, says of the action: 'It is admitted that such a thing was never heard of before, and yet the circumstances which would give rise to such a claim must at one time or another have existed.' In *Dietrich v. Northampton*, 138 Mass. 14, 52 Am. Rep. 422, the court says: 'But no case, so far as we know, has ever decided that, if the infant survived, it could maintain an action for injuries received by it while in its mother's womb.'

"Appellant's counsel substantially admits that there is no precedent for the action. While it is true that this is not conclusive that the action may not be maintained, yet, in view of the fact that, as said by Mr. Associate Justice O'Brien, similar circumstances must have before occurred, it is entitled to great weight, especially when the right to maintain the action is, to say the least, doubtful. Mr. Associate Justice O'Brien, in *Walker v. Great Northern R. Co.*, says: 'The law is, in some respects, a stream, that gathers accretions, with time, from new relations and conditions. But it is also a landmark that forbids advance on defined rights and engagements; and, if these are to be altered,—if new rights and engagements are to be created,—that is the province of legislation and not of decision.' In this we fully concur. That a child before birth is, in fact, a part of the mother, and is only severed from her at birth, cannot, we think, be successfully disputed. The doctrine of the civil law and the ecclesiastical and admiralty courts, therefore, that an unborn child may be regarded as *in esse* for some purposes, when for its benefit, is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth. If the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant with it. We are of opinion that the action will not lie. The judgment will be affirmed."

We concur in the foregoing views, and in the conclusion reached by the appellate court. Accordingly, *the judgment of the Appellate Court is affirmed.*

Boggs, J., dissenting:

It may be conceded no case adjudicated at the common law can be found wherein a plaintiff was awarded damages for injuries inflicted upon his person while in the womb of his mother. But an adjudicated case is not indispensable to establish a right to recover under the rules of the common law. 48 L. R. A.

Lord Mansfield declared: "The law of England he observed, would be an absurd science were it founded upon precedents only. Precedents," he observed, "were to illustrate principles, and to give them a fixed certainty." 1 Kent, Com. 477. In speaking of the establishment and growth of rights at the common law, Mr. Cooley, in his work on Torts (pp. 13-15), said: "The process of growth has been something like the following: Every principle declared by a court in giving judgment is supposed to be a principle more or less general in its application, and which is applied under the facts of the case, because, in the opinion of the court, the facts bring the case within the principle. The case is not the measure of the principle. It does not limit and confine it within the exact facts, but it furnishes an illustration of the principle, which, perhaps, might still have been applied had some of the facts been different. Thus, one by one, important principles become recognized through adjudications which illustrate them, and which constitute authoritative evidence of what the law is when other cases shall arise. But cases are seldom exactly alike in their facts. They are, on the contrary, infinite in their diversities; and, as numerous controversies on differing facts are found to be within the reach of the same general principle, the principle seems to grow and expand, and does actually become more comprehensive, though so steadily and insensibly, under legitimate judicial treatment, that for the time the expansion passes unobserved. But new and peculiar cases must also arise from time to time, for which the courts must find the governing principle, and these may either be referred to some principle previously declared, or to some one which now, for the first time, there is occasion to apply. But a principle newly applied is not supposed to be a new principle. On the contrary, it is assumed that from time immemorial it has constituted a part of the common law of the land, and that it has only not been applied before because no occasion has arisen for its application." At the common law, actions were maintainable to recover damages occasioned by injuries to the person of the plaintiff, whether inflicted intentionally or through the negligence of the defendant. The governing principle illustrated by such cases is that the common law, by way of damages, gave redress for personal injuries inflicted by the wrong or neglect of another. The case disclosed by the declaration under consideration is embraced within the limits of the principle thus recognized, and it is clear recovery could have been maintained at common law unless the fact the plaintiff was unborn when the alleged injuries were inflicted would have operated to deny a right of action. The argument is that at the common law an unborn child was but a part of the mother, and had no existence or being which could be the subject-matter of injury distinct from the mother, and that an injury to it was but an injury to the mother; that in such case there was but one person,—one life,—that of the mother. A fetus in the womb of the moth-

er may well be regarded as but a part of the bowels of the mother during a portion of the period of gestation; but if, while in the womb, it reaches that prenatal age of viability when the destruction of the life of the mother does not necessarily end its existence also, and when, if separated prematurely, and by artificial means, from the mother, it would be so far a matured human being as that it would live and grow, mentally and physically, as other children generally, it is but to deny a palpable fact to argue there is but one life, and that the life of the mother. Medical science and skill and experience have demonstrated that at a period of gestation in advance of the period of parturition the fœtus is capable of independent and separate life, and that, though within the body of the mother, it is not merely a part of her body, for her body may die in all of its parts and the child remain alive, and capable of maintaining life, when separated from the dead body of the mother. If at that period a child so advanced is injured in its limbs or members, and is born into the living world suffering from the effects of the injury, is it not sacrificing truth to a mere theoretical abstraction to say the injury was not to the child, but wholly to the mother?

A child in *ventre sa mère* was regarded at the common law as *in esse* from the time of conception for the purpose of taking any estate, whether by descent or devise, or under the statute of distribution, if the infant was born alive after such a period of fetal existence that its continuance in life was or might be reasonably expected. 10 Am. & Eng. Enc. Law, p. 624; Co. Litt. 36. Blackstone, after declaring the right of personal security to be an absolute right, says: "The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation. Life is the immediate gift of God,—a right inherent by nature in every individual; and it begins, in contemplation of law, as soon as an infant is able to stir in the mother's womb. For, if a woman is quick with child, and by a potion or otherwise killeth it in her womb, or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child, this, though not murder, was, by the ancient law, homicide or manslaughter." [1 Bl. Com. *129, 139]. Though it was the rule of the common law if one should unlawfully beat a woman pregnant with child, and thereby cause the child to die in the body of the mother, the crime was not deemed to be murder, but the ancient crime of homicide or manslaughter, still the doctrine of the common law was, if the child should not die in the womb of the mother, but should be born alive, and should afterwards die in consequence of the assault while in the womb of the mother, the offense was deemed to be murder. 3 Co. Inst. 50; [Beale v. Beale] 1 P. Wms. 246. If, in the contemplation of the common law, life begins as soon as the infant is able to stir in the mother's womb, and that an injury inflicted upon an infant while in the womb of the mother shall be

deemed murder if the infant survive the wound during prenatal life, but succumb to it, and dies from it after being born, and if every legitimate infant in *ventre sa mère* is to be deemed as born for all purposes beneficial to the child, why should it be supposed the common law would have denied to an infant born alive the right to recover damages for the injury inflicted upon it while in the womb of the mother? Had such injury, though inflicted on the child while in the mother's womb, been sufficient to cause the death of the infant after it had been born alive, the common law would have regarded the injury as having been inflicted upon a human being, and punished the perpetrator accordingly; and, that being true, why should the infant which survives be denied the right to recover damages occasioned by the same injury? In the case at bar the infant, when the injury was inflicted, had, as the declaration alleged, reached that advanced stage of fetal life which would have, according to the experience of mankind, and according to the medical learning of the age, endowed it with such vitality and vigor, and with members and faculties so far complete and mature, that it could have maintained independent life, and the death of the mother would not have deprived it of life. It is but natural justice that such an infant, if born alive, should be allowed to maintain an action in the courts for injuries so wrongly committed upon its person while so in the womb of the mother.

Two cases are much relied upon as in opposition to this view. One is the case of *Dietrich v. Northampton*, 138 Mass. 14, 32 Am. Rep. 422. The facts there were: A woman four or five months advanced in pregnancy slipped and fell by reason of a defect in the highway, in consequence of which there was a miscarriage. The child was alive when delivered, but was too little advanced in fetal life to survive its premature birth, and died before it was severed from its mother. The person of the infant was not directly injured otherwise than by a communication of the shock to the mother, and it was held an action to recover damages did not accrue to an administrator of the child. This case can have little application here, for the reason that in the case at bar it appears from the declaration that the child had reached that stage of fetal life when it was capable of continued existence independent of the mother; that its person was injured within itself, and it was afterwards born alive, and with sufficient strength and maturity to maintain independent existence, and still lives. It does not follow from the *Dietrich Case* that the plaintiff in this cause should not be recognized as capable of having a *locus standi* in court to recover damages for injuries to his person, or that the supreme court of Massachusetts would have so held.

The other case is that of *Walker v. Great Northern R. Co.* Ir. L. R. 28 C. L. 69, in which the facts were: A woman far advanced in pregnancy took passage on defendant's railway. There was an accident to the

train, whereby the mother and the child were seriously injured, so that the child was born a cripple. The action was by the child to recover damages, and on demurrer the court held the suit could not be maintained. The cause could only have been sustained on the ground the defendant road had failed to observe some duty it owed to the child arising generally by reason of its position as a common carrier, or of some contract with the child. The declaration did not disclose the railroad company had knowledge of the existence of the child, or of the condition of the mother, or that there was any contract with reference to the carriage of the child, or any consideration paid for such carriage. The ruling of the court that the railway company was not answerable to the child can have no influence adverse to the plaintiff in the case at bar. Here the appellee hospital knew of the condition of the mother, and of the existence of the plaintiff in her womb, contracted with direct reference to the safety and care of both mother and child, and received compensation for the performance of a duty to both. If in delivering a child, an attending physician, acting for a compensation, should wantonly or by actionable negligence injure the limbs of the infant, and thereby cause the child, although born alive and living, to be maimed and crippled in body or members, it would be abhorrent to every impulse of justice or reason to deny to such a child a right of action against such physician to recover damages for the wrongs and injuries inflicted by such physician. The appellee corporation owed it as a duty to the plaintiff, though unborn, to bestow due and ordinary care and skill to the matter of his preservation and safety before and at the time of his birth. It appeared from the declaration that that duty was neglected, and that the limbs and body of plaintiff received injuries by reason of such negligence, and that his legs and arms are now maimed and crippled by reason thereof. Should compensation for his injuries be denied on a mere theory—known to be false—that the injury was not to his person, but to the person of the mother? The law should, it seems to me, be that whenever a child *in utero* is so far advanced in prenatal age as that, should parturition by natural or artificial means occur at such age, such child could and would live separable from the mother, and grow into the ordinary activities of life, and is afterwards born, and becomes a living human being, such child has a right of action for any injuries wantonly or negligently inflicted upon him or her person at such age of viability, though then in the womb of the mother. That proposition having been established, that an adjustment of damages with the mother could not preclude the child would naturally and necessarily follow.

The argument that there can be no certainty that an unborn child is dead or alive when an injury is inflicted upon the mother is answered by the allegations of the declaration that the plaintiff was born alive, and is a living human being. There was, therefore, no uncertainty as to the fact that the plain-

tiff was alive in the mother's womb when the injuries were inflicted.

Harry GUNDLING, *Appt.*,

v.

City of CHICAGO.

(176 Ill. 340.)

1. Cigarettes are not included among the "other provisions" referred to in Rev. Stat. chap. 24, art. 5, § 1, ¶ 50, providing for the regulation by cities of sales of specified articles of food "and all other provisions."
2. An ordinance requiring a license for the sale of cigarettes is within the authority given by Rev. Stat. chap. 24, art. 5, § 1, ¶ 66, authorizing the enforcement of "all necessary police ordinances," and § 78, authorizing all acts and regulations "which may be necessary or expedient for the promotion of health or the suppression of disease."
3. An ordinance prohibiting the sale of cigarettes without a license does not violate the constitutional provisions as to due process of law, or any constitutional rights.
4. An ordinance providing that the mayor shall grant licenses in certain cases does not delegate the power of the city council to him, when the council in substance grants the licenses by authorizing him to do so when certain conditions are complied with.

(October 24, 1898.)

APPEAL by defendant from a judgment of the Criminal Court for Cook County convicting him of violating an ordinance against the sale of cigarettes without a license. *Affirmed.*

The facts are stated in the opinion.

Mr. Lee D. Mathias, with *Mr. Charles H. Aldrich*, for appellant:

When the charter of municipal corporations or the general incorporation act under which a city is organized provides what powers shall be exercised by the common council, the enumeration of those powers implies the exclusion of all others.

Rev. Stat. chap. 24, § 63, ¶¶ 50, 53, do not authorize the enactment of the ordinance.

Endlich, Interpretation of Statutes, § 405;

NOTE.—This case has been recently affirmed by the Supreme Court of the United States in 177 U. S. 183, 44 L. ed. —, Advance Sheets, page 634. 20 Sup. Ct. Rep. 633.

In *McGregor v. Cone* (Iowa) 39 L. R. A. 484, it was held that the original package of commerce when cigarettes were shipped in a wooden box containing packages of cigarettes, each of which was sealed with an internal revenue stamp, was the wooden box, and not the stamped package. But in *Austin v. State*, 101 Tenn. 563, the supreme court of Tennessee held that cigarettes are not legitimate articles of commerce within the protection of the United States Constitution because they possess no virtue, but are inherently bad, and only bad. This case is understood to be pending in the Supreme Court of the United States on writ of error.

Re Swigert, 119 Ill. 83, 59 Am. Rep. 789, 6 N. E. 469; *Cairo v. Bross*, 101 Ill. 475; *Emmons v. Levisstown*, 132 Ill. 380, 8 L. R. A. 328, 24 N. E. 58; *Cecil v. Green*, 161 Ill. 265, 32 L. R. A. 566, 43 N. E. 1105; *Hotelling v. Chicago*, 56 Ill. App. 289; *Vosse v. Memphis*, 9 Lea. 294.

The common council has no authority to enact the ordinance under the 66th and 78th paragraphs of § 63, chap. 24, Rev. Stat.

Cairo v. Bross, 101 Ill. 475; *Dill. Mun. Corp.* §§ 316, 364; *Tiedeman, Mun. Corp.* § 146; *Huesing v. Rock Island*, 128 Ill. 465, 21 N. E. 558; *Shuman v. Fort Wayne*, 127 Ind. 109, 11 L. R. A. 378, 26 N. E. 560; *Kinsley v. Chicago*, 124 Ill. 359, 16 N. E. 260; *Emmons v. Levisstown*, 132 Ill. 380, 8 L. R. A. 328, 24 N. E. 58; *Barling v. West*, 29 Wis. 307, 9 Am. Rep. 576; *Rev. Stat.* 1897, chap. 38, § 207*h*, i.

The common council of a municipal corporation cannot delegate a power conferred upon it by statute to one of its officers, and this ordinance, by delegating to the mayor the power to determine whether the license should be issued, became of no effect and void.

Dill. Mun. Corp. 4th ed. § 96; *East St. Louis v. Wehrung*, 50 Ill. 28; *Kinmundy v. Mahan*, 72 Ill. 462; *Chicago v. Trotter*, 136 Ill. 430, 20 N. E. 359; *Cass v. People ex rel. Kochersperger*, 166 Ill. 126, 46 N. E. 729; *Bradford v. Pontiac*, 165 Ill. 612, 46 N. E. 794; *Cairo v. Coleman*, 53 Ill. App. 680; *Re Elliott*, 11 *Manitoba L. Rep.* 358.

The ordinance in question and the judgment of the court in this case are both unconstitutional, depriving persons of liberty and property without due process of law.

Childers v. People, 11 Mich. 49; *Shuman v. Fort Wayne*, 127 Ind. 109, 11 L. R. A. 378, 26 N. E. 560; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; 46 Cent. L. J. p. 166; *Tiedeman, Mun. Corp.* pp. 294, 295; *Peoria v. Gugenheim*, 61 Ill. App. 374; *Frer v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Cooley, Const. Lim.* 198; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; 1 Black, *Judgm.* § 257; *Freeman, Judgm.* 3d ed. § 624; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108.

On petition for rehearing.

Vr. Charles S. Babcock, with **Mr. Charles H. Aldrich**, for appellant:

What laws may be properly classed as inspection laws must be determined largely by the nature of the inspection laws of the states at the time the Constitution was framed.

New York v. Compagnie Générale Transatlantique, 107 U. S. 59, 27 L. ed. 383, 2 Sup. Ct. Rep. 87.

The meaning of a word or phrase in a statute may be determined by the meaning of prior statutes and the effect which the legis-

lature has given to such words and phrases under analogous circumstances.

23 Am. & Eng. Enc. Law, pp. 311 *et seq.*

An investigation into the inspection laws of the state of Illinois will show that never in its history has a license been imposed as a means of, or as incidental to, carrying out the intention of these laws.

Messrs. Howard S. Taylor and George McA. Miller, for appellee:

The city of Chicago has the power under the incorporation act to pass the ordinance in question.

Because the power has been expressly granted by the legislature.

Ill. Stat. cl. 50, 53, art. 5, § 1, chap. 24; *Chicago Packing & P. Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545; *Kinsley v. Chicago*, 124 Ill. 359, 16 N. E. 260; *Endlich, Interpretation of Statutes*, §§ 404, 405; *Re Swigert*, 119 Ill. 83, 59 Am. Rep. 782, 6 N. E. 469; *Standard Dict. Provisions*; *Mooney v. Evans*, 41 N. C. (6 Ired. Eq.) 363; *Webber v. Chicago*, 148 Ill. 313, 36 N. E. 70.

Because the power, if not express, is implied.

Ill. Stat. cl. 53, 66, 78, art. 5, § 1, chap. 24; *Kinsley v. Chicago*, 124 Ill. 359; 16 N. E. 260; *Chicago & N. W. R. Co. v. Chicago*, 148 Ill. 141, 35 N. E. 881; *Mather v. Ottawa*, 114 Ill. 659, 3 N. E. 216; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 283, 8 L. R. A. 497, 22 N. E. 798; *Elliott, Priv. Corp.* § 63; *Madison W. & M. Pl. Road Co. v. Watertown & P. Pl. Road Co.* 5 Wis. 173; *Cairo v. Coleman*, 53 Ill. App. 680; *Mobile v. Craft*, 94 Ala. 156, 10 So. 534; *Culver v. Streator*, 130 Ill. 238, 6 L. R. A. 270, 22 N. E. 810; *Blake v. Pontiac*, 49 Ill. App. 543; *First Municipality v. Cutting*, 4 La. Ann. 335; *Beach, Pub. Corp.* 988; *Horr & B. Mun. Pol. Ord.* pp. 17, 199.

The city of Chicago has power to authorize its mayor to issue the license as provided by the ordinance.

Swarth v. People ex rel. Parton, 109 Ill. 624; *Horr & B. Mun. Pol. Ord.* pp. 14, 202.

Neither the ordinance nor the judgment of the court below is unconstitutional.

Braun v. Chicago, 110 Ill. 186.

Phillips, J., delivered the opinion of the court:

This case was tried on an agreed statement of facts, which showed that the city of Chicago, by its city council, adopted an ordinance which provides, by § 1, that the mayor shall, from time to time, grant licenses authorizing the sale of cigarettes. It further provides what formalities shall be observed by the applicant in making his application, such as a bond to obey the laws, affidavit of good character and reputation, etc., and gives to the mayor a discretion to determine whether a license shall be issued. Section 2 provides for a license fee of \$100 per year, and that no license shall be granted to sell cigarettes within 200 feet of a schoolhouse. Section 3 provides that every license granted shall be at the rate of \$100 per year. Section 4 grants the power to the mayor to revoke any license for cause. Sec-

tions 5 and 6 provide the manner of selling cigarettes. Section 7 makes the commissioner of health the general supervisor and inspector to see that the sale of cigarettes is carried on according to law. Section 9 prescribes the penalty for the violation of the terms of the ordinance. Section 9 is that the ordinance shall be in force after its due passage and publication. The statement further shows that appellant, on or about the 31st day of December, 1897, while said ordinance was in force, and after the same had been duly published, did have, keep, and expose for sale, and offer to sell, cigarettes within the city of Chicago, without having first procured a license, as required by said ordinance. The defendant was convicted before a justice of the peace, and a fine of \$50 and costs entered against him, from which he prosecuted an appeal to the criminal court of Cook county, where, on trial on the foregoing statement of facts, he was found guilty, and a fine of \$50 assessed against him. Motions for a new trial and in arrest of judgment were overruled, to which he excepted, and judgment was entered against him.

The defense was based on the ground that the ordinance in question, as enacted by the city council, was not within the powers delegated to the city by the legislature, and hence was null and void, and that the ordinance and judgment of the court deprived the appellant of liberty and property without due process of law, in violation of the Constitution of the state of Illinois and of the 14th Amendment of the Constitution of the United States, which latter in part provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The contention of appellee is that the power to enact this ordinance is expressly granted by § 50, § 1, art. 5, chap. 24, of our Revised Statutes, which provides that the common councils of cities shall have power "to regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same." The power to license and regulate the sale of cigarettes, it is contended, is included within that paragraph, and that the term "all other provisions" includes tobacco in the list of enumerated articles by the language as used.

The articles—meats, poultry, fish, butter, cheese, and lard—which are expressly enumerated in the above paragraph, and the power expressly given therein to regulate the sale thereof, are articles of food for man, and include, by the express enumeration of articles, only provisions to be used for man. The term "other provisions," by a familiar canon of construction, can extend only to articles of the same character as those specifically enumerated. When general words follow an enumeration of particular things, such words must be held to include only such

things or objects as are of the same kind as those specifically enumerated. *Re Swigert*, 119 Ill. 83, 59 Am. Rep. 789, 6 N. E. 469; *Cecil v. Green*, 161 Ill. 265, 32 L. R. A. 566, 43 N. E. 1105; *Emmons v. Lewistown*, 132 Ill. 380, 8 L. R. A. 328, 24 N. E. 58. Lexicographers have given to the term "provisions" a broader meaning than that of food for man. The meaning of general terms used in a statute, or in one section thereof, may be often determined from the connection in which the language is used and the purpose to be subserved. Paragraph 50, above, providing for the regulation of the sale of certain enumerated articles of food for man of daily consumption, followed by the general term "all other provisions," cannot be held to include in the term "all other provisions" such an article as tobacco in any of its various forms. Although it may be an article of frequent use, yet it is not included within the meaning of the term "food for man." The contention of appellant is that no express power is given to regulate the sale of tobacco by the provisions of § 50. We hold that contention of appellant must be sustained, and that by § 50 no power is given to the city council to regulate the sale of tobacco.

It is insisted by appellee that if no express authority for licensing the sale of cigarettes is given under § 50, above quoted, the power exists as an implied power under §§ 53, 66, and 78 of said § 1, which provide as follows: "Fifty-Third. To provide for and regulate the inspection of meats, poultry, fish, butter, cheese, lard, vegetables, cotton, tobacco, flour, meal, and other provisions." "Sixty-Sixth. To regulate the police of the city or village, and pass and enforce all necessary police ordinances." "Seventy-Eighth. To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease." An ordinance may derive its validity from several different grants of power, and not depend solely upon any single section or clause of a statute. *Kinsley v. Chicago*, 124 Ill. 359, 16 N. E. 260. An implied power of a municipal corporation is a power necessarily incident to the exercise of those powers expressly granted and directly and immediately appropriate to their exercise. *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 22 N. E. 798; *Chicago & N. W. R. Co. v. Chicago*, 148 Ill. 141, 35 N. E. 881; *Mather v. Ottawa*, 114 Ill. 659, 3 N. E. 216. The power to regulate the sale of an article includes the power to require a license to authorize the sale thereof. *Farwell v. Chicago*, 71 Ill. 269; *Chicago Packing & P. Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545; *Kinsley v. Chicago*, 124 Ill. 359, 16 N. E. 260. The licensing of a sale of an article is a legitimate means of regulating its sale. *Chicago Packing & P. Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545. By the paragraphs above quoted, power is expressly given the city to provide for and regulate the inspection of various enumerated articles, including tobacco, and this would include the various forms in which that product is prepared and used. The purpose of conferring this power

of providing for and regulating the inspection of those various enumerated articles is to subserve the public welfare and protect the public health. The measure has relation to the public health, and is required in that interest. With this object evidently in view, the legislature passed an act, approved June 15, 1887, in force July 1, 1887, entitled "An Act to Prohibit Selling, Giving, or Furnishing Tobacco, in Any of Its Forms, to Minors, and Providing a Penalty Therefor." Section 1 of said act provides: "That hereafter no person or persons in this state shall sell, buy for, or furnish any cigar or cigarette, or tobacco in any of its forms, to any minor under sixteen years of age, unless upon the written order of parent or guardian." Section 2 provides that, if any person or persons shall violate the provisions of § 1, he, she, or they shall, on conviction thereof, forfeit and pay for each offense the sum of \$20. The object and purpose of this enactment were to subserve and protect the health and welfare of the class of persons to whom the act refers, and to whom a sale is forbidden. The consensus of opinion in reference to the use of cigarettes is that they are injurious to the young with immature minds, and common observation causes us to know that tobacco in the form of cigarettes is more largely used by those of young and immature minds than by any other class.

It is urged by appellant that the city council has no right to single out a particular form of manufactured tobacco, and provide for its regulation, and require a license for its sale, without making the requirement apply to all the forms in which tobacco may be used. It being well known that young persons of weak and immature minds are more liable to use tobacco in the form of cigarettes than in any other form, a legislative body may properly provide for the regulation and sale of that article in the form in which it is likely to be most deleterious and injurious, and may restrict the sales of that particular form of tobacco. Paragraph 86, before quoted, expressly authorizes the adoption of ordinances necessary to police power; and § 78 is an express authorization of the city council to make all regulations necessary or expedient for the promotion of health or the suppression of disease. Under these two provisions, express authority is granted the municipality to pass all ordinances or requirements tending to promote the public health, morals, security, comfort, and welfare of the community. Such legislation is included within the provision authorizing the enactment of police regulations. The most important of police powers is that of caring for the health of the community, and that is inherent in a municipality, and may be exercised whether expressly granted or not, because the preservation of the health of the public is indispensable to the existence of the municipal corporation. *Ferguson v. Selma*, 43 Ala. 400.

The regulation of the police power is hardly susceptible of exact definition, as the exigencies of each case are varying, and the

cases are innumerable where the health of the inhabitants of the municipality may be in some degree endangered. When the city council considers some occupation or thing dangerous to the health of the community, and, in the exercise of its discretion, passes an ordinance to prevent such a danger, it is the policy of the law to favor such legislation as being humane and essential to the preservation and protection of the community. Municipalities are allowed a greater degree of liberty of legislation in this direction than any other. The necessity for action is often more urgent, and the consequences of neglect are more detrimental to the public good, in this than in any other form of local evil. It being clear that the public health and welfare of a large class in the community would be subserved and protected by ordinances regulating the sale of tobacco in one of its manufactured forms, an ordinance directed to the protection of the health or welfare of that particular class of the community would be a police regulation within the power of a city to enact under the power expressly granted by §§ 66 and 78. An ordinance of this character is not in conflict with any principle of the common law, or with any public or general statute, and infringes no private right not necessarily infringed in the interests of good government. It subserves the public welfare, protects the health of the community, and is included within the express powers granted the city council. The ordinance was not void.

Neither did the ordinance and the judgment of the court deprive the appellant of liberty or property without due process of law. The city having the authority to enact the ordinance and provide a penalty for its violation, which ordinance applies to all citizens within the community, no principle of the Constitution of the state of Illinois or of the United States, or the amendments thereto, was violated.

Appellant insists that the ordinance is void because it delegates to the mayor the power to determine whether the license should be granted. In *Sicarth v. People ex rel. Paxton*, 109 Ill. 621, it was said (626): "It is true, the ordinance prescribing the duties of the mayor in issuing licenses says that he shall, under certain circumstances, 'grant' licenses to certain persons, while the statute authority to 'grant' such licenses is given only to the city council; but the substance of the ordinance is that the city council grants licenses to a certain class of persons upon certain conditions, by authorizing the mayor to 'grant,' that is, to issue or cause license to be issued, when the conditions are complied with. This is not a delegation to the mayor of the power of the council. We see no objection to the form in which this power of the council is exercised, or the mode in which the license was issued." The ordinance, by its terms, fixes the rate per annum to be charged for a license, and regulates the price and object of sale of the particular article to which it refers, all of which is enacted by the city

council. That license is to be granted or issued by the mayor, and thus carrying out the express will of the city council as to issuing the license is not exercising a power conferred on the city council, but is a method by which the council exercises its power as to the manner in which the license is to be issued. In this there is no delegation to the mayor of the power of the city council. The appellant, however, is not in a position to raise this question, from the facts appearing in this record. He was not an applicant for a license, which had been refused him, but was before the court admitting that he had violated an ordinance of the city of Chicago duly passed and published, and denying the right of the city to adopt such ordinance

regulating the sale of cigarettes. He is not in a position to invoke the judgment of this court as to his right to a license, nor is that question before us. We are of the opinion that the ordinance was within the express powers granted to the city council, and the judgment of the court was not violative of any provision of the state or Federal Constitution.

The judgment of the Criminal Court of Cook County is affirmed.

Rehearing denied December 9, 1898.

Affirmed by Supreme Court of United States, April 9, 1900.

INDIANA SUPREME COURT.

Milliard W. SIMONS *et al.*, *Appts.*,

v.

Benjamin B. BOLLINGER.

(.....Ind.....)

An estate, by entireties. and not one of joint tenancy, is created by a deed made to husband and wife "jointly," and the word "jointly" will be construed as surplusage.

(January 24, 1900.)

A PPEAL by defendants from a judgment of the Circuit Court for Lagrange County in favor of plaintiff in an action brought to quiet title to certain real estate. *Affirmed.*

Daniel Weaver conveyed to David S. Kerr and Clara Kerr certain real estate. They, on January 17, 1894, conveyed to Benjamin B. Bollinger. On May 5, 1893, Milliard W. Simons recovered a judgment against David S. Kerr. On April 11, 1898, Simons issued execution against Kerr, which was levied upon the undivided half of the property as belonging to Kerr, and Bollinger thereupon brought this action to quiet his title.

Further facts appear in the opinion.

Messrs. F. J. Dunten, J. E. McClaskey, and J. M. VanFleet, for appellants:

Tenants by the entirety do not hold the title "jointly."

Davis v. Clark, 26 Ind. 424, 89 Am. Dec. 471; *Chandler v. Cheney*, 37 Ind. 398; *Hulett v. Inlow*, 57 Ind. 412, 26 N. E. 64; *Thornburg v. Wiggins*, 135 Ind. 178, 22 L. R. A. 42, 34 N. E. 999; *Dodge v. Kinzy*, 101 Ind. 102.

If the word "jointly," added to language which would create an estate in common, changes it to an estate in joint tenancy, we are unable to see why the addition of the same word to language which would create an estate by entireties will not change it to one in joint tenancy.

Case v. Owen, 139 Ind. 22, 38 N. E. 395.

The addition of the words "in joint tenancy" to a deed conveying land to husband

and wife, makes them joint tenants, and not tenants by entireties.

Thornburg v. Wiggins, 135 Ind. 178, 22 L. R. A. 42, 34 N. E. 999.

Messrs. James S. Drake and Francis D. Merritt, for appellee:

Tenancy by entireties is when husband and wife take an estate to themselves jointly.

2 Preston, Abstracts of Title, p. 39; 1 Washb. Real Prop. pp. 552, 557, 579; 2 Jarman, Wills, 250; Co. Litt. 326a.

Tenancies by entireties are strongly established in our law, and if there should be ambiguity or doubt, in a conveyance to husband and wife, the instrument must be construed to create them by entireties.

Challis, Real Prop. 282; Co. Litt. 326a; *Bevins v. Cline*, 21 Ind. 37; *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471; *Jones v. Chandler*, 40 Ind. 588; *Anderson v. Tannehill*, 42 Ind. 141; *Phelps v. Smith*, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156; *Carver v. Smith*, 90 Ind. 222, 46 Am. Rep. 210; *Morrison v. Seybold*, 92 Ind. 298; *Hadlock v. Gray*, 104 Ind. 596, 4 N. E. 167; *Brown v. Brown*, 133 Ind. 476, 32 N. E. 1128; *Grzesk v. Hibberd*, 149 Ind. 354, 48 N. E. 361; *Marbury v. Cole*, 49 Md. 402, 33 Am. Rep. 266.

The deed would have the same meaning with or without the word "jointly." When land is conveyed to husband and wife jointly they take by entireties.

U. S. Dig. 1876, vol. 7, p. 430; *Robinson v. Eagle*, 29 Ark. 202; *Joos v. Fey*, 30 N. Y. S. R. 147, 9 N. Y. Supp. 275; *Bevins v. Cline*, 21 Ind. 37; *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471; *Chandler v. Cheney*, 37 Ind. 391; Washb. Real Prop. 577; *Simpson v. Pearson*, 31 Ind. 1, 99 Am. Dec. 577; *Anderson v. Tannehill*, 42 Ind. 141; *Lash v. Lash*, 58 Ind. 526; *Hulett v. Inlow*, 57 Ind. 412, 26 Am. Rep. 64; *Carver v. Smith*, 90 Ind. 222, 46 Am. Rep. 210; *Patton v. Rankin*, 68 Ind. 246, 34 Am. Rep. 254; *Edwards v. Beall*, 75 Ind. 401; *Hadlock v. Gray*, 104 Ind. 596, 4 N. E. 167; *Barden v. Overmeyer*, 134 Ind. 660, 34 N. E. 439; *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361; *Beach v. Hollister*, 3

NOTE.—As to tenancy by entireties, see *Hiles v. Fisher* (N. Y.) 30 L. R. A. 305, and *note*. 48 L. R. A.

Hun, 519; *Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 462, 4 N. E. 824.

A husband and wife may hold as joint tenants if the language of the deed be such as to show clearly that such was the intention of all the parties.

Lash v. Lash, 58 Ind. 526; *Case v. Owen*, 139 Ind. 22, 38 N. E. 395; *Barden v. Overmeyer*, 134 Ind. 660, 34 N. E. 439; *Thornburg v. Wiggins*, 135 Ind. 179, 22 L. R. A. 42, 34 N. E. 999; *Wilkins v. Young*, 144 Ind. 1, 41 N. E. 68, 590; Washb. Real Prop. 579; *Miner v. Brown*, 133 N. Y. 308, 31 N. E. 24.

Hadley, Ch. J., delivered the opinion of the court:

Kerr and wife held land conveyed to them by deed in the words following: "Convey and warrant to David S. Kerr and Clara Kerr, his wife, jointly, the," etc. The only question presented for decision is whether the words employed created in David and Clara Kerr an estate in joint tenancy or an estate by entireties. It is agreed that, if they created an estate in joint tenancy, the judgment should be reversed, and, if an estate by entirety, it should be affirmed. It is also conceded by appellants that "the omission from the deed of the word 'jointly' would clearly make Kerr and wife tenants by the entirety, so that the exact question is, Does that word make them joint tenants?"

Section 3341, Burns's Rev. Stat. 1894 (§ 2922, Horner's Rev. Stat. 1897), is as follows: "All conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create estates in common, and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy." The exception is in these words [§ 2923]: "The preceding section shall not apply to mortgages, nor to conveyances in trust, nor when made to husband and wife; and every estate vested in executors or trustees, as such, shall be held by them in joint tenancy." It will be observed that the question we have here is not controlled by the statutes, but must be determined by the rules of the common law. Under the common law the two estates have been recognized from a very early period in the history of the law. The distinctive difference between them is: (1) A joint tenancy may be vested in any number of natural persons, more than one. A tenancy by entirety can be vested only in husband and wife. (2) Joint tenants take by moieties, and each is seised of an undivided moiety and of the whole (*per my et per tout*), while husband and wife take each the entirety (*per tout*). (3) Joint tenants may severally alienate their interests. Husband and wife can do so only by acting jointly. (4) Joint tenants may sever and continue to hold their estates. The estate of husband and wife is inseverable while it remains theirs. (5) Joint tenants may have partition. Husband and wife cannot, during the marriage. Up-
48 L. R. A.

on the death of one joint tenant, his estate is cast upon the survivors, and the last survivor takes the whole. Upon the death of husband or wife, the survivor takes the whole. Freeman, Co-Ten. § 64. Undoubtedly there is an element of joint holding in both estates. Joint tenants hold jointly the whole and the several parts. Tenants by the entirety hold jointly the whole. This common jointure has been recognized by eminent authors in treating of tenancies by entireties as a species of joint tenancy. "A still more peculiar joint estate is that which belongs to a husband and wife, where the same is conveyed to them as such." 1 Washb. Real Prop. 4th ed. p. 672, § 6. Preston says: "Tenancy by entireties is when husband and wife take an estate to themselves jointly by grant or devise." 2 Preston, Estates, 129. "This is a peculiar tenancy, and arises at common law when an estate is conveyed or demised to a husband and wife jointly during coverture." Whart. Conv. 121. "Tenancy by entireties occurs . . . where the husband and wife are jointly seised, to them and their heirs, of an estate made during the coverture.

. . . It constitutes the most intimate union of ownership known to the law." 2 Challis, Real Prop. 282. In many of our cases this court has referred to the seisin of husband and wife as being joint. In *Becins v. Cline*, 21 Ind. 40, it is said: "There are four kinds of joint tenancies at common law, viz.: In common, in parcenary, in joint tenancy, and in tenancy by entireties. . . . A conveyance of land made to a man or woman, who are then husband and wife, they take as joint tenants, by entireties." To the same effect, see *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471; *Jones v. Chandler*, 40 Ind. 588, 592; *Anderson v. Tannhill*, 42 Ind. 141; *Petton v. Rankin*, 68 Ind. 245, 34 Am. Rep. 254; *Phelps v. Smith*, 116 Ind. 387, 391, 17 N. E. 602, and 19 N. E. 156; *Carrer v. Smith*, 90 Ind. 222, 46 Am. Rep. 210; *Morrison v. Seybold*, 92 Ind. 298. In *Hadlock v. Gray*, 104 Ind., at page 598, 4 N. E. 168, it was said by Elliott, J.: "It is true that where real property is conveyed to husband and wife jointly, and there are no limiting words in the deed, they will take the estate as tenants in entirety." It is also said by Hackney, J., in *Brown v. Brown*, 133 Ind., at page 477, 2 N. E. 1128: "The question is now well settled in this state that if a conveyance be made to husband and wife jointly, and without words limiting the estate taken, they will take as tenants in entirety." Words of like import abound in our text-books and adjudicated cases in referring to estates of husband and wife; and, while it is well settled that technically the estate of joint tenancy and estate by the entirety are separate and distinct estates, yet the frequent reference by courts and authors to them both as joint estates, whatever the fact may be, should be of service in determining the legal effect of the word "jointly" as used in the deed under review, and whether the word was aptly or inaptly employed. Moreover, joint tenancies had their origin under a government that discouraged the severance of

landed estates, to promote which policy all conveyances to two or more persons, except to husband and wife, were held to be joint tenancies unless by clear and apt words of limitation some other was described. All presumptions and doubts were turned to the support of joint tenancies. *Case v. Owen*, 139 Ind. 22, 38 N. E. 395; *Freeman, Co-Ten.* § 18. In this country the policy and rule of construction are directly reversed. In this and most of the states, from our earliest history, the political policy has been to encourage the distribution of lands among the people to advance which all conveyances to more than one person, except to husband and wife, have been construed to be tenancies in common, unless another estate is fixed by express and definite words of limitation. *Carver v. Smith*, 90 Ind. 222, 46 Am. Rep. 210. Sections 3341 and 3342, *supra*, which are reenactments of former statutes to the same effect, emphasize two propositions, viz.: (1) That joint tenancies must be held in disfavor and refused except when forced by clear and unmistakable words; and (2) that the rule of the common law, as applicable to conveyances to husband and wife, should remain undisturbed in this state. The strength of that rule is stated by an eminent author in these words: "But, if our theory needs any further support, this support is found in the fact that all the English adjudications upon this subject, as well as all the earlier writers upon the common law, assert that husband and wife cannot, by any words of limitation, however well chosen for that purpose,

receive an estate as joint tenants." *Freeman, Co-Ten.* § 64. While the rule has been somewhat relaxed in this state in deference to the contractual rights of parties, the rule nevertheless exists, that all presumptions must be indulged, and all doubts resolved, against such estates, and in favor of estates by entireties, in conveyances to husband and wife. The words "convey and warrant to David Kerr and Clara Kerr, his wife, jointly," do not in terms create in the spouses a joint tenancy; and whether the word "jointly" was intended to relate to the union of the title and enjoyment, or to characterize the seisin and tenancy, or whether it was inaptly used by the grantor, and without legal significance, as we have seen so frequently happen with eminent authors and judges, is not altogether free from doubt; but, however this may be, it is clear that, under the rule above stated, we must construe it to be surplusage; and the estate conveyed, one of entireties. The cases of *Thornburg v. Wiggins*, 135 Ind. 178, 22 L. R. A. 42, 34 N. E. 999, and *Wilkins v. Young*, 144 Ind. 1, 41 N. E. 68, 590, are not analogous. In each of these cases the words employed were "in joint tenancy,"—the very language of the books,—and we are satisfied that the application of the rule in these cases was as liberal as is warranted by the authorities. *Case v. Owen*, 139 Ind. 22, 38 N. E. 395, has no application. In the *Owen Case* the grantees were unmarried.

Judgment affirmed.

Baker, J., did not participate.

KANSAS SUPREME COURT.

Edmund REDGATE, *Plff. in Err.*,
v.

Wyatt ROUSH *et al.*

(.....Kan.....)

- *1. Where the officer of a church, upon inquiry, find that their pastor is unworthy and unfit for his office, and thereupon, in the performance of what they honestly believe to be their duty towards other members and churches of the same denomination, publish, in good faith, in the church papers, the result of their inquiry, and there is a reasonable occasion for such publication, it will be deemed to be privileged and protected under the law.
- *2. Where the publication appears to have been made in good faith and for the members of the denomination alone, the fact that it incidentally may have been brought to the attention of others than members of the church will not take away its privileged character.
- *3. In such a case and where the plaintiff seeks damages, it devolves upon him to establish actual malice, and where his own

testimony disproves malice the court is justified in taking the case from the jury upon a demurrer to the evidence.

(February 10, 1900.)

ERROR to the District Court for Wabaunsee County to review a judgment in favor of defendants in an action brought to recover damages for alleged publication of a libel. *Affirmed.*

Statement by **Johnston, J.**:

Action by Edmund Redgate to recover damages from Wyatt Roush, W. H. Goodwin, E. Parmiter, and C. L. Wilkinson for alleged libels written and published by them. Redgate was a member of the Church of Christ, had preached in different churches of that denomination, and for three years prior to 1897 had preached for the congregation at Wilmington, Kansas, of which organization the defendants were elders. In 1897 his conduct and services were not satisfactory to that church, and at a meeting of the elders the fellowship of the church was withdrawn from the plaintiff, and official notice of the action taken was sent to, and published in, the *Octographic Review*, of Indianapolis, Ind.; the *Christian Leader*, of

*Headnotes by **JOHNSTON, J.**

NOTE.—As to libel by expression of opinion of clergyman, see *note* to *St. James Military Academy v. Gaiser* (Mo.) 28 L. R. A. 667.
48 L. R. A.

Cincinnati, Ohio; the Firm Foundation, of Austin, Tex.; and in the Primitive, of Panama, Neb.—sectarian papers published in the interest of the Church of Christ. The following is the notice which was so published:

To Whom it may Concern:

Wilmington, Kan., June 5.

This is to certify that on the 9th day of May, 1897, fellowship was withdrawn from one E. Redgate, a member of the Church of Christ at this place, and also a preacher. The charges against him were insubordination, and separating himself from the congregation, and trying to create a faction, and therefore we cannot commend him as worthy of the confidence of the brotherhood. He has tried to undermine the church here in various ways, and has shown himself utterly void of the spirit of Christ. There are other charges that could be preferred and sustained. Any other information that is wanted we will give when requested, and for any other reference we refer you to our sister congregation at Harveyville, 3½ miles north. We further state: Anything he may say or do to try to show that the Wilmington congregation is divided in his case is false; for there is not a member in the congregation, to the best of our knowledge, at the present time, but what believes he has walked disorderly, and to the detriment of the church.

E. Parmiter.

Wyatt Roush.

W. H. Goodwin.

C. L. Wilkinson.

In his petition the plaintiff alleged that the publication was maliciously made, with the intention of destroying his reputation as a preacher, and taking away his only means of support. The defendants answered by a general denial, and the averment that the plaintiff was never at any time a qualified and acting minister of the gospel of that denomination. Issue being joined and the trial had, the plaintiff introduced his testimony, after which the court sustained a demurrer to the evidence, and gave judgment for the defendants.

Messrs. Isenhardt & Alexander, for plaintiff in error:

A privileged communication is: "A communication made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty to a person having a corresponding interest or duty."

Newell, Defamation, Slander, & Libel, p. 388.

In this case it is impossible for the defendants to bring themselves under this rule.

If the communication is of such a character that the expressions contained in it are beyond what common sense indicates to be justifiable, it cannot be held to be privileged.

Newell, Defamation, Slander, & Libel, pp. 392, 393.

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A person must not step beyond bounds, even in cases of communications privileged in their character, and if the occasion is used merely as a means of enabling the party publishing the libel to indulge in his malice the occasion will furnish no excuse.

Bradley v. Heath, 12 Pick. 163, 22 Am. Dec. 418.

While a communication made to church authorities concerning a priest or minister might be privileged if made by a member, still the circulation of a pamphlet and the publication of the same outside the church are not privileged.

State v. Bienvenu, 36 La. Ann. 378.

Mr. R. C. Heiser for defendants in error.

Johnston, J., delivered the opinion of the court:

One of the principal questions presented for decision is whether the communication complained of was privileged under the law. It was alleged that it was made in bad faith, and with the malicious purpose of injuring the plaintiff. The publication is defamatory in character, and naturally would largely deprive the plaintiff of the confidence of the members of his church organization throughout the country. If it was false in fact and maliciously made, the plaintiff is entitled to recover to the extent of the injury suffered, unless the relations of the parties and the circumstances of the case justified the publication, and brought the defendants within the privilege and protection of the law. The defamatory statement was not absolutely privileged, as words spoken or written by judges, jurors, or witnesses in the course of judicial proceedings, or as in legislative debates, but it was, at most, a case of qualified privilege. Whether it was so privileged must be determined by the position occupied by the defendants, their relations to the plaintiff and to other members of the same denomination, and the circumstances under which the publication was made. If the statements were published in good faith, and in the performance of what was honestly deemed to be an official or moral duty towards other church members, and for the benefit and protection of the church organization at large, and there was a reasonable occasion for the publication, it is privileged and protected. On the face of the publication there is no vilification, extravagant language, or evidence of a wrong motive, and it would seem that the occasion fairly justified the publication of the defamatory matter. They were officers of the church, and were concerned in its welfare; the conduct and character of the plaintiff as their pastor had become a subject of official inquiry; and it had been found that he was "void of the spirit of Christ," insubordinate, disorderly, and unworthy of the confidence of the brotherhood. The result of their inquiry was a matter of interest, not only to them and the church of Wilmington, but to other members of their church organization throughout the country. If the plaintiff was unworthy or unfit to discharge the

sacred functions of his high calling, the defendants, interested in the welfare of the denomination throughout the land, would appear to have been justified in warning other members and congregations of that organization to whom the plaintiff might offer his services as pastor. If the publication is *prima facie* privileged, it devolves on the plaintiff to allege and prove that it was both false in fact and malicious in purpose. Instead of showing actual malice, the plaintiff called two of the defendants as witnesses, who showed plainly enough that they were free from malice, and that the defendants honestly believed that duty and the interests of the denomination required that their fellow members living elsewhere should be informed of the character and conduct of the plaintiff. Instead of showing malice, as he was required to do, the plaintiff proved pure motive and a justifiable occasion for the publication. In *Shurtleff v. Stevens*, 51 Vt. 501, 31 Am. Rep. 698, it is held that the good name and standing of every member of such an organization are matter of common interest to all the rest, and that all are affected by the fidelity with which their preachers perform their sacred functions. In the opinion it is stated that, "in order to be successful teachers of morality, they must be unspotted public exemplars of it. Hence, if it be suspected that a wolf in sheep's clothing has invaded their ranks and sits at their council board, it is not only for the interest of all the members of the association to know the fact, but it is their imperative duty to make inquiry and ascertain the fact. They owe such duty to the plaintiff as a brother member, if he is charged with scandalous conduct, to the end that his innocence may be established. They owe it to themselves lest by indifference they give apparent approval to his conduct. Their intimate official relation to the plaintiff in the cause of their common work leaves them no other alternative, and if, in making such inquiry and in acting upon the subject-matter of it, they proceed with honesty of purpose and act from a sense of duty, the law protects them." It was further held that the character and conduct of a clergyman is a matter of public interest, not limited to the narrow circle of his parish, and the publication that action had been taken upon charges made against a clergyman in two of the church papers did not forfeit the protection of the privilege which the law affords.

It is contended that, by the general publication in the papers, the defamatory matter was circulated outside of the church members, and therefore the privilege was lost. The communication appears to have been made in good faith, and manifestly for members of the denomination alone. As has been seen, it was published only in church papers, and the fact that the publication may have incidentally been brought to the attention of others than members of the Church of Christ will not take away its privileged character. In *Toogood v. Spyrring*, 1 Cromp. M. & R. 181, it was held that publications 48 L. R. A.

made in good faith, in discharge of a public or private duty, are protected for the common convenience and welfare of society, and that the law does not restrict the privilege within any narrow limits. It was further remarked that "I am not aware that it was ever deemed essential to the protection of such a communication that it should be made to some person interested in the inquiry alone, and not in the presence of a third person." See also *Farnsworth v. Storrs*, 5 Cush. 412; *Kelly v. Sherlock*, L. R. 1 Q. B. 686, 689.

The objection that the matter privileged was not specifically pleaded is of no importance, since the defendants were not called upon to make a defense. The burden of proof, as we have seen, was upon the plaintiff to establish actual malice, and, having himself disproved malice, he failed to establish a liability against the defendants, and the case was rightfully taken from the jury. *Kirkpatrick v. Eagle Lodge No. 32*, 26 Kan. 384, 40 Am. Rep. 316.

The judgment of the District Court will be affirmed.

All the Justices concur.

George A. HAMILTON
v.

J. M. WILSON.

(.....Kan.....)

*Chapter 243 of the laws of 1897, providing for the taxation of judgments, is unconstitutional and void.

(February 10, 1900.)

APPPLICATION for a writ of mandamus to compel defendant to issue an execution upon a judgment which had been obtained by plaintiff against Thomas N. Rankin. *Writ granted.*

Statement by **Smith, J.:**

The facts in this case have been agreed to by the parties in writing, and are as follows: "That the said George A. Hamilton, plaintiff, is now and has been a resident of the state of Iowa, and has never been a resident of the state of Kansas; that on or about the 27th day of November, 1889, the said George A. Hamilton recovered a judgment on a certain note and mortgage held by said Hamilton, and which had been sent to Ellsworth, Kansas, for collection, in the district court

*Headnote by **SMITH, J.**

NOTE.—As to taxation of credits, see also *Com. v. Delaware Division Canal Co. (Pa.)* 2 L. R. A. 798, and *note*; *Redmond v. Tarboro Comrs. (N. C.)* 7 L. R. A. 539; and *Detroit v. Lewis (Mich.)* 32 L. R. A. 439.

For tax on mortgages, see *Detroit v. Rentz (Mich.)* 16 L. R. A. 59, and *note*; *San Gabriel Valley Land & Water Co. v. Witmer Bros. Co. (Cal.)* 18 L. R. A. 465; and *Fuller v. Kane (Mich.)* 34 L. R. A. 308.

of Ellsworth county, Kansas, against one Thomas N. Rankin for the sum of \$2,484.10, which said sum drew interest from the date of said judgment at the rate of 7 per cent per annum, and for the foreclosure of a mortgage on certain real estate in Ellsworth county, Kansas; that in May, 1890, the said real estate was duly sold under foreclosure proceedings, and the proceeds of the sale were applied to the payment of the judgment debt, leaving a balance due of \$563.23; that on the 28th day of July, 1891, the clerk of the district court of Ellsworth county, Kansas, duly issued an execution to the sheriff of Ellsworth county, Kansas, for the purpose of collecting the balance due on the said judgment, and said execution was directed to the said sheriff to collect such balance out of the goods and chattels, and, for want of same, out of the real estate of the said Thomas N. Rankin; that said execution was duly received by the said sheriff, and was by him, on the 8th day of August, 1891, returned unsatisfied, having indorsed thereon a return that he could find no property of the said defendant; that thereafter, and on the 14th day of January, 1895, an execution was duly issued by the clerk of said district court of said Ellsworth county, and directed to the sheriff of said county, on said judgment, and directing the said sheriff to collect from the said Thomas N. Rankin the amount then due on the said judgment, which execution was returned by J. H. Hutchins, the then sheriff of said county, on the 14th day of March, 1895, with an indorsement thereon that he could find no goods and chattels and real estate of the said Thomas N. Rankin in said county; that thereafter, pursuant to the provisions of chapter 243 of the Session Laws of 1897 of the state of Kansas, relating to the taxation of judgments, the said judgment hereinbefore referred to, and being then of record in the district court of Ellsworth county, Kansas, was duly listed for taxation, and taxed in accordance with the provisions of the said act, and that there was a default in the payment of the said tax levied upon the said judgment, and said judgment was duly advertised for sale in manner and form as required by the provisions of said act, and was, according to the provisions of said act, duly sold to the highest and best bidder, and in the manner and form as required by the provisions of the said act of the legislature, and that at the said sale the said judgment was purchased by the said Thomas N. Rankin for the sum of \$13.80, that sum being the full amount of all taxes and charges assessed and levied on and against said judgment; that thereafter a certificate, showing the tax sale of the said judgment, was duly issued, as required by the said act of the legislature, to the said Thomas N. Rankin, as the purchaser of the said judgment at the said sale; that thereafter, and on the 16th day of March, 1899, the said Thomas N. Rankin, as the owner of the said judgment by virtue of the said tax-sale proceedings hereinbefore recited, duly entered upon the records of the district court of Ellsworth county, Kansas, a release and discharge of the said judgment,

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and at the same time filed and left with the clerk of the said court the certificate before that time received by him showing that he had purchased the said judgment at said tax sale, which said certificate was then and there, by the said clerk of the said district court, filed as a part of the records of the office of the said clerk of the said district court, and still remains a part thereof; that the said Thomas N. Rankin does not own nor claim to any ownership in said judgment, or any right to release the same of record, except such ownership or right as he may have acquired by reason of the tax proceedings herein set forth. It is further admitted by the parties hereto, for the purposes of this action, that all of the proceedings had in reference to the listing, taxation, advertising, and sale of the said judgment and the purchasing of same were strictly in accordance with the provisions of the said act of the legislature hereinbefore referred to, and being chapter 243 of the Laws of 1897 of the state of Kansas. It is further expressly stipulated and agreed that, in the event that the said proceedings as hereinbefore recited do not, in law, operate as a release and discharge of the said judgment, said judgment has not otherwise been paid, released, or satisfied by the said Thomas N. Rankin or said plaintiff, or by anyone for or on his behalf and account. It is further agreed by the parties hereto that the said George A. Hamilton had no actual knowledge of any of the tax proceedings herein recited in relation to said judgment until after the said Thomas N. Rankin had released the judgment of record as herein stated under his claim of right to do under his said tax proceedings. It is further stipulated that on the 10th day of September, 1899, the said plaintiff, George A. Hamilton, by his attorneys, Harvey & Harvey, presented to the clerk of the district court of said Ellsworth county, James M. Wilson, a praecipe for an execution, which said praecipe was in due form as required by law, and demanded of the said clerk that an execution issue on the said judgment; that the said James M. Wilson, as said clerk of said court, by reason of the cancellation and discharge of the said judgment in the manner as hereinbefore set out, refused, and still refuses, to issue an execution on the said judgment; that on or about the 16th day of September, 1899, said plaintiff filed a motion in said district court in said action, moving said court to make an order directing the said James M. Wilson, as clerk of said court, to issue an execution on the said judgment in accordance with the praecipe filed as aforesaid, which said motion regularly coming on to be heard at the October term, 1899, of the said district court, the said court refused to consider or pass upon the said motion, although the said plaintiff was present, and demanded a hearing and consideration thereof; that the reason assigned by the said court in refusing to pass upon the said motion was that said court would not pass upon the validity of the said law taxing judgments in such a summary manner in said action, and would only pass upon same under proper mandamus proceedings."

Messrs. Harvey & Harvey and A. E. Maine for plaintiff.

Messrs. Ira E. Lloyd and N. F. Nourse, for defendant:

Chapter 243, Kan. Laws 1897, is not unconstitutional as violating § 1, art. 11, of the Constitution.

The purpose of the act, construing it as an entirety, is to tax personal judgments.

The evident purpose of the legislature was to put all personal judgments, whether owned by residents or nonresidents, upon the same footing, and to subject all such judgments to be taxed under the laws of this state.

The wisdom of such law is apparent. The nonresident seeks the benefit of our courts and the protection of our laws, but pays no taxes to the public.

Where the note and mortgage are in the hands of an agent and within the state, they are subject to taxation within the state.

Buck v. Miller, 147 Ind. 586, 37 L. R. A. 384, 45 N. E. 647, 47 N. E. 8; *Detroit v. Lewis*, 103 Mich. 155, 32 L. R. A. 439, 66 N. W. 958.

The reason of the authorities makes judgments rendered and existing wholly within the state, even though owned by nonresidents, taxable within the state.

Kingman County Comrs. v. Leonard, 57 Kan. 531, 34 L. R. A. 810, 46 Pac. 960.

Smith, J., delivered the opinion of the court:

Chapter 243 of the Laws of 1897, relating to the taxation of personal judgments, is attacked as unconstitutional. The first section of the law reads: "Section 1. The term 'personal judgments' shall include all personal judgments for money only, owned by residents and nonresidents of the state of Kansas: provided, this section shall not apply to judgments upon foreclosure of mortgages prior to the sale of the lands described in the decree, work and labor judgments, or for material furnished in the erection of buildings, and improvements on land or lots. But shall apply to all personal judgments rendered upon foreclosure of mortgage after sale when a deficiency judgment remains against the judgment debtor." It is particularly urged that the exemptions contained in said section violate the requirement of uniformity in assessment and taxation contained in § 1 of article 11 of the Constitution, as follows: "Section 1. The legislature shall provide for a uniform and equal rate of assessment and taxation; but all property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent, and charitable purposes, and personal property to the amount of at least two hundred dollars for each family, shall be exempted from taxation." It is evident that the prescribed rule of uniformity has been disregarded in the discriminations made between different classes of judgments mentioned in § 1 of the act. It is quite certain that the law in question was passed for other purposes than the production of revenue. This, however, would be an immaterial con-

sideration if the taxing power had confined itself within constitutional limits. We know by common experience that judgments on debts secured by mortgages are of much greater value than deficiency judgments for the same amounts remaining over after the property upon which they were liens has been exhausted. Yet under this law such valuable judgments are wholly exempted, while judgments for deficiencies are taxed. Again, it is difficult to furnish a reason why, under a tax law requiring uniformity and equality in its operation, a judgment for material furnished in the erection of buildings should be exempted from taxation, while a judgment rendered for money borrowed to purchase the material so used should be taxed. Deficiency judgments remaining after the sale of real estate upon foreclosure of mortgages are subject to be taxed, but any deficiency arising on judgments in the case of the foreclosure of other liens, such as mechanics' or materialmen's liens, is wholly exempted. While it may be an unimportant inquiry, yet, reading the whole law together, it seems to have been enacted for the purpose of benefiting judgment debtors. By § 9, after a judgment has been advertised and offered for sale without bidders, the county treasurer is required to bid in the same in the name of the county. Thereafter the board of county commissioners is authorized to compromise the tax with the judgment debtors upon such terms and conditions as may be to the best interests of the county, thus restricting the power of the county commissioners to sell the judgment so held by the county, unless the judgment debtor shall see fit to purchase the same. Strangers to the judgment, or even the holder and owner of the same, cannot compromise the tax thereon with the county. Under the above constitutional provision the legislature has a narrow latitude in exempting property from taxation, and the extent of its departure from a uniform and equal rate of assessment and levy is marked out and circumscribed in express terms. This constitutional provision is to be regarded as a limitation on the power of the legislature to discriminate between different classes or kinds of property when enacting tax laws. In *Cooley*, Taxn. 2d ed. p. 215, it is said: "It is difficult to conceive of a justifiable exemption law which should select single individuals or corporations, or single articles of property, and, taking them out of the class to which they belong, make them the subject of capricious legislative favor. Such favoritism could make no pretense of equality; it would lack the semblance of legitimate tax legislation." In the case of *Re Page*, 60 Kan. 842-847, 58 Pac. 478, this court passed upon the validity of a law providing for the taxation of contracts of insurance made with insurance companies not authorized to do business in this state. The tax was restricted in its operation to contracts with insurance companies not licensed here, and made no provision for taxing contracts with domestic companies, or companies authorized and licensed to carry on insurance in Kansas. The law was held void. Mr. Justice Johnston, speaking for the court, said: "The lack of

uniformity is manifest in another way: One taxpayer has a policy written in the state by a company with authority on which no tax is imposed, while his neighbor has one written by an unlicensed company at Indianapolis, or other place outside of the state, which is subject to taxation. Taxes are uniform and equal when imposed on all property of the same character within the taxing district, and yet here the insured pays a 10 per cent tax upon a policy written outside of the state, while his neighbor pays nothing for a policy of equal value, and affording the same protection, because it is written within the state. . . . This is an invidious discrimination, purposely made, and is a distinct departure from the constitutional rule of uniformity." See the numerous authorities cited, and also *Atchison, T. & S. F. R. Co. v. Clark*, 60 Kan. 826, 58 Pac. 477.

Much has been said by counsel for plaintiff regarding the situs of the judgment, it being owned by a citizen and resident of Iowa. We deem it unnecessary to enter into a discussion of that question. For the purposes of the case we assume that the situs of the judgment is in this state. The act in question is void, and the sale of the judgment and its satisfaction by the judgment debtor unauthorized.

A peremptory writ of mandamus will be awarded.

All the Justices concur.

ST. LOUIS, KANSAS, & SOUTHWESTERN
RAILROAD COMPANY, *Plff. in Err.*,

v.

John W. NYCE *et al.*

(.....Kan.....)

*1. A railroad company obtained deeds from an owner of mortgaged land for a right of way across the same, and immediately constructed its roadbed, bridges, main line, and side tracks, together with a station house thereon. Thereafter an action was commenced by the mortgagee to foreclose his lien upon the real estate, in which suit the railroad company was made a party. It answered, setting up its deeds to the right of way, and averring that it was in possession of the strip of land by virtue of said conveyances from the owner. A decree was entered ordering a sale of the mortgaged property, and adjudging that the mortgage was a senior and paramount lien upon the land, including the right of way of the railroad company. A sale was ordered first of the land not embraced in the right of way, and, should that prove insufficient to satisfy the mortgage claim, then that the strip included in the right-of-way deeds be sold. The mortgagee bid in both tracts at less than his judgment, and received a sheriff's deed. The railroad

company thereupon made application to the district judge for the appointment of commissioners to condemn the right of way then in use over and across the land. They were appointed. On the trial of an appeal from their award, *held*, that the purchaser at the sheriff's sale could not recover the value of the improvements placed upon the land by the railroad company, and that the same did not pass by the sheriff's deed as part of the real estate.

2. The case of *Briggs v. Chicago, K. & W. R. Co.* 56 Kan. 520, 43 Pac. 1131, overruled.

3. Such purchaser at a foreclosure sale cannot recover damages caused to that part of the land outside of the right-of-way strip by reason of the construction or operation of the railroad.

4. Improvements placed upon real estate by a railroad company, necessary to the operation of the road, are to be regarded as trade fixtures, and not accessories of the land to which they are attached.

5. A railway corporation is, in one sense, a public agency. It possesses the sovereign power of eminent domain, conferred by reason of the benefits derived by the people of the state from the operation of the road. To permit a part of its roadbed and track to pass by sheriff's sale to an individual, with absolute dominion and ownership in the purchaser, would destroy it as an instrument of commerce, take away all power of regulation or control by the state, and divert it from the purposes for which it was built.

(February 10, 1900.)

ERROR to the District Court for Sumner County to review a judgment in favor of petitioners in a proceeding brought to obtain compensation for land which had been obtained by defendant for right of way. *Modified.*

Statement by Smith, J.:

In March, 1886, Alexander Blackstone and wife executed to the Stock Exchange Bank a mortgage upon a half section of land to secure a note for about \$4,500 given to the bank by Charles Blackstone, Alexander Blackstone, and William Corzine. The mortgage was duly recorded. On November 4 following, Alexander Blackstone and wife sold to the St. Louis, Kansas, & Southwestern Railroad Company a strip of land 100 feet wide through said land, and executed to the latter a warranty deed for the same, which was recorded December 14, 1886. Afterwards, in April, 1887, the railroad company acquired by another warranty deed from Blackstone and wife an additional right of way over said real estate, which last deed was recorded July 1, 1887. Immediately after acquiring said right of way and property by virtue of the two warranty deeds above mentioned, the railroad company constructed its track, roadbed, bridges, main line, and side tracks, and also built and constructed a depot and station house upon the land so granted. In October, 1887, an action was commenced by the Stock Exchange Bank to recover upon the note and to foreclose the

*Headnotes by SMITH, J.

NOTE.—On the question of the value of improvements made by one who takes property by eminent domain as an element of damages, see *Chase v. Jemmett* (Utah) 16 L. R. A. 805, and *note*.

mortgage executed to it by Alexander Blackstone and wife. Both the St. Louis, Kansas, & Southwestern Railroad Company and the St. Louis & San Francisco Railway Company (which latter company was then operating the road) were made parties defendant to the suit. The San Francisco Company filed an answer therein, setting up the deeds to said right of way. In May, 1888, a personal judgment was rendered against Charles and Alexander Blackstone and William Corzine in favor of the bank for the amount due upon the note, and a decree entered for the sale of the property covered by the mortgage at the expiration of six months, without appraisal. The cause was then continued as to the railway company. In December, 1889, the case came on for further hearing between the plaintiff bank and the railway company. It was then decreed that the mortgage of the bank was a senior and paramount lien upon all of said real estate, including the right of way of the railroad companies, but ordering that, upon the sale of the property mortgaged, the land not embraced in the right of way should be first sold and exhausted to satisfy the mortgagee's claim; and, in the event said sale should prove insufficient for that purpose, then the right of way should be sold, and barring the title and interest of the railroad companies in the property after such sale. On July 8, 1895, pursuant to the decree, the sheriff sold all of that portion of the land not embraced and included in the right of way to John W. Nyce for \$1,000, and thereupon sold the right of way to John W. Nyce for \$500. The sale was confirmed July 10 thereafter, and a sheriff's deed ordered. On July 27, 1895, the St. Louis, Kansas, & Southwestern Railroad Company made application to the district judge for the appointment of commissioners to condemn a right of way over and across said premises. Commissioners were appointed and qualified, and on December 3 filed their report, allowing damages to the land not taken \$383.07, and value of land taken \$245; making a total of \$629.67. In the commissioners' report the owner is given as unknown. On September 13, 1895, John W. Nyce and the Stock Exchange Bank, claiming to be the owners of all of said tract of land, filed an appeal bond, and a transcript of the record was transmitted to the district court. Thereafter, in November, Nyce and the bank filed a petition in the district court against the railroad company, wherein they alleged they were the owners of the land, setting forth the condemnation proceedings and claiming damages in the sum of \$9,000, consisting of the following items: A station house or depot, of the value of \$1,000; 1,700 feet of side track, laid upon grade, consisting of wooden ties and steel rails, and the necessary switches and appliances, of the value of \$2,000; a mile of main track, built and laid upon a grade, consisting of wooden ties and steel rails, of the value of \$6,000. The defendant below, the St. Louis, Kansas, & Southwestern Railroad Company, filed an answer, setting up its 48 L. R. A.

ownership of the land conveyed to it for right of way in the deeds from Blackstone and wife, heretofore mentioned, and the erection of improvements thereon by the railroad company, and the continuous occupation and use of the same thereafter for railroad purposes. Upon the trial the jury were instructed that the plaintiffs, Nyce and the bank, had a right to recover the value of the improvements placed upon the land by the railroad company, in addition to the value of the land taken, as well as damages to the land not taken; and plaintiffs below recovered a verdict against the company for the sum of \$4,851.17, upon which judgment was entered in their favor. In this amount \$500 was included for depreciation in value of the land not occupied by the railroad by reason of the maintenance and operation of the same over and across the half section mentioned.

Messrs. Rossington, Smith, & Histed, for plaintiff in error:

The value of the property in these cases is of the date when the condemnation is had.

Missouri P. R. Co. v. Gruendel, 3 Kan. App. 60, 44 Pac. 439; *St. Joseph & D. C. R. Co. v. Orr*, 8 Kan. 419; *Central Branch U. P. R. Co. v. Andrews*, 26 Kan. 702.

The improvements placed upon the right-of-way by the railroad company were not proper elements of damage.

When a particular parcel of land is taken under condemnation proceedings, the award that follows is in gross, and is for the benefit of whom it may concern.

A mortgagee has no standing in court to segregate his right from that of the mortgagor, and to appeal from the award.

Chicago, K. & W. R. Co. v. Sheldon, 53 Kan. 169, 35 Pac. 1105; *Rand v. Fort Scott, W. & W. R. Co.* 50 Kan. 114, 31 Pac. 683; *Whitaker v. Leavenworth Depot & R. Co.* 41 Kan. 315, 21 Pac. 264.

No one may assert a claim to that which the railroad company had put upon the land and paid for.

Ritchie v. Kansas, N. & D. R. Co. 55 Kan. 38, 39 Pac. 718; *Cohen v. St. Louis, Ft. S. & W. R. Co.* 34 Kan. 158, 55 Am. Rep. 242, 8 Pac. 138; *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Kan. 23, 4 L. R. A. 284, 21 Pac. 809, 22 Pac. 995; *Albion River R. Co. v. Hesser*, 84 Cal. 435, 24 Pac. 288; *California P. R. Co. v. Armstrong*, 46 Cal. 85; *Justice v. Nesquehoning Valley R. Co.* 87 Pa. 28; *Harrisburg v. Crangle*, 3 Watts & S. 460; *McClinton v. Pittsburg, Ft. W. & C. R. Co.* 66 Pa. 409; *Delaware, L. & W. R. Co. v. Burson*, 61 Pa. 379; *Chicago & A. R. Co. v. Goodwin*, 112 Ill. 282, 53 Am. Rep. 622; *Oregon R. & Nav. Co. v. Mosier*, 14 Or. 519, 58 Am. Rep. 321, 13 Pac. 300.

The owner of the land has no right to recover the amount of the cost of making such a grade, or the amount which the grade actually did cost, or the benefit which the land or the grade would be to the railroad company; for such is not the proper measure of his damages.

Albion River R. Co. v. Hesser, 84 Cal. 435, 24 Pac. 288; *Black River & M. R. Co. v. Barnard*, 9 Hun, 104; *Nelma, R. & D. R. Co. v. Keith*, 53 Ga. 178; 3 Sutherland, Damages, 462.

In an action to condemn a right of way for a railroad, commenced after the construction of the road, the landowner is not entitled to be paid the value of the improvements placed upon the land by the railroad company, or its predecessor in interest, before the commencement of the condemnation proceedings.

San Francisco & N. P. R. Co. v. Taylor, 86 Cal. 246, 24 Pac. 1027; *Louisville, N. O. & T. R. Co. v. Dickson*, 63 Miss. 380, 56 Am. Rep. 809; *Canton, A. & N. R. Co. v. French*, 68 Miss. 22, 8 So. 512; *Greve v. First Div. of St. Paul & P. R. Co.* 26 Minn. 66, 1 N. W. 816; *St. Johnsbury & L. C. R. Co. v. Willard*, 61 Vt. 134, 2 L. R. A. 528, 17 Atl. 38; *Jacksonville, T. & K. W. R. Co. v. Adams*, 28 Fla. 631, 14 L. R. A. 533, 10 So. 465; *Newgass v. St. Louis, A. & T. R. Co.* 54 Ark. 140, 15 S. W. 188; *California S. R. Co. v. Southern P. R. Co.* 67 Cal. 59, 7 Pac. 123; *North Hudson County R. Co. v. Booraem*, 28 N. J. Eq. 460; *Re Norwood & M. R. Co.* 47 Hun, 489; *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 273, 53 Am. Rep. 622.

Where a company takes possession of land, and constructs a track thereon, with the consent of the person in possession, under color of title, and afterwards the paramount owner commences an action for the permanent taking and appropriation of the land, the company will not be considered as a mere trespasser on the land, and will not be required to pay for improvements made thereon by itself, but will be required to pay only the value of the land taken at the time it was taken, and the damages to the land not taken.

Cohen v. St. Louis, Ft. S. & W. R. Co. 34 Kan. 158, 54 Am. Rep. 242, 8 Pac. 138; *Ellis v. Rock Island & M. C. R. Co.* 125 Ill. 82, 17 N. E. 62; *Jones v. New Orleans & S. R. Co. & Immigration Asso.* 70 Ala. 227; *Trasas & P. R. Co. v. Hays*, 3 Tex. App. Civ. Cas. (Willson) p. 79; *Hays v. Texas & P. R. Co.* 62 Tex. 397; *Justice v. Nesquehoning Valley R. Co.* 87 Pa. 28; *Denver & R. G. W. R. Co. v. Stanchiff*, 4 Utah, 117, 7 Pac. 530; *Toledo, A. A. & G. T. R. Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271; *Re Morgan*, 39 Mich. 675; *Kennedy v. Milwaukee & St. P. R. Co.* 22 Wis. 581; *Lyon v. Green Bay & M. R. Co.* 42 Wis. 538.

The action for damages is personal, and does not pass by deed.

McFadden v. Johnson, 72 Pa. 335, 13 Am. Rep. 681.

The benefits are special and particular to the owner.

Symonds v. Cincinnati, 14 Ohio, 147, 45 Am. Dec. 532, and note; *Mills, Em. Dom.* § 67.

Messrs. M. A. Low and W. F. Evans, also for plaintiff in error:

The purchaser of the land outside of the right of way at the foreclosure sale cannot
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recover damages caused to such land by the construction of the railroad many years before he became the owner thereof.

Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 59 Am. Rep. 341, 8 N. E. 460; *Colorado Midland R. Co. v. Trevarthen*, 1 Colo. App. 152, 27 Pac. 1012; *Indiana, B. & W. R. Co. v. Allen*, 100 Ind. 409; *Livermon v. Roanoke & T. River R. Co.* 109 N. C. 52, 13 S. E. 734; *Sennott v. St. Johnsbury & L. C. R. Co.* 59 Vt. 226, 9 Atl. 554; *Dows v. Congdon*, 16 How. Pr. 571; *Kennedy v. Milwaukee & St. P. R. Co.* 22 Wis. 584.

The mortgagee cannot recover, unless the construction of the railroad over and adjacent to the mortgaged property rendered it of less value than the amount of the indebtedness which the mortgage was intended to secure.

Knoll v. New York, C. & St. L. R. Co. 121 Pa. 467, 1 L. R. A. 366, 15 Atl. 571.

The materials composing the railroad which was constructed across the land in question were and are personal property, and their value should not be included in the damages awarded to the landowner.

Atchison, T. & S. F. R. Co. v. Morgan, 42 Kan. 23, 4 L. R. A. 284, 21 Pac. 809, 22 Pac. 995; *Winslow v. Bromich*, 54 Kan. 300, 38 Pac. 275; *Wagner v. Cleveland & T. R. Co.* 22 Ohio St. 563, 10 Am. Rep. 770; *Eaves v. Estes*, 10 Kan. 314, 15 Am. Rep. 345; *Central Branch R. Co. v. Fritz*, 20 Kan. 430, 27 Am. Rep. 175; *Northern O. R. Co. v. Canton Co.* 30 Md. 347; *Western N. C. R. Co. v. Deal*, 90 N. C. 110; *Albion River R. Co. v. Hesser*, 84 Cal. 435, 24 Pac. 288; *Jones v. New Orleans & S. R. Co. & Immigration Asso.* 70 Ala. 227; *Justice v. Nesquehoning Valley R. Co.* 87 Pa. 28; *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 273, 53 Am. Rep. 622; *Newgass v. St. Louis, A. & T. R. Co.* 54 Ark. 140, 15 S. W. 188; *Toledo, A. A. & G. T. R. Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271; *Louisville, N. O. & T. R. Co. v. Dickson*, 63 Miss. 380, 56 Am. Rep. 809; *Preston v. Sabine & E. T. R. Co.* 70 Tex. 375, 7 S. W. 825; *Charleston & W. C. R. Co. v. Hughes*, 105 Ga. 1, 30 S. E. 972.

A railroad does not, nor do the materials composing it, become a part of the real estate upon which it is located or to which it is annexed.

Cohen v. St. Louis, Ft. S. & W. R. Co. 34 Kan. 158, 54 Am. Rep. 242, 8 Pac. 138; *Ellis v. Rock Island & M. C. R. Co.* 125 Ill. 82, 17 N. E. 62; *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 273, 53 Am. Rep. 622; *Greve v. First Div. of St. Paul & P. R. Co.* 26 Minn. 66, 1 N. W. 816; *San Francisco & N. P. R. Co. v. Taylor*, 86 Cal. 246, 24 Pac. 1027; *Albion River R. Co. v. Hesser*, 84 Cal. 435, 24 Pac. 288; *California P. R. Co. v. Armstrong*, 46 Cal. 85; *Re Morgan*, 39 Mich. 675; *Toledo, A. A. & G. T. R. Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271; *Louisville, N. O. & T. R. Co. v. Dickson*, 63 Miss. 380, 56 Am. Rep. 809; *Canton, A. & N. R. Co. v. French*, 68 Miss. 22, 8 So. 512; *St. Johnsbury & L. C. R. Co. v. Willard*, 61 Vt. 134, 2 L. R. A. 528, 17 Atl. 38; *Daniels v. Chicago, I. & N. R. Co.* 41

Iowa, 52; *Denver & R. G. W. R. Co. v. Stancliff*, 4 Utah, 117, 7 Pac. 530; *Wagner v. Cleveland & T. R. Co.* 22 Ohio St. 563, 10 Am. Rep. 770; *North Hudson County R. Co. v. Booraem*, 28 N. J. Eq. 450; *Newgass v. St. Louis, A. & T. R. Co.* 54 Ark. 140, 15 S. W. 188; *Justice v. Nesquehoning Valley R. Co.* 87 Pa. 28; *Meigs's Appeal*, 62 Pa. 28, 1 Am. Rep. 372; *Bethlehem South Gas & Water Co. v. Yoder*, 112 Pa. 136, 4 Atl. 42; *Jacksonville, T. & K. W. R. Co. v. Adams*, 28 Fla. 631, 14 L. R. A. 533, 10 So. 465; *Jones v. New Orleans & S. R. Co. & Immigration Asso.* 70 Ala. 227; *Western N. C. R. Co. v. Deal*, 90 N. C. 110; *Preston v. Sabine & E. T. R. Co.* 70 Tex. 375, 7 S. W. 825; *Texas & P. R. Co. v. Hays*, 3 Tex. App. Civ. Cas. (Willson) p. 79; *Hays v. Texas & P. R. Co.* 62 Tex. 397; *Aspinwall v. Chicago & N. W. R. Co.* 41 Wis. 474; *Kennedy v. Milwaukee & St. P. R. Co.* 22 Wis. 581; *Northwestern C. R. Co. v. Canton Co.* 30 Md. 347; *Oregon R. & Nav. Co. v. Mosier*, 14 Or. 519, 58 Am. Rep. 321, 13 Pac. 300; *Charleston & W. C. R. Co. v. Hughes*, 105 Ga. 1, 30 S. E. 972; *Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 396, 35 L. ed. 1055, 12 Sup. Ct. Rep. 188; *Ritchie v. Kansas, N. & D. R. Co.* 55 Kan. 36, 39 Pac. 718; *Winslow v. Bromlich*, 54 Kan. 300, 38 Pac. 275; *Meriam v. Brown*, 128 Mass. 391; *Booraem v. Wood*, 27 N. J. Eq. 371.

The railroad of the plaintiff in error, including that portion on the real estate purchased by Nyce, was burdened by a public duty, and was devoted to public use. If Nyce became the owner of the material composing any part of it by his purchase at the sheriff's sale he could do as he pleased with it. He could tear it up, or sell it in pieces or as a whole, without reference to the rights of the public.

No person has the right to tear up or destroy the railroad or any part of it.

Georgia v. Atlantic & G. R. Co. 3 Woods, 434, Fed. Cas. No. 5351; *State v. Dodge City, M. & T. R. Co.* 53 Kan. 377, 36 Pac. 747; *Que v. Tide Water Canal Co.* 24 How. 257, 16 L. ed. 635; *National Foundry & Pipe Works v. Oconto Water Co.* 52 Fed. Rep. 43; *Morgan v. Lake Shore & M. S. R. Co.* 130 Ind. 101, 28 N. E. 548; *Central R. Co. v. Hetfield*, 29 N. J. L. 206; *Blakely v. Chicago, K. & N. R. Co.* 46 Neb. 272, 64 N. W. 972; *Saunders v. Memphis & R. S. R. Co.* 101 Tenn. 206, 47 S. W. 155.

Messrs. James Lawrence and W. W. Schwinn for defendants in error.

Mr. D. H. Martin, by permission of the court, also for defendants in error:

If the owner of land mortgages it, he cannot subsequently, by grant, create an easement in the land to the prejudice of the rights of the mortgagee.

Murphy v. Welch, 128 Mass. 489; *Hartley v. Harrison*, 24 N. Y. 170; *Frost v. Shaw*, 10 Iowa, 491; *Kruse v. Scripps*, 11 Ill. 98; *Anderson v. Strauss*, 98 Ill. 485.

The mortgagee is not affected by any act of the mortgagor in passing any rights of his to third persons.

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Ellithorp v. Dewing, 1 D. Chip. (Vt.) 141; *Coker v. Whitlock*, 54 Ala. 180.

When the condemnation was commenced, Nyce was the owner of 320 acres of land in a solid body, and is entitled to the application of the law of damages that is found in an unbroken line of cases determined by our supreme court from *St. Joseph & D. C. R. Co. v. Orr*, 8 Kan. 419, down to the present time.

He owns property valued at so much money with the inside strip and without the railroad. How much less is it worth without the strip and with the railroad? And in answering this the manner of acquiring such property is utterly immaterial.

Nyce is entitled to have an award of damages to the land lying on either side of the strip condemned.

Kansas City, E. & S. R. Co. v. Merrill, 25 Kan. 423; *Atchison & N. R. Co. v. Gough*, 29 Kan. 94; *Atchison, T. & S. F. R. Co. v. Blackshire*, 10 Kan. 477.

When the railroad company attempted to condemn the strip of land it came as an absolute stranger in just the same position it would be in had it never before been in possession of the land. It became a trespasser on the land after the sale by remaining.

Murphy v. Welch, 128 Mass. 489.

The compensation for such right of way appropriated to the use of the company includes, not only the value of the property taken, but also the loss the landowner sustains in the value of his property by being deprived of a portion of it.

Reisner v. Atchison Union Depot & R. Co. 27 Kan. 382.

The grade, rails, ties, telegraph poles, and fences attached to the land by the railway company while it was the owner of the land, subject to the mortgage to the bank, became a part of the real estate, and, as such, passed to the purchaser at sheriff's sale, and he is entitled to their value as a part of his damages in a subsequent proceeding for condemnation of the land.

1 Jones, Mortg. § 428.

Any improvement placed upon real estate by the owner thereof with the intention that it should be a permanent structure becomes a part of the realty, in the absence of any agreement between the parties interested therein.

Hopewell Mills v. Taunton Sav. Bank, 150 Mass. 519, 6 L. R. A. 249, 23 N. E. 327; *Turner v. Wentworth*, 119 Mass. 459; *Allen v. Mooney*, 130 Mass. 155; *Southbridge Sav. Bank v. Exeter Mach. Works*, 127 Mass. 542; *Smith Paper Co. v. Servin*, 130 Mass. 511; *Hubbell v. East Cambridge Five Cents Sav. Bank*, 132 Mass. 447, 43 Am. Rep. 446; *McRea v. Central Nat. Bank*, 66 N. Y. 489; *Hill v. Farmers' & M. Nat. Bank*, 97 U. S. 450, 24 L. ed. 1061; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *Dooley v. Crist*, 25 Ill. 551.

If erected for permanent use, fixtures become a part of the realty.

Wood v. Whelen, 93 Ill. 153; *Wight v. Gray*, 73 Me. 297; *Bond v. Coke*, 71 N. C. 97;

Hubbard v. Bagshaw, 4 Sim. 326; *Potter v. Cromwell*, 40 N. Y. 296, 100 Am. Dec. 485; *McRea v. Central Nat. Bank*, 66 N. Y. 489; *Roberts v. Dauphin Deposit Bank*, 19 Pa. 71; *Van Keuren v. New Jersey Cent. R. Co.* 38 N. J. L. 165.

All annexations made by the owner are presumed to be permanent.

Arnold v. Crowder, 81 Ill. 56, 25 Am. Rep. 260; *Winslow v. Merchants' Ins. Co.* 4 Met. 306, 38 Am. Dec. 368; *Hunt v. Hunt*, 14 Pick. 386, 25 Am. Dec. 400.

The fact that annexations to the freehold are called chattels in a deed to the mortgagor does not affect the mortgagee's right to them as fixtures.

Quinby v. Manhattan Cloth & Paper Co. 24 N. J. Eq. 260; *Rogers v. Brokaw*, 25 N. J. Eq. 496; *Lyle v. Palmer*, 42 Mich. 314, 3 N. W. 921.

In the absence of any agreement to the contrary, fixtures become subject to mortgage.

Ford v. Cobb, 20 N. Y. 344; *Sisson v. Hibbard*, 75 N. Y. 542; *Tyson v. Post*, 108 N. Y. 217, 15 N. E. 316; *Strickland v. Parker*, 54 Me. 283; *Peirce v. Goddard*, 22 Pick. 559, 33 Am. Dec. 764; *Butler v. Page*, 7 Met. 40, 39 Am. Dec. 757; *Richardson v. Copeland*, 6 Gray, 536, 66 Am. Dec. 424; *Crippen v. Morrison*, 13 Mich. 23; *Burnside v. Twitchell*, 43 N. H. 390; *Crane v. Brigham*, 11 N. J. Eq. 30; *Hobson v. Goringe*, 66 L. J. Ch. N. S. 114; *Seedhouse v. Boward*, 34 Fla. 509, 16 So. 425.

A railroad track annexed to land by the owner of the freehold with the intention that it shall be a permanent structure is a part of the realty.

1 Jones, *Mortg.* § 436; *Price v. Weehawken Ferry Co.* 31 N. J. Eq. 31; *Hunt v. Bay State Iron Co.* 97 Mass. 279; *Meriam v. Brown*, 123 Mass. 391.

The doctrine of trade fixtures has no application where the owner of land makes annexations intending them to be permanent.

Climie v. Wood, L. R. 3 Exch. 257; *Winslow v. Merchants' Ins. Co.* 4 Met. 313, 38 Am. Dec. 368.

A railroad track laid down upon land with a view to its permanent improvement or beneficial enjoyment is deemed a fixture and part of the realty.

Van Keuren v. Central R. Co. 38 N. J. L. 165; *Tudor Iron Works v. Hitt*, 49 Mo. App. 472; *Hunt v. Missouri P. R. Co.* 76 Mo. 115; *Goodman v. Hannibal & St. J. R. Co.* 45 Mo. 33, 100 Am. Dec. 336; *Booraem v. Wood*, 27 N. J. Eq. 371.

Smith, J., delivered the opinion of the court:

We will consider but two of the questions discussed by counsel for plaintiff in error in their brief and argument, *viz.*: (1) In estimating the amount of damages which the plaintiffs below were entitled to recover under the condemnation proceedings, can the value of the improvements put upon the land by the railroad company be taken into consideration? (2) Can the plaintiffs below recover damages to the land outside of the 48 L. R. A.

right of way of the railroad company by reason of the construction and operation of the road, the right of way and the land adjacent to it having been sold in separate tracts under the decree of foreclosure, and bid in by them at sheriff's sale long after the construction of the road. As the defendant in error Nyce and the Stock Exchange Bank appealed from the award made by the commissioners in condemnation, we will treat them, in the discussion of this case, as the owners of the property, although it appears from the record that Nyce alone purchased the property at the sheriff's sale. If the roadbed, ties, track, etc., placed upon the property by the railroad company are to be treated, under the circumstances of this case, as part of the real estate, then the position taken by the defendants in error on the first proposition (which was concurred in by the trial court) is the correct one; otherwise not. It becomes necessary, therefore, to consider, in the outset, the nature of the improvements placed upon the land by the railroad company, and their character, as affected by the relations sustained towards the public by such companies. From early times it has been held that buildings adapted and used for the purposes of trade are recognized as an exception from the general rule which obtains as to buildings constructed for other purposes, in that the former do not become a part of the real estate, when affixed thereto, from the fact of their erection alone. This doctrine was announced by Lord Ellenborough in 1802, and later by the Supreme Court of the United States in *Van Ness v. Pacard*, 2 Pet. 137, 7 L. ed. 374. In the latter case the improvement was a large house, built and used as a family residence, and it was sought to have the question depend upon whether the building was removable or not; but the court held that the size of the building, whether it had a brick foundation or not, or was one or two stories high, or had a brick chimney, was immaterial; the sole consideration being whether or not it was designed for the purposes of trade. If so, it was a fixture, which might be severed and removed by the person erecting the same. This distinction was applied in the case of *Wagner v. Cleveland & T. R. Co.* 22 Ohio St. 563, 10 Am. Rep. 770. Stone piers were built by a railroad company on premises over which it was authorized to construct its road, and the question determined was whether they were so annexed to the land as to become the property of the owner of the land. The court held that the use of the strip of land on which the piers were built was granted to the railroad company for the purpose of constructing a part of a continuous line of railroad which it was authorized to build and operate. The piers were held to be as much a part of the road as the bridge they supported, or the rails or ties. The road was alone adapted for the transportation of persons or property. All its parts were merely accessory for its business, and were put on the land for this purpose, and not as accessories to the land over which

the road was to pass. That part of the road built on the premises of the party plaintiff in error in the suit, disconnected from other parts of the road, could not be operated and would be useless as a railroad, nor could it serve any useful purpose as an appurtenance to the land on which it was built. It is said in the opinion: "The general principle to be kept in view, which underlies all questions of this kind, is the distinction between the business which is carried on in or upon the premises and the premises, or *locus in quo*. The former is personal in its nature, and articles that are merely accessory to the business, and have been put on the premises for this purpose, and not as accessions to the real estate, retain the personal character of the principal, to which they appropriately belong and are subservient. But articles which have been annexed to the premises as accessory to it, whatever business may be carried on upon it, and not peculiarly for the benefit of a present business, which may be of a temporary duration, become subservient to the realty, and acquire and retain its legal character. . . . The railroad company acquired an easement in the land to construct and use its road thereon. It did not bind itself to the landowner either to build or maintain the road, and it could change the character of the structure at pleasure. Nor do we perceive any good reason why, in the act of building, it should lose its right of property in the structure when built, or in the materials of which it was composed. The landowner retained his land subject to the easements, and the company owned the easement and the structure it was designed to support." Again, in *Northern O. R. Co. v. Canton Co.* 30 Md. 347, it was held that a railway came within the rule regarding trade-fixtures; that it was not an accessory to the enjoyment of the freehold, or in any manner necessary and convenient for the occupation of the land by the party entitled to the inheritance. The court said: "A railway is certainly quite as essential to the trade and business of a railway company as a steam engine and the house which may cover it, or any other fixture, can be to the miller or the miner. . . . Prima facie, a house, with its foundation planted in the soil, is real property; yet when it is accessory to trade, and in law a trade fixture, we find all the authorities regard it as personal property. The same doctrine is applicable to the railway in question." See also *Western N. C. R. Co. v. Deal*, 90 N. C. 110; *Albion River R. Co. v. Hesser*, 84 Cal. 435, 24 Pac. 288; *Oregon R. & Nav. Co. v. Mosier*, 14 Or. 519, 58 Am. Rep. 321, 13 Pac. 300; *Jones v. New Orleans & S. R. Co. & Immigration Asso.* 70 Ala. 227; *Justice v. Nesquehoning Valley R. Co.* 87 Pa. 28; *Newgass v. St. Louis, A. & T. R. Co.* 54 Ark. 140, 15 S. W. 188.

The above cases are to the effect that, although a railway company may enter upon land without right, and construct its track thereon, it being possessed with the continuing power of eminent domain, and having

the right to secure an easement on the land upon which it has laid its track for railroad purposes, the nature of its entry and the manner in which it annexes chattels to the soil distinguish it from the case of an ordinary trespasser making improvements to the freehold. In the case of *Cohen v. St. Louis, Ft. S. & W. R. Co.* 34 Kan. 158-164, 54 Am. Rep. 242, 8 Pac. 142, a railroad company had taken possession of a strip of land, and constructed its track thereon, without any formal condemnation proceedings, and without procuring any title thereto, or easement therein, from the owner of the land. In an action brought by the latter against the railroad company to recover damages for the permanent taking and appropriation of such strip, no recovery was allowed for materials and work furnished by the railroad company itself and used in the construction of its track. In passing upon this question the court said: "This question, we think, must be answered in the negative. Of course, it must be admitted that where a mere wrongdoer—a naked trespasser—enters upon the land of another, and makes improvements thereon of a permanent character, such improvements become the property of the landowner; and this will apply to railroad companies as well as to others. If a railroad company should enter upon the land of another without any color of claim of right or privilege, as a mere wrongdoer,—a naked trespasser,—and construct a railroad track on such land, such railroad track would, of course, become the property of the landowner. . . . But neither the foregoing principles nor the above authorities apply to the present case. The railroad company in the present case was not a wrongdoer nor a trespasser in any sense. It was a duly-organized railroad company under the laws of Kansas, and had a right to build its railroad across the plaintiff's land, provided, of course, that it first procured the right of way from the owner of the land; and it had the right to procure such right of way by condemnation proceedings, as the representative of the sovereign authority, the state of Kansas; for the operation of a railroad is everywhere considered and held to be a public purpose, and the statutes of Kansas authorize such condemnation proceedings. And the railroad company took possession of the land for its right of way, and appropriated the same to its own use, with the consent of the only person who had possession of the land, and the only person who seemed at the time to be the owner thereof. This person was B. F. Files. He had the unquestioned possession of the land, and claimed title thereto, and claimed the land as his own. He had tax deeds on all the land through which the defendant's railroad was constructed. . . . Nor has the plaintiff treated the railroad company as a trespasser. He has allowed the company to retain its right of way as a permanent easement, and simply sues it for compensation and damages. . . . Under such circumstances, the railroad company will not be required to pay for the improve-

ments which it itself made upon the land, but will be required to pay only the value of the strip of land which it appropriated, and the damages to the other land; and this value and these damages will be computed as of the time when the railroad company first took possession of said strip, and occupied the same as its right of way. This, we think, is founded in reason, and sustained by the weight of authority. [Citing authorities.] . . . It has even been held that, where a railroad company enters upon land as a technical trespasser, and afterwards procures the land for its right of way by condemnation proceedings, it is not compelled to pay for the improvements which it itself made upon the land while it was technically a trespasser, and before it legally procured its right of way. *Justice v. Nequachon R. Co.* 87 Pa. 28; *Daniels v. Chicago, I. & N. E. Co.* 41 Iowa, 52; *Lyon v. Green Bay & M. R. Co.* 42 Wis. 538; *Greve v. First Div. of St. Paul & P. R. Co.* 26 Minn. 68, 1 N. W. 816. This seems like justice; but, whether it is or not, surely where a railroad company enters upon a piece of land for the purpose of constructing a railroad track, and does so under the honest belief that it has a right to do so, and expends thousands of dollars thereon under such belief, and no person objects to its occupancy, or questions its right, while it is expending its money making improvements on the land, and where the paramount owner of the land afterwards treats the railroad company, not as a trespasser upon his land, but as a party which has in fact procured a permanent right of way over the land, and upon said theory sues the railroad company merely for the damages resulting from the permanent taking of the right of way, including the value of the land taken, and the permanent damages to his other property, he cannot say that the railroad company was at any time a mere trespasser; and he can recover only for the value of the land taken, and the damages to that not taken at the time when the railroad company first entered upon his land, and occupied the same for the purpose of procuring a right of way." In *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Kan. 23, 4 L. R. A. 284, 21 Pac. 809, the railroad company dug a well, and put in a pump and boiler for the purpose of filling a water tank on the line of its road, believing that the well and its attachments were upon its own property. When it was discovered that the same were upon the land of another, it was held that the pump and boiler could be removed without paying the owner of the land therefor. The court said: "It can readily be seen that one of the tests of whether a chattel retains its character or becomes a fixture is the uses to which it is put. . . . If the company had placed it there, even under a mistake, for the purpose of ultimately improving the real estate, the law might, under this state of facts, have held it to be the property of the owner of the real estate; but under the agreed statement it was placed there solely for the purpose of better operat-

ing its own railroad. . . . We believe, in this action, because the improvements did not and were not intended to benefit the realty, that the pump, boiler, and building should be held to be personal property, and not fixtures." In the case at bar the railroad company did not proceed to the laying down of its track and the erection of improvements mentioned, until after it had obtained a deed from Blackstone, the owner of the fee in the land. The mortgage held by the bank conveyed no estate, but was merely a lien. The mortgagee was in no sense the owner of the property, and in condemnation proceedings no personal notice was required to be served upon him, nor need he be named in the award. If condemnation had been had before the foreclosure, his rights as mortgagee would have received no consideration, and the value of the ties, track, etc., would have been wholly excluded from the amount of the award. *Chicago, K. & W. R. Co. v. Sheldon*, 53 Kan. 169, 35 Pac. 1105.

It is provided in § 7 of chapter 68 of the General Statutes of 1897, relating to the exercise of the right of eminent domain by railroad companies, that proceedings in condemnation may be commenced by a railway corporation after the road has been constructed; and such course was adopted in this case. Had the condemnation been had before the sale of the property under the decree and foreclosure, the value of the improvements upon the land would certainly not have entered into the estimate of the damages incurred by the owner, and the mortgagee by no possibility could have laid claim to them, or any part thereof. The improvements made did not become a part of the security under the mortgage, because they did not go to the betterment of the mortgagor's estate. In the case of *Ritchie v. Kansas, N. & D. R. Co.* 55 Kan. 38-59, 39 Pac. 725, the railroad company took possession of a piece of land conveyed to it on express conditions which it did not perform. By reason of the breach it was held that the land should revert to the owner. Mr. Justice Allen, in speaking for the court, said: "If the defendants desire to maintain a railroad across the lands, and to continue the use thereof for railroad purposes, they should be permitted to retain the land, and also the improvements they have constructed thereon, on payment of the value of the land computed as of the date of the commencement of this action, with interest since that time, without any charge on account of improvements made by the defendant thereon. *Cohen v. St. Louis, Ft. S. & W. R. Co.* 34 Kan. 158, 54 Am. Rep. 242, 8 Pac. 138." Upon another ground also property rights in the improvements made by the railway company upon its right of way, to the extent claimed by the purchaser at the sheriff's sale, must be denied to the latter. The case in the court below proceeded upon the theory that Nyce, by virtue of his sheriff's deed, took such title as the mortgagor (Blackstone) had at the time the mortgage was executed, and this title carried with it the betterments added to the land,

put there by the railroad company. If he took title to the extent claimed, then the exclusive estate in and dominion over the land and its improvements were vested in him absolutely, with the resulting power, necessarily accompanying such title and dominion, to exclude all persons from the land so purchased, and to use and enjoy the same unmolested by the railroad company in any way. As the owner of such an estate, he appeared as plaintiff in the court below, and was treated by that tribunal accordingly. If the contention of defendants in error be sustained, then his power over what he claimed was his own carried with it the right to fence his land, excluding all persons therefrom, as well as the servants of the railroad company, to stop the running of trains over his property by removing the track and ties, or by any other means. It must be remembered that a railroad is a public highway. The land over which it runs it holds under a franchise for a particular use conferred upon it by the state for public purposes. A railroad company is endowed with the sovereign power of eminent domain by reason of the benefits which the public at large derive from the operation of the road. It was said by Mr. Justice Allen in *State ex rel. Maylor v. Dodge City, M. & T. R. Co.* 53 Kan. 377, 378, 36 Pac. 747: "From this [public] use neither the corporation itself, nor any person, company, or corporation deriving its title by purchase either at voluntary or judicial sale, can divert it without the assent of the state." In the case of *Georgia v. Atlantic & G. R. Co.* 3 Woods, 434, Fed. Cas. No. 5,351, the question was considered whether an execution creditor of a railroad company might levy upon and sell its depots, freight houses, etc., in satisfaction of the debt. In denying such right, Mr. Justice Bradley said: "It is the means of communication between one part of the country and another. The interest which the public has in it is greater and more important than the interest which the company has in it. It cannot be supposed that the legislature, in authorizing its construction, and granting peculiar franchises for its operation and use, ever intended that execution creditors might levy upon parcels of it, and cut it up into sections, and destroy it as a great public thoroughfare. Such a supposition seems to us preposterous. Suppose a mile of the road should be levied on and sold, would the purchaser have a right to fence it in, and take up the rails and cross-ties, and plant it, and thereby destroy the railroad? Could this be done without condemning the power of the state by which it was created and made a public highway? We think not. . . . To sell it in parcels would be to sever an artery of commerce. It would affect the whole state in a vital part. Its public means of intercommunication are essential to the prosperity of the people. They are the most efficient appliances of modern civilization." In *Justice v. Nequehoning Valley R. Co.* 87 Pa. 28, a railroad company was a trespasser, and its entry upon land

not in conformity with law. In holding that the irregular proceedings did not operate as a dedication to the landowner of the property of the company placed on the land so as to enable the owner to receive the value of the improvements, the court, through Chief Justice Agnew, said: "This is not the case of a mere trespass by one having no authority to enter, but of one representing the state herself, clothed with the power of eminent domain, having a right to enter and to place these materials on the land taken for a public use,—materials essential to the very purpose which the state has declared in the grant of the charter. It is true, the entry was a trespass, by reason of the omission to do an act required for the security of the citizen, to wit, to make compensation or give security for it. For this injury the citizen is entitled to redress. But his redress cannot extend beyond his injury. It cannot extend to taking the personal chattels of the railroad company. They are not his, and cannot increase his remedy. The injury was to what the landholder had himself, not to what he had not. Then why should the materials laid down for the benefit of the public be treated as dedicated to him?"

There has been an attempt made by counsel to distinguish the case of *Briggs v. Chicago, K. & W. R. Co.* 56 Kan. 526, 43 Pac. 1131, from the case at bar. We are not impressed by their efforts in that direction. The facts in the two cases are remarkably similar. The decision in the *Briggs Case* is founded upon the following statement: In 1886, Ault and wife were the owners of a lot upon which they had executed a mortgage. In 1887 they conveyed to the railway company a right of way over the property. In 1889 a foreclosure suit was commenced by the mortgagee, in which the railroad company was made a party. It answered, setting up a right to occupy a strip of land 300 feet in width by virtue of a deed from the Aults. Judgment was rendered against the Aults for the amount of the mortgage debt and interest, and the whole tract decreed to be sold to pay the same. The cause was then continued as between the mortgagee, plaintiff in the suit, and the railroad company. Thereupon it was decreed that the railroad company be forever barred, foreclosed, enjoined, and cut off from claiming any interest or estate in or to the real estate, or any part thereof. An order of sale was issued, under which the land outside of the right-of-way strip was first sold for the sum of \$50 to James F. Briggs as administrator, and the strip was then bid off by him for \$100. A few days after the execution of the sheriff's deed to Briggs, the railroad company made application to the district judge for the appointment of commissioners to condemn a right of way over and across the premises. They were appointed, and proceeded in the usual way, allowing \$124 for the land occupied and \$30 damages to the remainder of the tract. No mention was made of any improvements. Briggs, as administrator and owner of the land, appealed from the award.

The trial court allowed the appellant \$124 and \$30, respectively, denying him the right to recover the value of the improvements, amounting to over \$2,000. It will be seen that the proceedings had were almost identical with those in the case at bar, and the title of Briggs the same as the title of the defendants in error here. In the opinion in that case Mr. Chief Justice Martin, while asserting that the structures placed upon the right of way were real property, in fact based the decision upon the ground that the company had been barred and cut off by the decree in foreclosure from any interest in the lot, which included the structures. He said: "Unless, therefore, we may judicially declare that these buildings and structures were not and are not real estate, we must hold that they passed by the sheriff's deed to the purchaser at the sale." We cannot adhere to the conclusion reached in that decision. While it appears that all the justices concurred, yet on the application for a rehearing Mr. Justice Johnston favored the granting of the same, as appears by the record in the case. We think it should have been declared judicially that the buildings and structures were not real estate, and that the decree in the foreclosure suit did not give to Briggs the right to recover for the improvements. In that case, as in this, the question as to whether the ties, rails, and other structures upon the right of way were real estate or personal property was not presented to, considered, or decided by the court in the foreclosure suit. There was no issue upon that question, and no adjudication thereon. It cannot be asserted that the materials placed upon the land were changed from personal to real property by the foreclosure proceeding. In the case at bar the answer of the railway company in the foreclosure action averred that it was in possession of a strip of land 100 feet wide across the land, and also another strip 100 feet wide and 1,700 feet long, adjoining the right of way, obtained for the purpose of depot, side track, and yard, which land was obtained by deed from Alexander Blackstone, the owner thereof. There was no reference in the pleadings to the improvements upon the land, other than might be implied from the averments in the answer of the railway company that it was in possession of the strip of land above mentioned. The litigation in both foreclosure cases related to the fixing of a mortgage lien upon the real estate, and the decrees went no further than that. If the structures placed upon the property by the railroad company were a part of the real estate before the foreclosure, they were a part of it afterwards, for there was nothing in the decrees changing its character. We are not without authority as to the effect of a judgment in foreclosure upon the rights of the parties. In the case of *Texas & P. R. Co. v. Hays*, 3 Tex. App. Civ. Cas. (Wilson), 79, before the commencement of condemnation proceedings the landowner had recovered a judgment against the railroad company in an action of ejectment to quiet title to the real state. In the condemnation proceeding it is L. R. A.

was contended that the company was estopped by the judgment from claiming the material composing that part of the railroad on the land in question. This claim was denied, the court holding that the judgment in ejectment gave to the owner of the land the title to the easement or right of way which the railroad company was using, and was a trespasser thereon, yet the title to the fixtures and superstructure, although placed upon the land by the company without authority, did not become a part of the land; that the question as to what were fixtures was not involved in the decision of the ejectment suit, and that the plea of *res judicata* could not be interposed. In *St. Johnsbury & L. O. R. Co. v. Willard*, 61 Vt. 134, 2 L. R. A. 528, 17 Atl. 38, certain land, at the time of the construction of a railroad, was encumbered by a mortgage, which was afterwards foreclosed, the railroad company being a party. The land was sold to Willard. In condemnation proceedings which were then instituted by the railway company he claimed that the latter was estopped by the judgment in the foreclosure suit from claiming the railroad, or the materials thereof. This claim was denied, and the improvements held to be personal property. The court said: "He [the defendant] also claims that the Essex County Company was a trespasser when it entered and constructed its road, and invoked the doctrine of the common law that structures placed upon land by a trespasser inure to the benefit of the owner of the land. But the company was not a trespasser as to either the mortgagor or the mortgagee. Not as to the mortgagor, for he consented to the entry and construction of the road. Not as to the mortgagee, for, as to third persons, a mortgagor in possession is regarded as the owner, and the mortgagee as having only a lien or security. . . . The effect of the decree of foreclosure was to cut off the right of redemption, and thereby convert defendant's conditional title into an absolute title; but in other respects the rights of the parties were left to be determined by the deed." In *Kennedy v. Milwaukee & St. P. R. Co.* 22 Wis. 581-587, the liability of a railway company entering upon mortgaged lands to the mortgagee was considered. Cole, J., in the opinion, says: "When the company obtained the right of way, it could not assume that the mortgage would not be paid by those under obligation to pay it. Of course, it incurred the risk that it might ultimately be enforced against the mortgaged premises. But, in the event it should be enforced, it seems to us that all equity requires the company to do is to make compensation by paying the value of the land at the time it was taken, and interest on that amount. This appears to us more just and equitable than to say that there should be no apportionment of the lien, but that the holder of the mortgage may enforce it to the full amount of his debt by selling the road track, superstructure, and fixtures placed upon the land at great expense by the company. . . . But when the company has purchased the right of way, and neg-

lected to have a mortgage lien discharged, so that it has to make further compensation, then we think it ought only to pay the value when taken, and interest upon that sum." In the case of *Northern C. R. Co. v. Canton Co.* 30 Md. 347, a railway was built on the lands of the Canton Company, with a license so to do. The license was revoked, and this was followed by two suits; one in ejectment, and the other of trespass *quare clausum fregit*. Judgment was recovered in both actions. A subsequent action of ejectment was brought for the roadbed, judgment obtained, and under a writ possession was delivered to the plaintiff in the suit. The rails and other materials which formed a part of the railway constructed by the appellant were upon the land at the time, and the question arose who was the rightful owner of them. It was held that they were trade fixtures, and, no matter how strongly attached to the soil, were to be treated as personal property. The court said: "If the property replevied did not belong to the appellee at the time the license to the appellant to be upon its land was revoked, it is not perceived how the subsequent suits between them could have changed the title to it. This property was not the subject of those suits. They had reference to the land only upon which it was, and determined no question of its ownership, inasmuch as it does not pass with the realty from the single circumstance of having been affixed to the soil." See also *Winslow v. Bromich*, 54 Kan. 300, 38 Pac. 275. It is well settled that, where a railroad company commences condemnation proceedings after being in possession of the land sought to be taken for right of way, it is only required to pay for the land, and not for the improvements it has placed thereon. *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Kan. 23, 4 L. R. A. 284, 21 Pac. 809; *San Francisco & N. P. R. Co. v. Taylor*, 86 Cal. 246, 24 Pac. 1027; *Louisville, N. O. & T. R. Co. v. Dickson*, 63 Miss. 380, 56 Am. Rep. 309; *Canton, A. & N. R. Co. v. French*, 68 Miss. 22, 8 So. 512; *Greve v. First Div. of St. Paul & P. R. Co.* 26 Minn. 66, 1 N. W. 816; *Ritchie v. Kansas, N. & D. R. Co.* 55 Kan. 36, 39 Pac. 718; *St. Johnsbury & L. C. R. Co. v. Willard*, 61 Vt. 134, 2 L. R. A. 528, 17 Atl. 38; *Jacksonville, T. & K. W. R. Co. v. Adams*, 28 Fla. 631, 14 L. R. A. 533, 10 So. 465; *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 273, 53 Am. Rep. 622. After much consideration, we are convinced that the decision in *Briggs v. Chicago, K. & W. R. Co.* is contrary to established principles settled by a great number of well-considered cases involving the same question. So far as that decision is based upon argument, we think it fails in reason, and, when sought to be sustained upon precedent, lacks authority. While the doctrine *stare decisis* has been adhered to by this court with much pertinacity, yet we shall not hesitate to incur the accusation of instability by overturning a rule previously adopted, when it is contrary to right reason, and the foundation of which is shattered by the pressing weight of opposing authority.

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On the second proposition stated at the beginning of this opinion it is quite clear that the plaintiffs below cannot recover damages to the land outside of the right of way by reason of the construction and operation of the railroad. Under the terms of the decree in the foreclosure suit, the half section outside of the strip of land deeded for right of way purposes by Blackstone and wife to the railroad company was first sold by the sheriff, and bought in by Nyce, and afterwards he purchased the right-of-way strip. When he purchased, the road was in operation. Embankments had been thrown up, ties and track laid, the road fully completed, and trains were running over the land. He bought the property with the disadvantage of the railroad upon it. The former owner was the person who might have recovered for the depreciation in value of the property caused by the construction of the railroad, and the right of action was in him. *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 59 Am. Rep. 341, 8 N. E. 460. The general rule is stated in the case of *Colorado Midland R. Co. v. Trevarthen*, 1 Colo. App. 152, 153, 27 Pac. 1013, as follows: "It is the law of this state that a lotowner can only recover for those damages which he has sustained from the construction or operation of a road subsequent to the time when he acquired his title to the property. If the road has been constructed, and is in operation at the time he gets title, he is supposed to have taken it *cum onere*, and to have paid the lesser price because of the disadvantages. The damages arising from the construction inure to the holder of the fee, and do not pass by the deed which transfers the title." In the case of *Indiana, B. & W. R. Co. v. Allen*, 100 Ind. 409-414, a farm, at the time a railroad was constructed over it, was owned by one Brittingham, who afterwards sold and conveyed the same to Allen. The latter then conveyed the farm, except the strip of land within the right of way, and reserved to himself "all right of action of every kind and nature against the railroad company, . . . and all right to prosecute proceedings for the assessment of damages for the taking and occupancy of said premises, or any part thereof, by said company for the use of its railroad, and the right to all damages done to said premises by reason of such taking and occupancy" to one Fields. The railroad company then instituted condemnation proceedings, in which Allen claimed damages to the land outside of the right of way. In denying this claim the court said: "Upon this testimony we think it appears clearly that the appellee was not entitled to any damages for the strip of land taken, or for the injury done to the remainder of the quarter section. When he bought the quarter section, the railroad was upon it. It is fair to presume that the existence of such an encumbrance affected the price paid. When the strip of land was taken, the quarter section belonged to Martha E. Brittingham; the right to recover all the damages then belonged to her. That right was a chose in action. It did not pass

to appellee by the warranty deed from Mrs. Brittingham and her husband. No assignment is alleged, and the rule is that damages to land remaining uncollected do not pass to a vendee." See also *Sennott v. St. Johnsbury & L. C. R. Co.* 59 Vt. 226, 9 Atl. 554; *Licrmon v. Roanoke & T. River R. Co.* 109 N. C. 52, 13 S. E. 734; *Doues v. Congdon*, 16 How. Pr. 571; *Kansas P. R. Co. v. Muhlman*, 17 Kan. 224.

The defendants in error were entitled to recover only the value of the land occupied by the railroad, irrespective of the improvements. In the particular questions of fact answered by the jury, this was found to be \$164.

The judgment of the court below will be modified, with directions to enter judgment in favor of the defendants in error for that amount. The costs of this court will be divided between the parties.

All the Justices concur.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, *Pf. in Err.*,
v.

I. P. CAMPBELL.

(.....Kan.....)

"The statute (Laws 1897, chap. 167) being 'An Act to Require Railroad Companies to Furnish Free Transportation to Shippers of Stock in Certain Cases,' etc., is a deprivation of property without due process of law, and a denial of the equal protection of the laws, and is therefore unconstitutional and void, under the 14th Amendment to the Federal Constitution.

(February 10, 1900.)

ERROR to the Court of Appeals, Southern Department, Central Division, affirming judgment of the District Court for Sedgewick County in favor of plaintiff in an action brought to recover the price paid for transportation over defendant's road in violation of a statute giving plaintiff the right of free transportation because returning from accompanying stock shipped by him over the road. *Reversed.*

The facts are stated in the opinion.

Messrs. A. A. Hurd, W. Littlefield, and O. J. Wood, for plaintiff in error;

This is class legislation. It undertakes to confer rights and privileges upon one class of shippers to the exclusion of all other shippers.

If this power assumed by the legislature not restrained, it will in the end work a confiscation of railroad property.

*Headnote by DOSTER, Ch. J.

NOTE.—For consideration of statutes regulating the duties of carriers of live stock, see notes (*Chesapeake & O. R. Co. v. American Exch. Bk. (Va.)* 44 L. R. A. 449; *Harman v. Norfolk & W. R. Co. (Va.)* 44 L. R. A. 289; and *Illinois C. R. Co. v. Petersen (Miss.)* 14 L. R. A. 9.

L. R. A.

Being directly repugnant to the Constitution, it becomes the duty of the court to declare its unconstitutionality.

Chicago & N. W. R. Co. v. Dey, 35 Fed. Rep. 866, 1 L. R. A. 744, 2 Inters. Com. Rep. 325.

Corporations are persons within the meaning of the 14th Amendment to the Federal Constitution.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 29, 32 L. ed. 586, 9 Sup. Ct. Rep. 207; *Charlottesville, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; *Ames v. Union P. R. Co.* 64 Fed. Rep. 165, 4 Inters. Com. Rep. 835; *State ex rel. Board of Transportation v. Sioux City, O. & W. R. Co.* 46 Neb. 682, 31 L. R. A. 47, 65 N. W. 766; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624; *Atty. Gen. v. Boston & A. R. Co.* 160 Mass. 62, 22 L. R. A. 112, 35 N. E. 252; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

Any act of a legislature not recognizing the right that "private property shall not be taken for public use without just compensation" would be void.

Mills, Em. Dom. § 1, p. 81; Leavenworth County Comrs. v. Miller, 7 Kan. 490, 12 Am. Rep. 425; *State ex rel. Board of Transportation v. Sioux City, O. & W. R. Co.* 46 Neb. 682, 31 L. R. A. 47, 65 N. W. 766; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624.

In the case at bar there was a contract made between the parties for the shipment of the cattle, which included the right of the shipper to transportation one way, under certain conditions to be observed and performed by him. The effect of this law is to annul and render void that contract, and deny to the parties the freedom of making any contract whatever giving to the shipper or his employee the right to accompany the stock and have transportation therefor under certain expressed conditions.

Braceville Coal Co. v. People, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 350, 10 S. E. 288; *State v. Saunders*, 19 Kan. 127, 27 Am. Rep. 98.

Messrs. Sankey & Campbell, for defendant in error:

This court has not jurisdiction of this case.

If this action involves the constitutionality of an act of the legislature, any litigant can involve it.

Erb v. Morasch, 60 Kan. 251, 56 Pac. 133; *Allen v. Portland* (Or.) 58 Pac. 509; *Morris v. People*, 23 Colo. 465, 48 Pac. 534.

It is mere assertion that the act under which this action is brought is in conflict with certain provisions of the Constitution. *Rathbone v. Wirth*, 6 App. Div. 277, 40 N. Y. Supp. 535.

The plaintiff having brought his action in justice's court and obtained judgment, and the defendant having appealed without questioning the constitutionality of the act, and having filed no pleading in the district court pointing out why and wherein the action could not be maintained, it cannot now raise the question in this court.

Hilton v. St. Louis, 129 Mo. 391, 31 S. W. 771; *May v. Jarvis*, *Conklin Mortg. Trust Co.* 138 Mo. 447, 40 S. W. 122; *Conkey v. Knight*, 104 Ill. 337; *Sawyer v. Moyer*, 105 Ill. 192; *Chicago, B. & Q. R. Co. v. Watson*, 105 Ill. 217; *Addins v. Beane*, 135 Ill. 530, 26 N. E. 657; *Hupp v. Hupp*, 153 Ill. 490, 39 N. E. 124; *McClellan v. Hurd*, 21 Colo. 197, 40 Pac. 445.

The provision in a shipping contract for accompanying the stock is reasonable, and the shipper cannot recover unless he complies with it.

Sprague v. Missouri P. R. Co. 34 Kan. 347, 8 Pac. 465; *Goggin v. Kansas P. R. Co.* 12 Kan. 416.

It costs the railroad company no more to haul the shipper to the point of destination, per hundred, than it does the cattle. He has no better or more expensive accommodations. In this case it cost the company 40 cents, and no more, probably much less, to carry the shipper from Attica to Kansas City. How shall he get back home? If he does not choose to walk he must take passage on the only railroad that will carry him back to Attica. For this the railroad charges him and compels him to pay \$8.75.

The railroad companies, prior to the enactment of this law, had a way of compelling a certain class of people to patronize their passenger trains. Was this justice? Ought such conditions to be permitted to exist?

This statute in no sense attempts to fix a rate.

If a law applying to all railroads within the state, and to all shippers of live stock alike, is class legislation, then this is. Such legislation is proper, and has been so recognized by the courts of this and every other state.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 258; *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383; *State, Point Breeze Ferry & Improv. Co. Prosecutor, v. Bergen Neck R. Co.* 53 N. J. L. 108, 20 Atl. 762; *Com. v. Sellers*, 130 Pa. 32, 18 Atl. 541; *West Chicago Park Comrs. v. McMullen*, 134 Ill. 170, 10 L. R. A. 215, 25 N. E. 676; *Beckstead v. Montana Union R. Co.* 19 Mont. 147, 47 Pac. 795; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Bennett v. Wabash, St. L. & P. R. Co.* 61 Iowa, 355, 16 N. W. 210.
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Doster, Ch. J., delivered the opinion of the court:

This was an action brought by the defendant in error, as plaintiff, against the plaintiff in error, as defendant, to recover an amount of money paid as passenger fare on the line of the road of plaintiff in error from Kansas City, Kansas, to Attica, Kansas. The defendant in error shipped a car load of live stock from the point last named to the one first named. On the going trip he rode free upon a stock shipper's contract issued to him by the railroad company's agent at the shipping point. Upon the return trip he demanded to be carried free, in accordance with the provisions of chapter 167, Laws 1897. This demand was refused, and, to avoid ejection from the train, he paid the required fare. He then brought an action to recover the amount paid, together with an attorney's fee for the prosecution of the suit. Judgment was rendered in his favor, first by a justice of the peace, next by the district court, and lastly by the court of appeals.

Atchison, T. & S. F. R. Co. v. Campbell, 8 Kan. App. 661, 56 Pac. 509. The railroad company has prosecuted error to this court. The sole question involved in the case is the constitutionality of the legislative enactment under which the demand for free transportation was made. The title of the act and its first two sections (the only ones material to quote) read as follows:

"An Act to Amend Chapter 195 of the Laws of 1895, being An Act Entitled, 'An Act to Require Railroad Companies to Furnish Free Transportation to Shippers of Stock in Certain Cases, and Providing a Remedy in Case of Failure or Refusal on the Part of the Railroad Company to Comply with the Provisions of This Act,' to Provide a Penalty for the Violation of the Provisions of This Act, and Repealing All Acts and Parts of Acts in Conflict Herewith.

"Sec. 1. That section 1 of chapter 195 of the Laws of 1895 be amended so as to read as follows: 'Section 1. Whenever any railroad company or corporation, doing business within the limits of this state, shall receive and ship any live stock by the car-load, said company, in consideration of the usual price paid for the shipment of said car, shall pass the shipper or his employee to and from the point designated in the contract or bill of lading, without further expense to the shipper in the way of fare: provided, however, that in all cases where a shipper ships more than one car-load of stock at the same time the said railroad company shall be and is hereby required to pass free, as aforesaid, only one additional person, shipper, or employee, for every three car-loads shipped in addition to the first car-load.'

"Sec. 2. That section 2 of said chapter 195, Laws of 1895, is hereby amended so as to read: 'Sec. 2. Every railroad company or corporation failing or refusing to comply with the provisions of section one of this act, shall be liable in damages to the shipper, for the amount of damages sustained by reason of such failure or refusal on the part of

the railroad company, to be recovered before any court of competent jurisdiction, and any judgment recovered on any such action shall be made to cover reasonable attorney's fees for plaintiff's attorney."

The above act is assailed upon the ground of its repugnancy to that portion of the 14th Amendment to the Constitution of the United States which reads, "Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Speaking for myself, I am of the opinion that a strained and artificial construction has been often placed upon this constitutional provision, especially by the Federal courts, for the purpose of bringing within its prohibitive terms much wholesome state legislation. For instance, I do not believe that the word "person," used in the clause above quoted, was designed to include corporations; nor that it can, in reason, bear that signification when read in connection with the preceding clauses of the section, and interpreted in the historic light of the origin and purpose of the amendment. However, the Federal courts, the authoritative expositors of the Federal Constitution, departing from the view first taken by them, have been for many years holding that a corporation was a "person," within the meaning of the provision above quoted. Those decisions are, of course, binding upon the state courts. Being, therefore, under the compulsion of the now settled rule of interpretation, I agree with my associates that the above-quoted enactment cannot be upheld. It operates as a deprivation of property without due process of law, and is a denial of the equal protection of the laws. The property of a railroad company consists, not alone in its franchise to be a corporation, nor its right of way and track, nor its rolling stock and other tangible property, but it consists, in its most essential character and important sense, in the right to charge and collect tolls for the transportation of persons and property over its line. Without the right to take tolls, such corporation could not do business; and a denial of its right to take tolls would as effectually render valueless all of its other property as a confiscation of its other property would defeat its ability to carry on its business. Upon the conception of the right to take tolls, as a species of property belonging to railroad corporations, rest all the decisions of all the courts, both state and Federal, denying the right of state legislatures to restrict such tolls below a reasonable amount. It needs but a glance at the act in question, and but a moment's thought over the consequences to result from a sanction of its provisions, to perceive that it strikes vitally at the fundamental right of a railroad company to own and enjoy that species of property which exists in the form of its franchise to charge and collect tolls. It purports in its title to be, and is, "An Act to Require Railroad Companies to Furnish Free Transportation to Shippers of Stock in Cer-

tain Cases;" and in its body it requires railroad companies, "in consideration of the usual price paid for the shipment of a car of stock, to pass the shipper or his employee to and from the point designated in the contract or bill of lading, without further expense to the shipper in the way of fare." Upon no theory whatever, consistent with the idea that the franchise of railroad companies to take tolls is a species of property, or consistent with the adjudications of the courts that such right of property is protected by the 14th Amendment to the Federal Constitution, can such an enactment be upheld. Once grant that so much of the property of railroad companies as is involved in their right to charge passenger fare to shippers of stock can be taken away by legislative enactment, and it necessarily follows that the like property of theirs which consists in their right to charge passenger fare to other shippers of other kinds of property can also be taken away for like reasons; and once grant, upon like considerations, that the property right of railroad companies to take tolls for passenger carriage can be thus taken away, and the right to take tolls for freight transportation can be likewise taken away; and once grant that the right to take tolls for freight and passenger carriage can be taken away, and it follows that the right to own and possess the rolling stock and other like property necessary to the operation of the road can be likewise taken away. In short, there would be no end to the extension of legislative authority over the right of railroad companies to own and enjoy property. It would be no answer to say that the enforcement of the act in question would not sufficiently impair the property right of the companies to take tolls as to be substantially detrimental to their interests. Rights are not measured or ascertained by the extent of the injury resulting from their impairment or denial. They do not cease to exist merely because the hurt to them may be slight. Rights reside in principles, and not in the physical ability of the claimant of rights to do without a minor portion of them.

Again speaking for myself, I am a firm believer in the right of the legislature of this state, under the reserved power of the Constitution (art. 12, § 1), to amend or add to the original acts providing for the incorporation of companies, and to amend or add to the original body of laws governing them, without declaring its enactments to be amendatory in character. However, its power of amendment in such cases is limited to such enactments as do not substantially impair the vested rights of the corporation. 7 Am. & Eng. Enc. Law, 2d ed. p. 675. I therefore agree with my associates that the act in question, even if to be regarded as an exercise of the reserved power of the legislature to amend the charter of railroad corporations, is a substantial impairment of their vested rights. We do not mean to say that the legislature is powerless to declare circumstances or prescribe conditions under which railroad companies may be required to

furnish transportation to shippers of live stock or other merchandise over their lines. However, those circumstances or conditions, if declared or prescribed, must exist in the form of considerations or equivalents for the transportation furnished. It may be that railroad companies can be compelled to carry patrons of their lines for some other consideration than cash fares. To illustrate, but only to illustrate, not to decide, it may be that a legislative enactment which imposed upon shippers of live stock the obligation to care for their stock *en route*, and to that extent to relieve the trainmen of the burden of its care, and which required the company to transport the shipper free, as an equivalent for his relief of the train employees in the way stated, would be constitutionally valid,—would not be a taking of private property without compensation. But the enactment in question does not provide for the equivalent of labor performed for transportation furnished. It declares that the transportation shall be furnished “in consideration of the usual price paid for the shipment of said car.” What the railroad company is required to do is not required of it as a compensation for anything to be done for it by the shipper, but is required of it in the form of a gratuity over and above the usual and ordinary charges for transportation. The enactment is not framed upon the assumption that the usual price paid for the shipment of live stock is excessive, to the extent of the passenger carriage of the shipper to and from the place of shipment, and that in order to make good the excess the shipper shall be transported free, but it is framed upon the assumption that the charge for the transportation of the car of stock is a reasonable one.

The brief of counsel for defendant in error suggests the importance of the shipper accompanying his stock in order to care for it *en route*. We do not judicially know that it is important or advantageous to the shipper or to the company for the former to accompany his stock to market, nor does the act assume the importance or advantage either to the shipper or the company in the former accompanying the stock. It imposes upon him no such requirement. So far as the act is concerned, he may accompany his stock, or he may ride upon another train. There is nothing whatever in the act from which an idea of obligation upon the part of the shipper to pay or perform anything as an equivalent for his transportation can be derived. However, turning to the shipping contract made by the defendant in error, we perceive in it certain stipulations imposing upon him the obligation to accompany and care for his stock, but this contract is no part of the statute in question. The statute does not purport to be framed upon the assumption that such contracts are or will be entered into between railroad companies and shippers of live stock. The contract is apart from the statute. None of its provisions are included within the terms of the statute. In short, there is no theory upon which this act

can be upheld, and therefore we are constrained to hold it to be unconstitutional and void. No cases of a like character have been brought to our attention, except that of *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 505. That case involved the validity of an act of the legislature of Michigan requiring railroad companies to keep for sale 1,000-mile tickets, at specified rates, less than the regular rates, to be issued in the name of the purchaser and the members of his family, and to be good for use for two years from the date of sale. Commenting upon this enactment, the court said: “If the legislature can interfere by directing the sale of tickets at less than the generally-established rate, it can compel the company to carry certain persons or classes free. If the maximum rates are too high, in the judgment of the legislature, it may lower them, provided they do not make them unreasonably low, as that term is understood in the law; but it cannot enact a law making maximum rates, and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper. What right has the legislature to take from the company the compensation it would otherwise receive for the use of its property in transporting an individual or classes of persons over its road, and compel it to transport them free, or for a less sum than is provided for by the general law? Does not such an act, if enforced, take the property of the company without due process of law? We are convinced that the legislature cannot thus interfere with the conduct of the affairs of corporations.”

The judgment of the Court of Appeals and of the District Court are reversed, and the latter court is directed to enter judgment for the defendant, the plaintiff in error in this court.

All the Justices concur.

STATE of Kansas, Appt.,
v.

George HAGER.

(.....Kan.....)

*1. A plea of former jeopardy is a special plea of matter in bar which is not involved under the general issue or plea of not guilty, and therefore it should be heard and determined apart from the main issue. Such plea not being of matter which goes to the question of the innocence of the accused, a hearing upon it is not a jeopardy, and an order sustaining it, and discharging the defendant, may be appealed by the state as a question reserved, and, in the event of a reversal of such order on the state's appeal, the

*Headnotes by DOSTER, Ch. J.

NOTE.—As to discharge of jury entitling prisoner to discharge, see *State v. Richardson* (S. C.) 35 L. R. A. 238; and note to *Upchurch v. State* (Tex. Crim. Rep.) 44 L. R. A. 694.

defendant may be rearrested and held for trial.

2. Where the record of the trial of a criminal case shows that the jury "were absent some time considering of their verdict," and upon being returned to the jury box the foreman, in reply to an inquiry by the court, stated, in the presence of the remainder of the jury and without dissent by any of them, that there was no probability of their agreeing upon a verdict, and the court thereupon discharged them, "because they were unable to agree upon a verdict,"—*Held*, that such record does not show an arbitrary or unreasonable exercise of the court's authority in discharging the jury, but does show facts from which a presumption of a correct exercise of judicial authority arises, and that it will not support a plea of former jeopardy when the defendant is again put upon trial.

(February 10, 1900.)

APPEAL by the state from a ruling of the District Court for Jackson County in favor of defendant upon a plea of former jeopardy to an indictment for larceny. *Reversed*.

The facts are stated in the opinion.

Messrs. Hayden & Hayden and H. F. Graham, for appellant:

It was not necessary to have the defendant's consent to a discharge of the jury.

Jones v. Com. 86 Va. 661, 10 S. E. 1004.

The length of time a jury should be kept together, and the improbability of an agreement, must be determined by the trial court from the facts and circumstances of the particular case, and its discretion will be conclusive unless it has abused its discretion in that regard.

State v. Allen, 59 Kan. 758, 54 Pac. 1060.

In interrogating the jury and making its determination from the answers received, the court was acting on an official report made by the jury, and one which the defendant has no right to question.

State v. Smith, 44 Kan. 75, 8 L. R. A. 774, 24 Pac. 84; *State v. Reed*, 53 Kan. 767, 37 Pac. 174; *State v. White*, 19 Kan. 445, 27 Am. Rep. 137; *Dobbins v. State*, 14 Ohio St. 493; *State v. Koinhart*, 26 Or. 466, 38 Pac. 822; *People v. Smelling*, 94 Cal. 112, 29 Pac. 421; *State v. Stephenson*, 54 S. C. 234, 32 S. E. 305; *Smith v. State*, 40 Fla. 203, 23 So. 854; *State v. Jorgenson* (Idaho) 32 Pac. 1129; *People v. Greene*, 100 Cal. 140, 34 Pac. 630; *Com. v. Cody*, 165 Mass. 138, 42 N. E. 575.

The necessity of the discharge of a jury is a matter within the discretion of the trial judge.

Re Allison, 22 Colo. 525, 22 Pac. 820; *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617.

Messrs. Crane & Woodburn and J. A. Beke, for appellee:

The defendant was not called upon to object in advance to the discharge of the jury.

Whitten v. State, 61 Miss. 717.

The facts on which the finding of the trial court is based, as well as the finding itself, must appear on the record.

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State v. Allen, 59 Kan. 758, 54 Pac. 1060; *Ex parte Maxwell*, 11 Nev. 437; *Reese v. State*, 8 Ind. 416; *Hines v. State*, 24 Ohio St. 138.

In the following cases the court held the record did not show a sufficient reason for the discharge of the jury, and in each case the jury stated to the court they could not agree upon a verdict.

State v. Shuchardt, 18 Neb. 454, 25 N. W. 722; *Conklin v. State*, 25 Neb. 784, 41 N. W. 788; *Ex parte Maxwell*, 11 Nev. 437; *Hines v. State*, 24 Ohio St. 138; *Poage v. State*, 3 Ohio St. 239; *Mitchell v. State*, 42 Ohio St. 394; *Josephine v. State*, 39 Miss. 613; *Reese v. State*, 8 Ind. 416; *Com. v. Fitzpatrick*, 121 Pa. 110, 1 L. R. A. 451, 15 Atl. 466; *Whitten v. State*, 61 Miss. 717; *Powell v. State*, 17 Tex. App. 345.

Dexter, Ch. J., delivered the opinion of the court:

This is an appeal by the state upon a question reserved by it. The defendant in the court below interposed a plea of former jeopardy, which, upon hearing and consideration by the court, was sustained, and an order made for his discharge. The defendant had been informed against for grand larceny. Upon the trial of his case the jury reported they were unable to agree, whereupon they were discharged from further consideration of the case. The action was continued to the next succeeding term, and at that term the defendant filed his plea of former jeopardy. In this plea he alleged that, at the trial of his case the preceding term, "the jury were arbitrarily discharged, without a verdict, from the consideration of the case, and without any sufficient or lawful reason therefor, to which discharge defendant excepted, and, having once been in jeopardy, he cannot again be placed upon trial." The evidence in support of this plea was, of course, the record of the former proceeding. The material portion of the record was as follows: "The said jury retired in charge of a sworn bailiff to consider of their verdict; and, after being absent some time in consideration of their verdict, they were duly returned to the jury box, and the court duly inquired of the foreman whether they had agreed upon a verdict, and was informed by said foreman that they had not. The court then inquired of said foreman, 'Is there any probability of your doing so?' and was answered by said foreman, 'There is not.' The jury was by the court thereupon discharged from the further consideration of the cause, because they were unable to agree upon a verdict."

We have delayed the determination of the case to give consideration to a question involved in it, but which was not argued by counsel. That question is as to the effect of the defendant's discharge upon the hearing of his plea of former jeopardy. Can he, in the event of a reversal of this case upon the state's appeal, be again arrested and held for trial, or was the hearing given him upon his plea of former jeopardy itself a jeopardy, which he may plead in bar when again brought to trial? If the latter should be

the case, the question presented to us as to the effect of the discharge of the jury on the first trial would be moot in its nature, and would not be considered by us. *State v. Rook*, 61 Kan. —, 59 Pac. 653. The subject, as we now view it, in the light of the authorities, is quite free from doubt, although it did not appear so when first occurring to us. Our conclusion is that a hearing upon a plea of former jeopardy alone is not itself a jeopardy, and a discharge upon such hearing is not an acquittal. Pleas of former acquittal or conviction, or former jeopardy, are special pleas of matter not properly involved under the general issue or plea of not guilty. Such being the case, they should be heard and determined apart from the main issue. Wharton, *Crim. Pl.* §§ 419, 420, 429; Bishop, *New Crim. Proc.* §§ 799-805. Therefore, a plea of former acquittal, not being of matter involved in the general issue, and not being of matter which goes to the question of guilt or innocence, a judgment sustaining it cannot be in the nature of an acquittal. If such were the case, a judgment against a defendant overruling his plea of former acquittal would be a former conviction, and could be pleaded as *autrefois* convict to the indictment when again called for trial. Hence the defendant could always escape punishment by pleading a former acquittal to the indictment against him, because, if the plea should be found against him, it would be a former conviction; if in his favor, a former acquittal. For the same reasons a plea of former jeopardy, whether determined one way or the other, cannot be regarded as involving the merits of the case. It does not reach to the question of guilt or innocence, and, if determined in defendant's favor, the state may have an appeal upon the question, if reserved by it. There seems to be some contrariety in the decisions as to whether the defenses of former acquittal, conviction, or jeopardy may be heard under the general issue (9 Enc. Pl. & Pr. title *Former Conviction or Acquittal*); but we think there are no decisions holding that such defenses, when made under the general issue, are not triable separately from the main question, or, at least, no decisions holding that a hearing upon the special defense is itself a former jeopardy, and a judgment upon it alone a former conviction or acquittal.

The question now recurs. Was the plea of former jeopardy sustained by the record? It is undeniable that the arbitrary and unnecessary discharge of a jury before which an accused person is tried, without a verdict, operates also to discharge the defendant. In such case he has been once in jeopardy. That jeopardy, terminating without fault upon his part and from no overweening necessity, cannot be renewed, and the accused again called upon to defend himself. Code Civ. Proc. § 291 (Gen. Stat. 1897, chap. 95). provides: "The jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no prob-

ability of their agreeing." The provisions of this section are made applicable to trials of criminal cases. Code Crim. Proc. § 201 (Gen. Stat. 1897, chap. 102). Authority for the discharge of a jury trying a criminal case therefore exists if "they have been kept together until it satisfactorily appears that there is no probability of their agreeing." The tribunal primarily intrusted with the duty of determining whether a jury has been kept together until there is no probability of their agreeing is the trial court. The questions whether they have been so kept together, and whether there is a probability of their agreeing, are judicial questions. As such, they cannot be arbitrarily or capriciously determined by the court. The court must be satisfied that the jury, in all probability, cannot agree to a verdict before it should order their discharge. However, when it does become of that conviction, and enters it of record, the correctness of its view and the soundness of its conclusions are not subject to review, unless the record of its action discloses it to be in error. Unless the record discloses hastily formed conclusions, immature judgment, or capricious conduct, the action of the trial judge cannot be reviewed by this or any other court. In *State v. Allen*, 59 Kan. 758, 54 Pac. 1060, the record of the former trial recited that "the jury not having agreed upon a verdict in the above-entitled cause, the jury is discharged from further consideration of this case." It was therefore held that the existence of no proper or necessary grounds for the discharge of the jury had been shown, but that something more should have appeared than that the jury had not agreed upon a verdict. It should have been shown that there was no probability of their agreeing. The present case, however, is unlike that of *State v. Allen*, 59 Kan. 758, 54 Pa. 1060. In this case it appeared, not merely that the jury had failed to agree, but that upon inquiry of the foreman, in the presence of his fellows, he had stated that there was no probability of their being able to agree. This statement of the foreman, the usual spokesman of the panel, in the presence of the remainder of the jurors, and not dissented from by them, must be regarded as their conclusion, as well as his. In addition to the inquiry addressed by the court and answered by the foreman, it appears from another recital of the record that the jury had "been absent some time, in consideration of their verdict," before they were again brought into the presence of the court. How long they had been absent does not appear, but we must indulge the presumption that it had been for such a length of time as to enable the court to regard it as some evidence of inability to reach a conclusion. The record further shows, in connection with its recitals of absence of the jury for "some time in consideration of their verdict," and inquiry and answer as to the probability of an agreement, that the jurors were thereupon discharged "because they were unable to agree upon a verdict." It would appear, therefore, that the court acted according to judicial methods

in discharging the jury. He took into consideration the length of time, whatever that may have been, the jury had been in consideration of their verdict, and the statement of the foreman, in the presence of the remainder of the jury, and presumably assented to by them, because not dissented from, that they were unable to agree upon a verdict. From these facts he evidently deduced the conclusion that there was no reasonable probability of their being able to agree. While the record of the proceedings was not made as full as such records ought to be made, yet it is sufficiently full to prevent us from saying that the court below erred. While in *State v. Allen*, 59 Kan. 758, 54 Pac. 1060, it was held that the court had erroneously discharged the jury under the particular circumstances of that case as disclosed by the record, yet the rule was distinctly announced that "the length of time a jury should be kept together, and the improbability of an agreement, must be determined by the trial court from the facts and circumstances of the particular case, and its decision will be conclusive, unless it has abused its discretion in that regard." This statement of the rule is in harmony with the holdings of nearly all the cases. Mr. Bishop says: "The result whereof [of the authorities] would seem to be that when he [the judge] concurs in and affirms the jury's conclusion of inability to agree, and discharges them, the fact so found, the existence whereof nullifies the seeming jeopardy, is absolute and irreversible." 1 Bishop, New Crim. Law, § 1041. An instructive and valuable case, reviewing many of the decisions upon the subject, and showing the rule to be as above stated by Mr. Bishop, and also as herein stated, is *State v. Reinhart*, 26 Or. 466, 38 Pac. 822.

We think the plea of former jeopardy was improperly sustained. *The judgment* of the court below sustaining it is therefore reversed, with directions to proceed with the trial of the case.

All the Justices concur.

Anna M. LOVE, *Plff. in Err.*,
v.

Ferdinand C. BLAUW.

(.....Kan.....)

*1. A written instrument examined, and held to be a deed, and not testamentary in character.

*2. The owner of a life interest in lands cannot maintain an action of partition against the owners of the estate in remainder. A decree in such case, setting over a part of

*Headnotes by SMITH, J.

NOTE.—For a few authorities on the general question as to who can maintain partition, see *Cannon v. Lomax* (S. C.) 1 L. R. A. 637, and note.

On the question of partition between life tenant and remaindermen the authorities seem 48 L. R. A.

the property to the plaintiff (a life tenant) in fee simple, is wholly void.

(February 10, 1900.)

ERROR to the Court of Appeals for the Northern Department, Eastern Division, reversing a judgment of the District Court for Johnson County in favor of plaintiff in an action brought to recover possession of certain real estate. *Reversed.*

Statement by Smith, J.:

Catherine Blauw and her husband, Ferdinand, executed, in due form, a deed to the real estate in controversy in the following terms:

Whereas, Captain Joseph Parks, deceased, a Shawnee Indian, as a reservee under the treaty of May 10, 1854, concluded between the United States government and the Shawnee tribe of Indians in Kansas, received in his lifetime a patent from the government of the United States to the land hereinafter described (together with other lands), and said land (with other lands) at the death of said Parks descended to said Catherine Swartzell, and her sister Rebecca Vogel, granddaughter of said Parks, and to one Sally Rogers, a daughter of said Parks; and whereas, said Catherine Swartzell succeeds to all the estate in and to said lands hereinafter described by regular conveyance from the other heirs; and whereas, said Catherine has now living with her three sons by her former husband, John T. Swartzell, deceased, namely, Charles T. Swartzell, John A. Swartzell, and Elmer O. Swartzell, all minors of tender years; and whereas, said Catherine has recently intermarried with one Ferdinand C. Blauw; and whereas, said Catherine Blauw being desirous of making provision for her said named children after her death, her said husband consenting thereto by joining with her in this conveyance: Now, therefore, know all men by these presents, that Catherine Blauw (formerly Swartzell) and Ferdinand C. Blauw, her husband, in consideration of the sum of five dollars to them paid, the receipt of which is hereby acknowledged, and for the love and affection the said Catherine bears to her said-named children, doth hereby grant, bargain, sell, and convey unto the said Charles T. Swartzell, John A. Swartzell, and Elmer O. Swartzell, and to their heirs and assigns, the following described real estate, situate in Johnson county and state of Kansas, to wit: [Then follows a description of the land.] The estate in said lands and tenements not to vest in said named grantees and their heirs until the death of said Catherine Blauw, she reserving in herself a life estate therein. To have and to hold unto the said named grantees and their heirs from and after the death of the said Catherine Blauw,

to be quite fully collected in the opinion and briefs in the present case.

As to partition between tenants by entireties, see note to Robinson's Appeal (Me.) 30 L. R. A. on page 335.

the case, the question presented to us as to the effect of the discharge of the jury on the first trial would be moot in its nature, and would not be considered by us. *State v. Rook*, 61 Kan. —, 59 Pac. 653. The subject, as we now view it, in the light of the authorities, is quite free from doubt, although it did not appear so when first occurring to us. Our conclusion is that a hearing upon a plea of former jeopardy alone is not itself a jeopardy, and a discharge upon such hearing is not an acquittal. Pleas of former acquittal or conviction, or former jeopardy, are special pleas of matter not properly involved under the general issue or plea of not guilty. Such being the case, they should be heard and determined apart from the main issue. Wharton, Crim. Pl. §§ 419, 420, 429; Bishop, New Crim. Proc. §§ 799-805. Therefore, a plea of former acquittal, not being of matter involved in the general issue, and not being of matter which goes to the question of guilt or innocence, a judgment sustaining it cannot be in the nature of an acquittal. If such were the case, a judgment against a defendant overruling his plea of former acquittal would be a former conviction, and could be pleaded as *autrefois* convict to the indictment when again called for trial. Hence the defendant could always escape punishment by pleading a former acquittal to the indictment against him, because, if the plea should be found against him, it would be a former conviction; if in his favor, a former acquittal. For the same reasons a plea of former jeopardy, whether determined one way or the other, cannot be regarded as involving the merits of the case. It does not reach to the question of guilt or innocence, and, if determined in defendant's favor, the state may have an appeal upon the question, if reserved by it. There seems to be some contrariety in the decisions as to whether the defenses of former acquittal, conviction, or jeopardy may be heard under the general issue (9 Enc. Pl. & Pr. title *Former Conviction or Acquittal*); but we think there are no decisions holding that such defenses, when made under the general issue, are not triable separately from the main question, or, at least, no decisions holding that a hearing upon the special defense is itself a former jeopardy, and a judgment upon it alone a former conviction or acquittal.

The question now recurs. Was the plea of former jeopardy sustained by the record? It is undeniable that the arbitrary and unnecessary discharge of a jury before which an accused person is tried, without a verdict, operates also to discharge the defendant. In such case he has been once in jeopardy. That jeopardy, terminating without fault upon his part and from no overweening necessity, cannot be renewed, and the accused again called upon to defend himself. Code Civ. Proc. § 291 (Gen. Stat. 1897, chap. 95). provides: "The jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no prob-

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ability of their agreeing." The provisions of this section are made applicable to trials of criminal cases. Code Crim. Proc. § 201 (Gen. Stat. 1897, chap. 102). Authority for the discharge of a jury trying a criminal case therefore exists if "they have been kept together until it satisfactorily appears that there is no probability of their agreeing." The tribunal primarily intrusted with the duty of determining whether a jury has been kept together until there is no probability of their agreeing is the trial court. The questions whether there have been so kept together, and whether there is a probability of their agreeing, are judicial questions. As such, they cannot be arbitrarily or capriciously determined by the court. The court must be satisfied that the jury, in all probability, cannot agree to a verdict before it should order their discharge. However, when it does become of that conviction, and enters it of record, the correctness of its view and the soundness of its conclusions are not subject to review, unless the record of its action discloses it to be in error. Unless the record discloses hastily formed conclusions, immature judgment, or capricious conduct, the action of the trial judge cannot be reviewed by this or any other court. In *State v. Allen*, 59 Kan. 758, 54 Pac. 1060, the record of the former trial recited that "the jury not having agreed upon a verdict in the above-entitled cause, the jury is discharged from further consideration of this case." It was therefore held that the existence of no proper or necessary grounds for the discharge of the jury had been shown, but that something more should have appeared than that the jury had not agreed upon a verdict. It should have been shown that there was no probability of their agreeing. The present case, however, is unlike that of *State v. Allen*, 59 Kan. 758, 54 Pa. 1060. In this case it appeared, not merely that the jury had failed to agree, but that upon inquiry of the foreman, in the presence of his fellows, he had stated that there was no probability of their being able to agree. This statement of the foreman, the usual spokesman of the panel, in the presence of the remainder of the jurors, and not dissented from by them, must be regarded as their conclusion, as well as his. In addition to the inquiry addressed by the court and answered by the foreman, it appears from another recital of the record that the jury had "been absent some time, in consideration of their verdict," before they were again brought into the presence of the court. How long they had been absent does not appear, but we must indulge the presumption that it had been for such a length of time as to enable the court to regard it as some evidence of inability to reach a conclusion. The record further shows, in connection with its recitals of absence of the jury for "some time in consideration of their verdict," and inquiry and answer as to the probability of an agreement, that the jurors were thereupon discharged "because they were unable to agree upon a verdict." It would appear, therefore, that the court acted according to judicial methods

in discharging the jury. He took into consideration the length of time, whatever that may have been, the jury had been in consideration of their verdict, and the statement of the foreman, in the presence of the remainder of the jury, and presumably assented to by them, because not dissented from, that they were unable to agree upon a verdict. From these facts he evidently deduced the conclusion that there was no reasonable probability of their being able to agree. While the record of the proceedings was not made as full as such records ought to be made, yet it is sufficiently full to prevent us from saying that the court below erred. While in *State v. Allen*, 59 Kan. 758, 54 Pac. 1060, it was held that the court had erroneously discharged the jury under the particular circumstances of that case as disclosed by the record, yet the rule was distinctly announced that "the length of time a jury should be kept together, and the improbability of an agreement, must be determined by the trial court from the facts and circumstances of the particular case, and its decision will be conclusive, unless it has abused its discretion in that regard." This statement of the rule is in harmony with the holdings of nearly all the cases. Mr. Bishop says: "The result whereof [of the authorities] would seem to be that when he [the judge] concurs in and affirms the jury's conclusion of inability to agree, and discharges them, the fact so found, the existence whereof nullifies the seeming jeopardy, is absolute and irreversible." 1 Bishop, New Crim. Law, § 1041. An instructive and valuable case, reviewing many of the decisions upon the subject, and showing the rule to be as above stated by Mr. Bishop, and also as herein stated, is *State v. Reinhart*, 26 Or. 466, 38 Pac. 822.

We think the plea of former jeopardy was improperly sustained. The judgment of the court below sustaining it is therefore reversed, with directions to proceed with the trial of the case.

All the Justices concur.

Anna M. LOVE, Plff. in Err.,
v.

Ferdinand C. BLAUW.

(.....Kan.....)

- *1. A written instrument examined, and held to be a deed, and not testamentary in character.
- *2. The owner of a life interest in lands cannot maintain an action of partition against the owners of the estate in remainder. A decree in such case, setting over a part of

*Headnotes by SMITH, J.

NOTE.—For a few authorities on the general question as to who can maintain partition, see *Cannon v. Lomax* (S. C.) 1 L. R. A. 637, and note.

On the question of partition between life tenant and remaindermen the authorities seem 48 L. R. A.

the property to the plaintiff (a life tenant) in fee simple, is wholly void.

(February 10, 1900.)

ERROR to the Court of Appeals for the Northern Department, Eastern Division, reversing a judgment of the District Court for Johnson County in favor of plaintiff in an action brought to recover possession of certain real estate. *Reversed.*

Statement by Smith, J.:

Catherine Blauw and her husband, Ferdinand, executed, in due form, a deed to the real estate in controversy in the following terms:

Whereas, Captain Joseph Parks, deceased, a Shawnee Indian, as a reservee under the treaty of May 10, 1854, concluded between the United States government and the Shawnee tribe of Indians in Kansas, received in his lifetime a patent from the government of the United States to the land hereinafter described (together with other lands), and said land (with other lands) at the death of said Parks descended to said Catherine Swartzell, and her sister Rebecca Vogel, granddaughter of said Parks, and to one Sally Rogers, a daughter of said Parks; and whereas, said Catherine Swartzell succeeds to all the estate in and to said lands hereinafter described by regular conveyance from the other heirs; and whereas, said Catherine has now living with her three sons by her former husband, John T. Swartzell, deceased, namely, Charles T. Swartzell, John A. Swartzell, and Elmer O. Swartzell, all minors of tender years; and whereas, said Catherine has recently intermarried with one Ferdinand C. Blauw; and whereas, said Catherine Blauw being desirous of making provision for her said named children after her death, her said husband consenting thereto by joining with her in this conveyance: Now, therefore, know all men by these presents, that Catherine Blauw (formerly Swartzell) and Ferdinand C. Blauw, her husband, in consideration of the sum of five dollars to them paid, the receipt of which is hereby acknowledged, and for the love and affection the said Catherine bears to her said-named children, doth hereby grant, bargain, sell, and convey unto the said Charles T. Swartzell, John A. Swartzell, and Elmer O. Swartzell, and to their heirs and assigns, the following described real estate, situate in Johnson county and state of Kansas, to wit: [Then follows a description of the land.] The estate in said lands and tenements not to vest in said named grantees and their heirs until the death of said Catherine Blauw, she reserving in herself a life estate therein. To have and to hold unto the said named grantees and their heirs from and after the death of the said Catherine Blauw,

to be quite fully collected in the opinion and briefs in the present case.

As to partition between tenants by entireties, see note to Robinson's Appeal (Me.) 30 L. R. A. on page 335.

put there by the railroad company. If he took title to the extent claimed, then the exclusive estate in and dominion over the land and its improvements were vested in him absolutely, with the resulting power, necessarily accompanying such title and dominion, to exclude all persons from the land so purchased, and to use and enjoy the same unmolested by the railroad company in any way. As the owner of such an estate, he appeared as plaintiff in the court below, and was treated by that tribunal accordingly. If the contention of defendants in error be sustained, then his power over what he claimed was his own carried with it the right to fence his land, excluding all persons therefrom, as well as the servants of the railroad company, to stop the running of trains over his property by removing the track and ties, or by any other means. It must be remembered that a railroad is a public highway. The land over which it runs it holds under a franchise for a particular use conferred upon it by the state for public purposes. A railroad company is endowed with the sovereign power of eminent domain by reason of the benefits which the public at large derive from the operation of the road. It was said by Mr. Justice Allen in *State ex rel. Maylor v. Dodge City, M. & T. R. Co.* 53 Kan. 377, 378, 36 Pac. 747: "From this [public] use neither the corporation itself, nor any person, company, or corporation deriving its title by purchase either at voluntary or judicial sale, can divert it without the assent of the state." In the case of *Georgia v. Atlantic & G. R. Co.* 3 Woods, 434, Fed. Cas. No. 5,351, the question was considered whether an execution creditor of a railroad company might levy upon and sell its depots, freight houses, etc., in satisfaction of the debt. In denying such right, Mr. Justice Bradley said: "It is the means of communication between one part of the country and another. The interest which the public has in it is greater and more important than the interest which the company has in it. It cannot be supposed that the legislature, in authorizing its construction, and granting peculiar franchises for its operation and use, ever intended that execution creditors might levy upon parcels of it, and cut it up into sections, and destroy it as a great public thoroughfare. Such a supposition seems to us preposterous. Suppose a mile of the road should be levied on and sold, would the purchaser have a right to fence it in, and take up the rails and cross-ties, and plant it, and thereby destroy the railroad? Could this be done without contemning the power of the state by which it was created and made a public highway? We think not. . . . To sell it in parcels would be to sever an artery of commerce. It would affect the whole state in a vital part. Its public means of intercommunication are essential to the prosperity of the people. They are the most efficient appliances of modern civilization." In *Justice v. Nesquehoning, Valley R. Co.* 87 Pa. 28, a railroad company was a trespasser, and its entry upon land

not in conformity with law. In holding that the irregular proceedings did not operate as a dedication to the landowner of the property of the company placed on the land so as to enable the owner to receive the value of the improvements, the court, through Chief Justice Agnew, said: "This is not the case of a mere trespass by one having no authority to enter, but of one representing the state herself, clothed with the power of eminent domain, having a right to enter and to place these materials on the land taken for a public use,—materials essential to the very purpose which the state has declared in the grant of the charter. It is true, the entry was a trespass, by reason of the omission to do an act required for the security of the citizen, to wit, to make compensation or give security for it. For this injury the citizen is entitled to redress. But his redress cannot extend beyond his injury. It cannot extend to taking the personal chattels of the railroad company. They are not his, and cannot increase his remedy. The injury was to what the landholder had himself, not to what he had not. Then why should the materials laid down for the benefit of the public be treated as dedicated to him?"

There has been an attempt made by counsel to distinguish the case of *Briggs v. Chicago, K. & W. R. Co.* 56 Kan. 526, 43 Pac. 1131, from the case at bar. We are not impressed by their efforts in that direction. The facts in the two cases are remarkably similar. The decision in the *Briggs Case* is founded upon the following statement: In 1886, Ault and wife were the owners of a lot upon which they had executed a mortgage. In 1887 they conveyed to the railway company a right of way over the property. In 1889 a foreclosure suit was commenced by the mortgagee, in which the railroad company was made a party. It answered, setting up a right to occupy a strip of land 300 feet in width by virtue of a deed from the Aults. Judgment was rendered against the Aults for the amount of the mortgage debt and interest, and the whole tract decreed to be sold to pay the same. The cause was then continued as between the mortgagee, plaintiff in the suit, and the railroad company. Thereupon it was decreed that the railroad company be forever barred, foreclosed, enjoined, and cut off from claiming any interest or estate in or to the real estate, or any part thereof. An order of sale was issued, under which the land outside of the right-of-way strip was first sold for the sum of \$50 to James F. Briggs as administrator, and the strip was then bid off by him for \$100. A few days after the execution of the sheriff's deed to Briggs, the railroad company made application to the district judge for the appointment of commissioners to condemn a right of way over and across the premises. They were appointed, and proceeded in the usual way, allowing \$124 for the land occupied and \$30 damages to the remainder of the tract. No mention was made of any improvements. Briggs, as administrator and owner of the land, appealed from the award.

The trial court allowed the appellant \$124 and \$30, respectively, denying him the right to recover the value of the improvements, amounting to over \$2,000. It will be seen that the proceedings had were almost identical with those in the case at bar, and the title of Briggs the same as the title of the defendants in error here. In the opinion in that case Mr. Chief Justice Martin, while asserting that the structures placed upon the right of way were real property, in fact based the decision upon the ground that the company had been barred and cut off by the decree in foreclosure from any interest in the lot, which included the structures. He said: "Unless, therefore, we may judicially declare that these buildings and structures were not and are not real estate, we must hold that they passed by the sheriff's deed to the purchaser at the sale." We cannot adhere to the conclusion reached in that decision. While it appears that all the justices concurred, yet on the application for a rehearing Mr. Justice Johnston favored the granting of the same, as appears by the record in the case. We think it should have been declared judicially that the buildings and structures were not real estate, and that the decree in the foreclosure suit did not give to Briggs the right to recover for the improvements. In that case, as in this, the question as to whether the ties, rails, and other structures upon the right of way were real estate or personal property was not presented to, considered, or decided by the court in the foreclosure suit. There was no issue upon that question, and no adjudication thereon. It cannot be asserted that the materials placed upon the land were changed from personal to real property by the foreclosure proceeding. In the case at bar the answer of the railway company in the foreclosure action averred that it was in possession of a strip of land 100 feet wide across the land, and also another strip 100 feet wide and 1,700 feet long, adjoining the right of way, obtained for the purpose of depot, side track, and yard, which land was obtained by deed from Alexander Blackstone, the owner thereof. There was no reference in the pleadings to the improvements upon the land, other than might be implied from the averments in the answer of the railway company that it was in possession of the strip of land above mentioned. The litigation in both foreclosure cases related to the fixing of a mortgage lien upon the real estate, and the decrees went no further than that. If the structures placed upon the property by the railroad company were a part of the real estate before the foreclosure, they were a part of it afterwards, for there was nothing in the decrees changing its character. We are not without authority as to the effect of a judgment in foreclosure upon the rights of the parties. In the case of *Texas & P. R. Co. v. Hays*, 3 Tex. App. Civ. Cas. (Wilson), 79, before the commencement of condemnation proceedings the landowner had recovered a judgment against the railroad company in an action of ejectment to quiet title to the real estate. In the condemnation proceeding it

was contended that the company was estopped by the judgment from claiming the material composing that part of the railroad on the land in question. This claim was denied, the court holding that the judgment in ejectment gave to the owner of the land the title to the easement or right of way which the railroad company was using, and was a trespasser thereon, yet the title to the fixtures and superstructure, although placed upon the land by the company without authority, did not become a part of the land; that the question as to what were fixtures was not involved in the decision of the ejectment suit, and that the plea of *res judicata* could not be interposed. In *St. Johnsbury & L. C. R. Co. v. Willard*, 61 Vt. 134, 2 L. R. A. 528, 17 Atl. 38, certain land, at the time of the construction of a railroad, was encumbered by a mortgage, which was afterwards foreclosed, the railroad company being a party. The land was sold to Willard. In condemnation proceedings which were then instituted by the railway company he claimed that the latter was estopped by the judgment in the foreclosure suit from claiming the railroad, or the materials thereof. This claim was denied, and the improvements held to be personal property. The court said: "He [the defendant] also claims that the Essex County Company was a trespasser when it entered and constructed its road, and invoked the doctrine of the common law that structures placed upon land by a trespasser inure to the benefit of the owner of the land. But the company was not a trespasser as to either the mortgagor or the mortgagee. Not as to the mortgagor, for he consented to the entry and construction of the road. Not as to the mortgagee, for, as to third persons, a mortgagor in possession is regarded as the owner, and the mortgagee as having only a lien or security. . . . The effect of the decree of foreclosure was to cut off the right of redemption, and thereby convert defendant's conditional title into an absolute title; but in other respects the rights of the parties were left to be determined by the deed." In *Kennedy v. Milwaukee & St. P. R. Co.* 22 Wis. 581-587, the liability of a railway company entering upon mortgaged lands to the mortgagee was considered. Cole, J., in the opinion, says: "When the company obtained the right of way, it could not assume that the mortgage would not be paid by those under obligation to pay it. Of course, it incurred the risk that it might ultimately be enforced against the mortgaged premises. But, in the event it should be enforced, it seems to us that all equity requires the company to do is to make compensation by paying the value of the land at the time it was taken, and interest on that amount. This appears to us more just and equitable than to say that there should be no apportionment of the lien, but that the holder of the mortgage may enforce it to the full amount of his debt by selling the road track, superstructure, and fixtures placed upon the land at great expense by the company. . . . But when the company has purchased the right of way, and neg-

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ant for conducting a department store. *Affirmed.*

The facts are stated in the opinion.

Messrs. Charles M. Walker and Denis E. Sullivan, for appellant:

By the terms of cl. 50, art. 5, chap. 24, Hurd's Rev. Stat., power is given "to license, regulate, and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed, or fermented liquors."

In the absence of specific constitutional restrictions, it is competent for the legislature of a state, by a general incorporation law, or by a particular charter, to empower a municipality to make ordinances operative within its limits for the regulation and licensing of the traffic in intoxicating liquors.

Com. v. Fredericks, 119 Mass. 199; *Black, Intoxicating Liquors*, § 217.

The right to sell intoxicating liquors is not one of the privileges or immunities of citizens of the United States.

Black, Intoxicating Liquors, § 36; *Re Hoover*, 30 Fed. Rep. 51.

The city council has the right to pass an ordinance licensing the sale in one portion of the community, and prohibiting it in another.

People ex rel. Morrison v. Cregier, 138 Ill. 401, 28 N. E. 812.

All rights are held subject to the police power of the state.

Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Dennehy v. Chicago*, 120 Ill. 640, 12 N. E. 227; *Heisembrittelle v. Charleston*, 2 McMull. L. 233.

A city ordinance declaring that the cultivation of rice within the corporate limits of the city is injurious to public health, and providing for the destruction of the growing crop, is valid.

Green v. Savannah, 6 Ga. 1.

An ordinance is valid which requires the filling up of wells on premises where bread is made, when its object is to prevent the use of unwholesome well-water in the making of bread for public use and distribution.

State v. Schlemmer, 42 La. Ann. 1166, 10 L. R. A. 135, 8 So. 307.

The police power is also manifested in laws prohibiting restaurants to be kept open after a certain hour in the evening, and providing that no intoxicating liquors shall be used or kept in a refreshment saloon or restaurant within a city.

State v. Clark, 28 N. H. 176, 61 Am. Dec. 611; *State v. Freeman*, 38 N. H. 426.

Messrs. William W. Gurley and Horace G. Stone, for appellee:

This ordinance is an unlawful discrimination.

Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108; *Frorer v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Braceville Coal* 48 L. R. A.

Co. v. People, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *Tugman v. Chicago*, 78 Ill. 405.

Citizens have a constitutional right to sell useful and harmless merchandise.

Frorer v. People use of School Fund, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Carrollton v. Bazzette*, 159 Ill. 284, 31 L. R. A. 522, 42 N. E. 837; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343.

Selling merchandise is not a public business.

Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Cecil v. Green*, 161 Ill. 265, 32 L. R. A. 560, 43 N. E. 1105.

Merchants cannot be prohibited from selling from their own stores, even by market ordinances.

Caldwell v. Alton, 33 Ill. 417, 75 Am. Dec. 282; *Bloomington v. Wahl*, 46 Ill. 489; *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196.

Prohibiting sales by certain persons or in certain places creates a partial or entire monopoly.

Chicago v. Rumpff, 45 Ill. 90, 92 Am. Dec. 196; *Tugman v. Chicago*, 78 Ill. 405; *Caldwell v. Alton*, 33 Ill. 417; *Bloomington v. Wahl*, 46 Ill. 489.

Selling dry goods and groceries is a legitimate business.

Carrollton v. Bazzette, 159 Ill. 284, 31 L. R. A. 522, 42 N. E. 837; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108.

Selling dry goods and groceries does not injure the health, safety, or morals of the public.

The ordinance involved herein was not enacted for the benefit of the public at large, and cannot be sustained on any such pretense.

Caldwell v. Alton, 33 Ill. 416; *Bloomington v. Wahl*, 46 Ill. 489; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 197, 22 Am. Rep. 71.

The legislature cannot suppress or prohibit merchants.

Carrollton v. Bazzette, 159 Ill. 284, 31 L. R. A. 522, 42 N. E. 837.

The right to sell harmless merchandise, and use private property therefor, is guaranteed by the Constitution, and cannot be taken away.

Ibid.; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 240, 35 N. E. 62; *Cecil v. Green*, 161 Ill. 265, 32 L. R. A. 560, 43 N. E. 1105; *Cooley, Torts*, p. 286; *Frorer v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *Yick Wo v. Hopkins*, 118

U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Ex parte Whitwell*, 98 Cal. 73, 19 L. R. A. 727, 32 Pac. 870; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71.

Under the power to regulate, the state cannot deprive the citizen of the lawful use of his property, if it does not injuriously affect or endanger others.

Com. v. Perry, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *Com. v. Potomaska Mills Corp.* 155 Mass. 122, note, 28 N. E. 1128; *Ramsay v. People*, 142 Ill. 380, 17 L. R. A. 533, 32 N. E. 364; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624; *Cooley*, Const. Lim. p. 745; *Con. v. Bacon*, 13 Bush, 210, 28 Am. Rep. 189; *State v. Scougal*, 3 S. D. 55, 15 L. R. A. 477, 51 N. W. 858; *Helena v. Dwyer*, 64 Ark. 424, 39 L. R. A. 206, 42 S. W. 1071; *People ex rel. Kuhn v. Detroit* (Mich.) 38 N. W. 470; *Taggart v. Detroit*, 71 Mich. 92, 38 N. W. 714; *Hughes v. Detroit Recorder's Ct.* 75 Mich. 574, 4 L. R. A. 863, 42 N. W. 984; *Sipe v. Murphy*, 49 Ohio St. 536, 17 L. R. A. 184, 31 N. E. 884; *St. Louis v. Dorr*, 145 Mo. 466, 42 L. R. A. 686, 41 S. W. 1094; *St. Louis v. Hill*, 116 Mo. 527, 21 L. R. A. 226, 22 S. W. 861; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 288; *Com. v. Frooman*, 3 Pa. Dist. R. 340; *Ex parte Whitwell*, 98 Cal. 73, 19 L. R. A. 727, 32 Pac. 870.

The right to sell liquor is a constitutional right to the extent that anybody is permitted to sell it.

Zanone v. Mount City, 103 Ill. 552; *Chicago v. Rumpff*, 45 Ill. 97, 92 Am. Dec. 196; *East St. Louis v. Wehrung*, 46 Ill. 392; *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265.

Messrs. Wilson, Moore, & McIlvaine also for appellee.

Cartwright, Ch. J., delivered the opinion of the court:

Two prosecutions were instituted before a justice of the peace by the city of Chicago, appellant, against Charles Nether, appellee, for the violation of two ordinances of said city. In each case he was found guilty, and fined \$25 and costs by the justice. On appeal to the criminal court of Cook county the cases were tried upon agreed statements of fact before the court without a jury. In each case the court held the ordinance upon which the prosecution was based to be void, in propositions of law submitted for that purpose, and found the defendant not guilty. The city prosecuted appeals from these judgments to this court. The cases, being of the same nature, and largely involving the same questions of law, have been argued together, and will be considered and disposed of in this opinion.

The defendant is the owner of what is known as a "department store," or general store for the sale of different kinds of mer-

chandise, divided into separate departments, in the city of Chicago. The ordinances are directed against stores of that class, and the object of each is to prohibit the sale of certain kinds of merchandise in any store or place of business where certain other kinds of merchandise are sold. One of these ordinances provides as follows: "It shall be unlawful for any person, firm, or corporation doing business in this city, where dry goods, clothing, jewelry, and drugs are sold, to have exposed for sale, or sell to any person, firm, or corporation, any meats, fish, butter, cheese, lard, vegetables, or any other provisions." The facts agreed upon at the trial for the violation of this ordinance were that the defendant owned, conducted, and operated the store in question, and in the basement and on certain floors exposed for sale and sold dry goods, clothing, jewelry, and drugs, and on a different floor, where no such articles were sold or exposed for sale he exposed for sale and sold meats, fish, butter, cheese, lard, vegetables, and other provisions. The city of Chicago is organized under the general incorporation law, and must find in its charter authority for the exercise of every power which it claims to possess. The authority to pass this ordinance is claimed by virtue of cl. 50, § 1, art. 5, of said act, which enumerates among the powers of the city council the following: "To regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same." Hurd's Rev. Stat. 1895, p. 207. Regulations concerning the sale of provisions have relation to the public health, and may be necessary or proper for its preservation and the suppression of disease. *Kinsley v. Chicago*, 124 Ill. 359, 16 N. E. 260. The clause of the incorporation act relied upon confers upon cities organized under the act the right to regulate the sale of provisions, with the object of promoting or preserving the public health, where the regulation tends to serve that purpose. But this ordinance does not regulate the business of selling provisions, nor prescribe the manner in which the business shall be carried on. It merely prohibits persons engaged in the business of selling dry goods, clothing, jewelry, and drugs from selling in their stores the provisions enumerated in the ordinance. It permits a person to sell in any place or manner, provided, only, that he does not at the same time sell certain other things. A dealer may sell provisions at the same place with hardware, furniture, boots and shoes, hats and caps, millinery, books and stationery, crockery and glassware, carpets, confectionery, wooden ware, wall paper, or any other sort of merchandise except dry goods, clothing, jewelry, and drugs. This is not a regulation, but a prohibition, and a purely arbitrary one, which attempts to deprive certain persons of exercising a right which has always been lawful, and has been heretofore exercised throughout the state and country without question. The ordinance is also an attempted interference by the city with

rights guaranteed to the defendant by the Constitutions of the United States and of this state. The questions involved are not new. They have been before this and other courts throughout this country in numerous cases, and the rights of the citizen, as against such interference, have been frequently defined, and uniformly upheld. These Constitutions insure to every person liberty, and the protection of his property rights, and provide that he shall not be deprived of life, liberty, or property without due process of law. The liberty of the citizen includes the right to acquire property, to own and use it, to buy and sell it. It is a necessary incident to the ownership of property that the owner shall have a right to sell or barter it, and this right is protected by the Constitution as such an incident of ownership. When an owner is deprived of the right to expose for sale and sell his property, he is deprived of property, within the meaning of the Constitution, by taking away one of the incidents of ownership. Liberty includes the right to pursue such honest calling or avocation as the citizen may choose, subject only to such restrictions as may be necessary for the protection of the public health, morals, safety, and welfare. The state, for the purpose of public protection, may, in the proper exercise of the police power, impose restrictions and regulations; but the right to acquire and dispose of property is subject only to that power. The individual may pursue, without let or hindrance from anyone, all such callings or pursuits as are innocent in themselves, and not injurious to the public. These are fundamental rights of every person living under this government. The legislature can neither, by an enactment of its own, interfere with such rights, nor authorize a municipal corporation to do so. *Froer v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *Cooley, Const. Lim.* 393.

In order to sustain legislative interference with the business of the citizen by virtue of the police power, it is necessary that the act should have some reasonable relation to the subjects included in such power. If it is claimed that the statute or ordinance is referable to the police power, the court must be able to see that it tends, in some degree, towards the prevention of offenses, or the preservation of the public health, morals, safety, or welfare. It must be apparent that some such end is the one actually intended, and that there is some connection between the provisions of the law and such purpose. If it is manifest that the statute or ordinance has no such object, but, under the guise of a police regulation, is an invasion of the property rights of the individual, it is the duty of the court to declare it void. *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108; *Cooley, Const. Lim.* 577. It 48 L. R. A.

is not claimed in the argument for the city that the selling of the different kinds of merchandise mentioned in the ordinance in the same building tends in any way to affect the safety, health, morals, comfort, or welfare of the public. No attempt is made to suggest any grounds upon which the ordinance can be justified as an exercise of the police power of the city or the state. It certainly cannot be contended that there is anything in the character of dry goods, clothing, jewelry, and drugs which renders it dangerous to the public, or inimical to the general welfare, that they should be sold in the same building with provisions. General stores have always dealt in all kinds of merchandise, and no one has ever imagined that the comfort, safety, or welfare of the public was in any manner or to any extent injured or prejudiced by them. Public health and public comfort are in no way affected by selling the different kinds of merchandise enumerated in different departments of the same building, and would not be if the same clerk should sell them; nor would the public welfare or comfort be increased by compelling a customer to buy one kind of merchandise in one store and another in some other store. In *Meyers v. Baker*, 120 Ill. 567, 60 Am. Rep. 580, 12 N. E. 79, the act prohibiting the establishment of any tent, booth, or place of vending provisions or refreshments within a certain distance of a camp meeting was sustained as a police regulation tending to prevent disturbance or disorderly conduct. But this ordinance has no such purpose. It is plain that its object is not to protect the health, morals, or safety of the public, or to accomplish any object falling within the police power. It is a mere attempt to deny a property right to a particular class in the community, where all other members of the community are left to enjoy it. It is immaterial whether such a denial is in a statute or in an ordinance passed by virtue of a statute. It is equally invalid in either case.

The other ordinance, under which the second prosecution was begun, provides as follows: "It shall be and is unlawful for any person, firm, or corporation to have exposed for sale or sell any intoxicating, malt, or fermented liquors in any place of business in the city of Chicago where any dry goods, clothing, jewelry, or hardware are kept or exposed for sale." The agreed statement of facts is that the defendant kept in his above-mentioned store dry goods, clothing, jewelry, and hardware, and exposed them for sale in the basement and on certain floors, and on a different floor kept and exposed for sale and sold intoxicating, malt, and fermented liquors; that no liquors of any kind were sold to be drunk on the premises, and none were kept except in sealed bottles or jugs, which were delivered to the purchaser at the store, or delivered by wagons; and that defendant had complied with all the rules and ordinances of the city, and was entitled to sell intoxicating, malt, and fermented liquors in said store, except so far as he was disqualified and prevented, it

at all, by said ordinance. The authority of the city to regulate the liquor business is found in clause 46 of said § 1 of article 5 of the incorporation act, as follows: "To license, regulate, and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed, or fermented liquor, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license." Hurd's Rev. Stat. 1895, p. 267. The liquor business is one peculiarly subject to the police power on account of the multitude of evils which result from it. Police regulation of that business has always been sustained, as having for its object the prevention of intemperance, pauperism, and crime, and diminishing, as far as practicable, the injurious consequences to the public resulting from the business. In *Schuchow v. Chicago*, 68 Ill. 444, it was said: "This business is, on principle, within the police power of the state, and restrictions which may rightfully be imposed upon it might be obnoxious as an illegal restraint of trade when applied to other pursuits." It is clearly within the police power to prohibit all sales of liquor on the ground that "drum drinking is an evil to the person, and pernicious to the welfare of the public." *Dennehy v. Chicago*, 120 Ill. 627, 12 N. E. 227. The city may also form prohibition districts for the protection of particular neighborhoods from the influence of dram shops, wherever it is desirable or reasonable that there should be such prohibition, although the sale may be licensed in other parts of the city. *People ex rel. Morrison v. Cregier*, 138 Ill. 401, 28 N. E. 812. This ordinance, however, is not an exercise of the police power for the protection of the public from the injurious effects of the liquor business. It is not aimed at the suppression of the business, either in certain localities or upon any ground of police regulation, but is directed solely against the sale by certain persons in their places

of business; that is, by those who also sell dry goods, clothing, jewelry, or hardware. The city of Chicago has not seen fit to prohibit the sale of liquor, either generally or in the district of the city where defendant's store is kept. It has established its policy with reference to that business, and defendant has complied with its ordinances, so as to be entitled to sell liquor in his store, unless this ordinance constitutes a valid prohibition against his doing so. It is apparent that, if there is any evil in permitting a sealed bottle of liquor to be sold from a store where dry goods, clothing, jewelry, or hardware are sold, the same evils would result from the sale from any other kind of a store. The ordinance permits the dealer in all kinds of merchandise, except dry goods, clothing, jewelry, and hardware, to sell liquor from his store, and the city cannot arbitrarily discriminate against the defendant without any basis or ground for the discrimination. Special privileges are not to be granted to favored persons in the liquor business any more than in any other business. *Zanore v. Mound City*, 103 Ill. 552. There are other clerks employed in the other departments of defendant's store, separate and independent from this, but there is no liquor drunk on the premises, and none sold there for that purpose; so that the ordinance could not have been intended to prevent making a drinking place where clerks are employed in other lines of business. The restriction is purely arbitrary, not having any connection with, and not tending in any way towards the protection of, the public against the evils arising from the sale of intoxicating liquor. That was not the object of the ordinance, and the attempted discrimination is illegal, and in violation of the defendant's rights.

The criminal court was right in holding both ordinances void, and the judgments are affirmed.

MISSOURI SUPREME COURT.

STATE of Missouri *ex rel.* John C. WYATT,
Respt.,

v.

Thomas R. ASHBROOK *et al.*, *Appts.*

(.....Mo.....)

1. An exercise of the power of taxation for the sole purpose of revenue or undue restraint or prohibition of a business will not be saved from the constitutional restrictions that apply to it as the imposition of a tax, by its designation in the statute as a "license fee."
2. A statute which nowhere attempts to protect any public interest, or defend against any public wrong, which shows

NOTE.—In connection with this case, see the preceding case of *CHICAGO V. NETCHER* (Ill.) case, 261, and footnote thereto.
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upon its face that regulation is not its purpose, but that revenue or undue restriction of a business in the interest of others is the aim in view, cannot be sustained as an exercise of the police power, although it purports to be "An Act to Regulate Business and Trade."

3. To sustain a statute as an exercise of the police power, the courts must be able to see that its object to some degree tends toward the prevention of some offense or manifest evil, or that it has for its aim the preservation of the public health, morals, safety, or welfare.
4. The sale in one store or building, under one head or unit of management, of different articles enumerated in the different classes or groups designated by the Missouri anti-department store act of May 16, 1899, cannot be deemed harmful and dangerous so as to be subject to regulation by the police power, merely because fifteen or

more persons may be employed in the establishment, if it is innocent and harmless to sell articles of any one class or group, and also to sell those of different classes or groups in establishments employing less than fifteen persons.

3. An imposition by the general assembly of taxes upon municipal corporations or the inhabitants or property thereof for municipal purposes, in violation of Const. art. 10, §§ 1, 10, is made by the Missouri anti-department store act of May 16, 1899, § 6, providing that the two thirds of the license fee or tax imposed upon department-store merchants is to be paid to the treasurer of the city wherein such stores are located, and the remaining third to the state treasury for the use of the state.
4. The requirement of uniform taxation upon the same class of subjects, made by Const. art. 10, § 3, is violated by the anti-department store act of May 16, 1899, imposing license taxes upon those merchants in cities having 50,000 or more inhabitants who employ fifteen or more persons in the same establishment, and sell goods enumerated in more than one of the classes or groups designated in the act, while the amount of tax to be imposed in any city, is, within certain limits, left to the discretion of commissioners who may fix different rates for the different cities governed by the statute.
7. The ambiguity or uncertainty in the language of the Missouri anti-department store act of May 16, 1899, which leaves it a matter purely of guess work to determine whether the license fee is intended to be exacted for selling the articles of each of the seventy-three classes or for only each of the twenty-eight groups therein designated, and also fails to define the life and duration of the license to be issued, whether it is for a day, month, or year, for the life of the applicant, or for the duration of his business at a fixed place, is sufficient to render the statute void.
8. Due process of law is denied when any particular person of a class or of a community is singled out for the imposition of restraints or burdens not imposed upon, or to be borne by, all of the class or of the community at large, unless the imposition or restraint be based upon existing distinctions that differentiate the particular individuals of the class to be affected from the body of the community.

(February 20, 1900.)

APPEAL by defendants from a decision of the Circuit Court, Buchanan County, against the constitutionality of a statute imposing a license tax on the privilege of conducting a department store, and granting a mandamus to compel the issuance of such a license. *Affirmed.*

The facts are stated in the opinion.

Messrs. Culver & Phillip for appellants.

Mr. B. R. Vineyard, for respondent:

The power of taxation is legislative, and cannot be delegated to ministerial agencies. *State ex rel. Munday v. Rahway*, 43 N. J. L. 338; *State, Wharton, Prosecutor, v. Koster*, 38 N. J. L. 308; *East St. Louis v. Wehrung*, 50 Ill. 29; *Kimmundy v. Mahan*, 72 Ill. 462; *State ex rel. Howe v. Des Moines*, 103 Iowa, 76, 39 L. R. A. 285, 72 N. W. 639; *Reelfoot Lake Levee Dist. v. Daur-*

son, 97 Tenn. 151, 34 L. R. A. 725, 36 S. W. 1041; *Wyandotte County Comrs. v. Abbott*, 52 Kan. 148, 34 Pac. 418; *McCabe v. Carpenter*, 102 Cal. 469, 36 Pac. 836; *Bernards Twp. v. Allen*, 61 N. J. L. 228, 39 Atl. 716; *Dollar Sav. Bank v. Ridge*, 62 Mo. App. 324; *St. Louis use of Murphy v. Clemens*, 43 Mo. 395; *St. Louis use of Creamer v. Clemens*, 52 Mo. 133; *Lammert v. Lidwell*, 62 Mo. 188; *Matthews v. Alexandria*, 68 Mo. 119, 30 Am. Rep. 776; *Darling v. St. Paul*, 19 Minn. 389, Gil. 336; 13 Am. & Eng. Enc. Law, 1st ed. p. 531; 25 Am. & Eng. Enc. Law, p. 79; Cooley, Taxn. 2d ed. pp. 61, 62, 65; Cooley, Const. Lim. 5th ed. 139-148; *Walsh v. Denver*, 11 Colo. App. 523, 53 Pac. 458; *Ex parte Jones*, 38 Tex. Crim. Rep. 482, 43 S. W. 513.

The anti-department store act (Acts 1899, p. 76, § 3) is limited by its terms to cities containing 50,000 inhabitants or more, thus dividing cities of the second class into two classes, and violating § 7 of art. 9 of the state Constitution.

Murnane v. St. Louis, 123 Mo. 479, 27 S. W. 711; *Kansas City ex rel. North Park Dist. v. Scarritt*, 127 Mo. 642, 29 S. W. 845, 30 S. W. 111; *St. Louis v. Dorr*, 145 Mo. 467, 42 L. R. A. 686, 41 S. W. 1094, 46 S. W. 976; *Robert J. Boyd Paving & Contracting Co. v. Ward*, 55 U. S. App. 730, 85 Fed. Rep. 27, 28 C. C. A. 667, 79 Fed. Rep. 390.

Lack of uniformity makes the license tax unconstitutional.

St. Louis v. Spiegel, 75 Mo. 145, 90 Mo. 587, 3 S. W. 80; *Ex parte Sing Lee*, 96 Cal. 354, 24 L. R. A. 195, 31 Pac. 245; *Kansas City v. Grush*, 151 Mo. 128, 52 S. W. 286.

The imposition of two thirds of the tax which is required to be paid into the city treasury violates § 10, art. 10, of the state Constitution.

The act fixes an arbitrary and unnatural distinction between different kinds of merchants, and between merchants of the same class, and is therefore void.

State v. Thomas, 138 Mo. 100, 39 S. W. 481; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781; *State v. Walsh*, 136 Mo. 405, 35 L. R. A. 231, 37 S. W. 1112; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *State ex rel. Harris v. Herrmann*, 75 Mo. 340; *Lippman v. People*, 175 Ill. 101, 51 N. E. 872; *Fraser v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *State v. Gardner*, 58 Ohio St. 599, 41 L. R. A. 689, 51 N. E. 136; *Ex parte Jones*, 38 Tex. Crim. Rep. 482, 43 S. W. 513; *State v. Conlon*, 65 Conn. 478, 31 L. R. A. 55, 33 Atl. 519; *Hannibal v. Missouri & K. Teleph. Co.* 31 Mo. App. 23; *Re Sam Kee*, 31 Fed. Rep. 680; *Ex parte Sing Lee*, 96 Cal. 354, 24 L. R. A. 195, 31 Pac. 245; *Schmalz v. Wooley*, 56 N. J. Eq. 649, 39 Atl. 539; *State ex rel. Atty. Gen. v. Miller*, 100 Mo. 449, 13 S. W. 677.

A classification based on the number of persons employed, as a condition to the right to receive a license, is unjust and unconstitutional.

Re Yot Sang, 75 Fed. Rep. 983; *State v. Mahner*, 43 La. Ann. 496, 9 So. 480.

"Liberty" means, among other things, "the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."

People v. Gillson, 109 N. Y. 399, 17 N. E. 343.

Liberty "includes and comprehends, among other things, the right to freely buy and sell as others may."

State v. Loomis, 115 Mo. 313, 21 L. R. A. 789, 22 S. W. 350; *State v. Julow*, 129 Mo. 173, 29 L. R. A. 257, 31 S. W. 781; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 51 N. E. 1006; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108; *Frorer v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, 24 Pac. 731; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *Godcharles v. Wiggeman*, 113 Pa. 431, 6 Atl. 354; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126.

There is nothing in the act which can justify its enactment as an exercise of the police power.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *State v. Julow*, 129 Mo. 177, 29 L. R. A. 257, 31 S. W. 781; *Eden v. People*, 161 Ill. 308, 32 L. R. A. 659, 43 N. E. 1108.

Section 5 of this act is also void, because there is no time prescribed by that section, or anywhere in the act, for which the license is to run.

Darling v. St. Paul, 19 Minn. 389, Gil. 336.

If a statute is so doubtful that no judicial certainty can be settled upon as to its meaning, it is void.

State, Crow, v. West Side Street R. Co. 146 Mo. 155, 47 S. W. 959.

The act also violates that clause of the 1st section of the 14th Amendment of the Constitution of the United States, which reads as follows: "Nor shall any state deprive any person of life, liberty, or property without due process of law."

State v. Julow, 129 Mo. 177, 29 L. R. A. 257, 31 S. W. 781; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Shaver v. Pennsylvania Co.* 71 Fed. Rep. 931; *Eden v. People*, 161 Ill. 303, 32 L. R. A. 659, 43 N. E. 1108; *Walsh v. Denver*, 11 Colo. App. 523, 53 Pac. 458.

This act also violates those other clauses of the 1st section of the 14th Amendment of the Federal Constitution, which provide that "no state shall make or enforce any law which shall abridge the privileges, or immunities of citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the laws."

Re Yot Sang, 75 Fed. Rep. 983; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 64 L. R. A.

Sup. Ct. Rep. 1064; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *State v. Kuntz*, 47 La. Ann. 106, 16 So. 651; *Walsh v. Denver*, 11 Colo. App. 523, 53 Pac. 458; *Re Ah Fong*, 3 Sawy. 144, Fed. Cas. No. 102; *Ho Ah Kow v. Nunan*, 5 Sawy. 552, Fed. Cas. No. 6,546; *Santa Clara County v. Southern P. R. Co.* 9 Sawy. 165, 18 Fed. Rep. 385; *Railroad Tax Case*, 13 Fed. Rep. 722; *Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132.

No good reason can be shown for the arbitrary discrimination made between merchants by this act.

Kansas City v. Grush, 151 Mo. 128, 52 S. W. 286.

Robinson, J., delivered the opinion of the court:

This is a proceeding by mandamus, commenced by the relator in the Buchanan circuit court, for the purpose of compelling the auditor, treasurer, and comptroller of the city of St. Joseph, the defendants herein, to issue to him a merchant's license to conduct a department store in said city. The defendants had refused to issue the license applied for unless the relator would first pay into the city treasury two thirds, and into the state treasury one third, of the amount required to be so paid by § 6 of what is known as the "Anti-Department Store Act," approved May 16, 1899 (Acts 1899, p. 72), in addition to the tax imposed by the general laws of the city for a merchant's license. In the alternative writ, which follows in detail the allegations of the petition therefor, the laws and ordinances of the city of St. Joseph prescribing the various requirements necessary to be followed in order to secure a merchant's license are set forth. The writ then shows that the relator complied with all those requirements in his application for a license; and it was refused by the defendants on the sole ground, as shown in the writ, that he had not paid into the state and city treasury the license fees required by the act referred to, in addition to the ad valorem tax required of all merchants under the general laws of the city, and which the relator has tendered in connection with his application. The writ further shows that in his application for the license the relator clearly indicated that he desired the license to conduct a department store within the city for the sale of five different classes or departments of goods as defined by said act. It shows that he intended to sell the goods at retail and through twenty clerks or employees engaged by him for that purpose; that the relator filed his application for the license desired by him with the defendant Ashbrook, as city auditor, on September 15, 1899,—one hundred and twenty-two days after the passage and approval of the act in question,—ignoring its provisions, tendering the license fee under the general levy made by the city for taxes, and demanding of the defendants, and each of them, that they perform the acts required

by the general laws and ordinances of the city where a merchant's license is applied for, and which are set forth in the alternative writ of mandamus. The alternative writ also shows that the license was refused by defendants solely on the ground that relator had not complied with the provisions of said act. For a return to the alternative writ, the defendants filed a demurrer, alleging as grounds therefor that the matters and things set forth in the alternative writ are not sufficient in law or equity to entitle the plaintiff to the relief asked for, or to authorize the issuing of a writ of mandamus. The court below overruled said demurrer, and in its decree specially held the act under consideration to be unconstitutional and void. The defendants declined to plead further, and the court thereupon rendered final decree for the plaintiff, and directed the issuance of a peremptory writ of mandamus, commanding the defendants, and each of them, to do and perform the acts and things required conditionally by the alternative writ, and which were necessary to be performed in the issuance of the license applied for by the relator. From this final decree, the defendants have appealed to this court.

The only question involved in this controversy is as to whether this act, known as the "Anti-Department Store Law," a brief synopsis of which is given below, is operative or constitutional. By § 1 of the act, all goods, wares, and merchandise in the cities to which it now applies are divided into seventy-three classes, and these classes are then rearranged into twenty-eight groups or departments. By § 2 of the act, from and after one hundred and twenty days after its passage it is made unlawful for any person or persons, firm, corporation, or association of persons to have on hand for sale, sell, or expose for sale, at retail, any goods, wares, and merchandise of more than one of these several classes or groups, without first having obtained a license therefor, as provided for in the act. By § 3 it is provided that during the 120 days from the passage of the act the board of officers of the city charged with the duty of issuing merchant's licenses, and after that a license commissioner for each city, to be appointed by the governor, are authorized to issue merchants' licenses. By a proviso in this section the act is limited in its application to such cities of the state as have or may hereafter have 50,000 inhabitants or more. By § 4 the applicant for license is required to state the class or group under which he proposes to conduct his business, and also state what additional class or group, or what additional article or articles in any class or group, he desires to keep or sell, and also the street number at which he proposes to conduct his business. By § 5 the board or license commissioner charged with the duty of issuing licenses is empowered to fix the sum to be paid for licenses required by the act, but which sum is not to be fixed at less than \$300 nor more than \$500 for every class or group, or for any particular article of any class or group named in the application, in

addition to the principal business to be conducted by the applicant. The license fee thus fixed is to be uniform in each city. Section 6 prohibits the issuance of any license, until the applicant shall have paid into the city treasury two thirds and into the state treasury one third of the amount required to secure the license. Section 7 provides a punishment by imprisonment in the county jail for a term not exceeding one year, and the payment of a fine of not less than \$100 nor more than \$500, for the violation of any provision of the act, and makes each day's violation a new offense. Section 8 provides that the act "shall not apply to manufacturing establishments, warehouse or auction houses, or to any establishment where not more than fifteen persons are employed."

No question is made here by respondent as to the right of relator to compel by mandamus the issuance to him of the license applied for if the act known as the "Anti-Department Store Bill" is unconstitutional or inoperative, as declared by the circuit court in its disposition of the case. The duty of respondent being clearly ministerial where all the requirements of the law preliminary to acquiring a license have been complied with by relator its issuance, if refused, was properly compellable by mandamus. And it might further be added that no question ought to be raised as to the character of the imposition levied by the act, notwithstanding it is called a "license fee," and the act imposing it is designated "An Act to Regulate Business and Trade in Cities Having a Population of 50,000 Inhabitants or Over," etc. Courts look beyond the mere title of an act to see and determine its real object, purpose, and result; and where the power of taxation therein provided for is exercised for the mere purpose of revenue, or undue restraint or prohibition,—as is most manifest in the act in question,—its designation as "license fee" will not save it from the constitutional restrictions that would apply to it as the imposition of a tax. In no sense can this most extraordinary act be regarded as a police measure, and, consequently, does not fall within the protection of the police power. It nowhere attempts to protect any public interest, or defend against any public wrong. It shows upon its face that regulation is not its purpose, but that revenue, or undue restriction in the interest of others, not embraced in the class designated, is the aim in view. While a most onerous license fee by name is imposed, no police inspection, supervision, or regulation is provided, nor is any standard set for the applicant to establish, or that he agrees to attain or maintain, but any and all persons engaged in the business designated in the act, without qualification or hindrance, may come, and a license, on payment of the stipulated sum to the commissioner named in the act, will issue, to do business, subject to no prescribed rule of conduct, and under no guardian eye, but according to the unrestrained judgment or fancy of the applicant and licensee. The applicant is simply required to pay his money and take out his license. That is the

beginning and the ending of the police supervision and control over him or his business, so far as concerns the act in question. In order to sustain legislation of the character of the act in question as a police measure, the courts must be able to see that its object to some degree tends towards the prevention of some offense or manifest evil, or has for its aim the preservation of the public health, morals, safety, or welfare. If no such object is discernible, but the mere guise and masquerade of public control, under the name of "An Act to Regulate Business and Trade," etc., is adopted, that the liberty and property rights of the citizens may be invaded, the court will strike down the act as unwarranted. Mere legislative assumption of the right to direct and indicate the channel and course into which the private energies of the citizen shall flow, or the attempt to abridge or hamper his right to pursue any lawful calling or avocation which he may choose without unreasonable regulation or molestation, have ever been condemned in all free government.

No suggestion is made by counsel in their effort to sustain this act, and, to our mind, none can be conjectured, why the selling of any or all of the articles of merchandise embraced in two or more of the classes or groups designated therein in one store or building, under one head or unit of management, when fifteen or more persons are employed, is a thing of danger to the public, or that the morals, health, safety, or comfort of the community will to any extent be injured or prejudiced thereby in any manner different or greater than would result if the same articles were sold in different store buildings, run by the same person, corporation, or company as independent establishments, and each employing fifteen or more persons, or when all of the enumerated articles are sold in one store wherein less than fifteen persons are employed. If the selling of the different articles enumerated in any one of the classes or groups designated by the act is innocent and harmless when pursued separately as a business, how does it become harmful and dangerous merely because the articles in two or more classes or groups designated in the act became united for sale under one unit of management, and the business conducted in one building, where fifteen or more persons are employed, so that it would call for special legislation with increased and onerous license fees or tax burdens imposed. Such grouping together for sale or disposition of those articles of daily use and necessity does not endanger or threaten the peace and good order of society. They neither engender disease, spread contagion, corrupt the morals, nor encourage dissipation or vice in any form because of such combination, and no sanction for such reasons can be found for the act as a public measure.

As said above, the act, though entitled "An Act to Regulate Business and Trade in Cities Having a Population of Fifty Thousand Inhabitants and Over," is clearly an exercise of the power of taxation, and must

be enforced, if at all, under and according to the constitutional limitations and restrictions on the subject of taxation. Conceding that the legislature is not limited to any form of taxation, and that it may impose a license tax as well as a direct tax upon the department-store merchant, and further treat the imposition provided in the act in question as a tax imposed direct by the legislature, and not a delegation of power to the commissioner therein named to fix an uncertain and varying sum between \$300 and \$500, as his fancy may suggest (which the relator in this case most strenuously contends is done), then the tax to be paid under the act in question is violative of the provision of § 10 of article 10 of our Constitution, which declares that "the general assembly shall not impose taxes upon counties, cities, towns, or other municipal corporations, or upon the inhabitants or property thereof for county, city, town, or other municipal purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." By § 1 of the same article it is further provided that "the taxing power may be exercised by the general assembly for state purposes, and by counties and other municipal corporations, under authority granted to them by the general assembly, for county and other corporate purposes." Section 6 of the act in question provides that "no such license shall be issued until the person, firm, corporation, or association of persons applying therefor shall pay to the city treasurer of the city two thirds, and into the state treasury one third, of the amount fixed by the board or officer receiving such application, as due and payable therefor." While the legislature might authorize the municipality to be affected by the act in question—as it has done in the city charters and in the general laws regulating the incorporations of cities—to license and tax certain occupations and callings, and to impose taxes on all the property within its limits for municipal purposes, it cannot itself, or through the agency of the commissioners, to be appointed under the act, any more impose such tax directly upon such occupation or business in cities for city purposes than it can directly impose taxes upon city property for city purposes. As will be seen by § 6 of the act in question, two thirds of the license fee or tax imposed thereunder upon the department-store merchant is to be paid to the treasurer of the city wherein such store is located, and goes into the city treasury for city purposes, while the remaining one third of the tax named is to be paid into the state treasury, for the use of the state; whereas § 10 of article 10 of the Constitution above quoted expressly inhibits the general assembly from imposing taxes upon cities or other municipal corporations, or upon the inhabitants or property thereof, for city or other municipal purposes, and directs that by general laws it may vest in the corporate authorities thereof power to so assess and collect all taxes for corporate purposes. Sec-

tion 1 of said article 10 of the Constitution is likewise mandatory in directing how the taxing power may be exercised by the general assembly and by the cities and municipal corporations of our state, and excludes the assertion of authority attempted by the act in question. And again it might be suggested that, as part of the imposition provided for in § 6 of the act in question is a city tax, the state not only was wanting in authority to impose it upon the city, or the inhabitants or property thereof, but to appropriate any part to itself, and, if the imposition be treated as a state tax, the legislature had no right to give or remit any part of the state's revenue to the city.

But aside from the question as to whether the tax to be imposed be considered as a municipal or state tax that should have been imposed by the legislature of the state or by the cities of the state, relator insists that the act is vitally defective in that it delegates to the commissioner named in the act, to be appointed by the governor, the power to fix the amount of the license fee or tax, and for that reason violates § 1 of article 10 of the Constitution. By § 5 of this act it is provided that "the said board or officer in such city charged with the duty of issuing merchant's licenses, shall have power to fix the sum to be paid for licenses required by this act, but such license fee shall not be fixed at less than three nor more than five hundred dollars for every class or group, or for any particular article of any class or group mentioned in the application for such license," etc. While a minimum below which and a maximum above which the commissioner cannot go has been designated in the act, the authority to name and fix the amount of the imposition between those designated sums is plainly delegated to the commissioner, and can be exercised according to his arbitrary discretion in the premises, subject only to the qualification, as further set out in the section, "that the license fee exacted shall be uniform in each city in which it is collected." Until the commissioner acts and determines upon the rate of the imposition to be levied within the limits of the city for which he is appointed, no one of that community can determine from the law itself what the license fee or tax is or will be. Until he acts, the rate of the tax is an unknown quantity. In fact, until he acts, there is no tax provided. An undetermined tax is in law no tax. The determination of the amount or rate of a tax to be imposed is as essential an exercise of the taxing power as the designation of the property to be taxed, or the time for its collection or enforcement.

And here, again, on account of the delegated authority to the commissioner, to be named under the act, to fix the sum to be paid for the license therein required, the further objection is urged to it that it is violative of the uniformity clause of our state Constitution, which, by § 3 of article 10 of the Constitution, provides that all taxes to be levied and collected for public purposes "shall be uniform upon the same

class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general law." Ignoring, for the present, the question that the merchants doing business in the cities of our state having a population of 50,000 inhabitants or more, in one store or building, where fifteen or more persons are employed, have been arbitrarily singled out by this act as a class to themselves, that additional burdens might be imposed upon them, from which all other merchants of the state are exempted, all of the class of merchants thus arbitrarily named under this act are not subject to the same uniform rate of tax. Even as to them the tax may vary, according to the whim and fancy of the different commissioners to be named by the governor for the different cities, as will be seen from a reading of the act. The merchant in St. Joseph, for selling the articles enumerated in each of the classes or groups designated in the act (more than one), may be required to pay \$300, while for selling the same articles in Kansas City his brother department-store merchant may be required to pay \$400, and the merchant of St. Louis be required to pay \$500, and all under the same act, and where a part of the tax to be collected from each goes to the same common public purpose. So the practical operation of the act in question not only makes an arbitrary class of merchants in cities of 50,000 inhabitants or more, doing a retail business under one unit of management, where fifteen or more persons are employed, as contradistinguished from all other merchants of such cities, and all other merchants of the state outside of cities of 50,000 inhabitants or more, whether conducting business under the same condition as those designated in the class defined by the act or otherwise, but all merchants of that class are not necessarily subject to the same uniform rates of taxation, since the rate between three or five hundred dollars is to be fixed and determined according to the discretion of the different commissioners to be appointed for the various cities coming within the influence of the act. But the inequality and want of uniformity in the matter of the application of the act to the merchants of the designated class is made more striking when it is suggested that under it the commissioner (say for the city of St. Joseph) may determine that he will require license fee for selling the articles classified and enumerated under each one of the twenty-eight groups of articles designated in the act to be kept and sold by the merchant of that city (less the articles named in any one group, which he may sell without the requirement of a license), when then the highest license fee that would be required in that city for selling all articles of merchandise enumerated in the act would be 300 times 27, or \$8,100; while in St. Louis, perhaps, the commissioner appointed to look after the interest of that city, being a man of more comprehensive views, and of a disposition to give to the act a more liberal and far-reaching in-

terpretation, to meet the present pressing needs of that city, and being a man of bold financial reach, might determine that a license fee for each of the seventy-three classes of articles enumerated in the act was required, and would further fix \$500 as the amount of the license fee to be imposed for the selling of articles of each class over and above the articles of one class that can be sold without a license, then we would have the merchant of that city, for conducting the same business as the St. Joseph merchant paying for his license seventy-two times \$500, or the enormous sum of \$36,000; thus making the possible astounding difference of \$27,900 between the amounts to be paid by merchants, arbitrarily created by this act, for the mere purpose that they might be legislated against.

Thus it is seen that the uniformity clause of the Constitution has been violated in this act, not only by the arbitrary and unreasonable classification of merchants of a natural class, for the particular purpose of this particular imposition, and also on account of the discretion given to the commissioner to be named under the act to fix, in different cities, different license fees or rates of taxation upon the merchants of the same designated class, but the very uncertainty in the language of the act has introduced another element of possible and probable inequality and want of uniformity in the matter of determining the amount of the tax to be fixed and imposed. In the exercise of the taxing power, which is the very essence of sovereignty, and of the gravest consequences to the citizen, there ought to be no ambiguity or uncertainty in the language of the law. An act which attempts to levy such burdensome taxation as that provided in the act in question should at least be plain, and past all misunderstanding, as to the basis on which the computation is to be made: and yet from a reading of the act no one can tell whether for the selling or exposing for sale by a merchant of the designated class all the different articles of goods, wares, and merchandise enumerated therein a license fee or tax is to be exacted for selling or exposing to sale the articles named in each of the seventy-three classes or only the twenty-eight groups of articles. The act provides that a license fee shall be fixed at not less than \$300 nor more than \$500 "for every class or group or for any particular article of any class or group mentioned in the application for such license." The words "class" and "group" are used together throughout the act as "class or group," and nothing is to be found therein to indicate which is to be considered or what is to be rejected or ignored in the matter of computing the amount of license fee to be collected, by the commissioner called upon to execute the act. As to whether a license fee is intended to be exacted for selling the articles of each of the seventy-three classes or for only each of the twenty-eight groups of articles, it is a matter of pure guess-work, a thing of blind conjecture, a foundation too uncertain and untenable up-
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on which to rest the cumbrous tax imposition provided in the act. But the uncertainty as to the meaning of the act is not only nude to appear from the use of irreconcilable words and language found therein, but also on account of the absence of proper words therein defining the life and duration of the license to be issued by the terms of the act. Whether the license provided for in the act is to issue and run for a day, month, or a year, or for life of the applicant, or for the duration of his business at a fixed place, nothing is to be found in the act to inform one; and again we are driven to the field of conjecture and speculation, without data upon which to predicate a construction as to what is meant. We know of no rule of construction that would justify this court giving to this act a definite meaning not somewhere disclosed or indicated within its four corners. The act is clearly void for uncertainty.

But, independent of all these objections to the form and structure of the act, to the mode, manner, and amount of the attempted imposition, or as to whether the imposition be treated as a tax or a license, the act is further assailed upon the broad constitutional ground that, as unwarranted class legislation, it is violative of the natural rights of the citizen defined in § 4 of article 2 of our Constitution (Bill of Rights), which declares "that all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry," and of § 30 of the same article, which declares "that no person shall be deprived of life, liberty, or property without due process of law." The protection of liberty and of property, defined in § 4 of the Constitution, *supra*, "as the gains of their own industry," are among the principal objects for which free government among men has been established, and, as further declared in the closing paragraph of said section, "that when government does not confer this security it fails of its chief design," and of these rights no person shall be deprived without "due process of law," which means, as declared by this, as of all courts of the land, to be "the law of the land;" and these words, when having reference to legislative enactments, must mean a requirement of action or abstinence, binding upon and affecting alike each and every member of the community of the same class, or of similar circumstances, enacted for the general public good or welfare. Does the act in question, by the imposition of the license fee provided for therein, infringe upon the liberty of the citizen whom it is to affect, or his right to the enjoyment of the gains of his industry, or its equivalent, his property? If the terms "life," "liberty," and "property" as used in the Constitution, are "representative terms, and cover every right to which a member of the body politic is entitled under the law," as said by Sherwood, J., in *State v. Julow*, 129 Mo. 172, 29 L. R. A. 258, 31 S. W. 782, and that within this comprehensive scope are embraced the right to buy and sell as others may, and to pur-

such honest calling, vocation, or business as the citizen may choose, subject only to such restraints or the imposition of such burdens as may be required or imposed for the general good, and if "due process of law" is to be defined as "the law of the land," designed to protect and preserve the rights of the citizen against arbitrary legislation, as well as against arbitrary executive or judicial action, then "due process of law" is denied when any particular person of a class or of the community is singled out for the imposition of restraints or burdens not imposed upon and to be borne by all of the class, or of the community at large, unless the imposition or restraint be based upon existing distinctions that differentiate the particular individuals of the class to be affected from the body of the community; and this question as to whether the persons thus designated constitute a natural or a reasonable class depends upon facts which the court passing upon the validity or invalidity of the legislation must determine upon. While the legislature, under its vested authority and power, may arbitrarily impose taxes, restraints, and burdens of various kinds, within the constitutional limitations prescribed, that may become most onerous and oppressive to the citizen, which the courts can do naught but uphold, it cannot create conditions or flat classes that will operate to make legislation alone applicable to those artificial conditions and classes as general law within the meaning of the Constitution, or that will entitle it to the designation of "the law of the land," or that will make the act "due process of law" by which alone the liberty of the citizen may be restrained, or his property burdened or disposed of. As said above, no reason has been given or suggested, and, to our minds, none can be conceived, why the arbitrary selection of persons and corporations having or exposing for sale, in the same store or building, under a unit of management or superintendency, at retail, in the cities of the state having a population of 50,000 inhabitants, any articles of goods, wares, or merchandise set out and named in

§ 1 of the act in question of more than one of the several classifications or groups therein designated, when fifteen or more persons are employed, was named or made, for the imposition of the license fee provided in the act, from which all other persons and merchants of the state are exempted. Such classification is wholly without reason or necessity. It is so arbitrary and unreasonable as to defy suggestion to the contrary. The simple statement of its creation is a most fatal blow to its continued existence. It is truly "classification run wild." It is special legislation unrestrained. To have made the act apply to all merchants of a given avoirdupois, or to those employing clerks of a designated statute, or to those doing business in buildings of a special architectural design, would have been as natural and as reasonable a classification, for the purpose in view, as the classification made by this act.

It follows from what has been said that the judgment of the circuit court directing the issuance of the peremptory writ of mandamus should be affirmed, and it is so ordered.

Gantt, Ch. J., and Brace and Valliant, JJ., concur. Burgess and Marshall, JJ., concur specially. Sherwood, J., not being present at the hearing, takes no part in the decision.

Marshall, J., concurring:

I agree to the affirmance of the judgment of the trial court upon the grounds: First, that the act considered is clearly class legislation, and therefore unconstitutional; and, second, that the act is incomplete, and is not a law, and does not constitute a rule of conduct, and is therefore void. I do not agree that what is commonly termed an "occupation tax," which, properly expressed, means a license or permission to do business, is in any proper sense a tax. Such license fees have always been held constitutional in Missouri and elsewhere, provided they apply equally to all persons similarly situated.

MAINE SUPREME JUDICIAL COURT.

NORTHPORT WESLEYAN GROVE CAMP-MEETING ASSOCIATION.

v.

Chester PERKINS.

(.....Me.....,)

A camp-meeting association which has made perpetual leases of cottages on its grounds, without any restriction except that they are "subject to such rules and regulations as the association may from time to time adopt," and which also owns a store on

the grounds which it has leased for a rental, cannot impose a revenue tax on the business of taking orders for fruit, groceries, and provisions from cottagers upon the grounds of the association.

(November 25, 1899.)

R E P O R T upon an agreed statement of facts by the Supreme Judicial Court for Waldo County for the opinion of the full bench of an action brought to recover a license fee imposed by plaintiff for the privilege of selling provisions upon its grounds. *Nonsuit granted.*

The facts are stated in the opinion.

NOTE.—As to how far members are bound by rules of association, see note to Thomas v. Musical Mut. Protective Union (N. Y.) 8 L. R. A. 175.

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Mr. W. P. Thompson for plaintiff.

Messrs. Dunton & Dunton for defendant.

Emery, J., delivered the opinion of the court:

The Wesleyan Grove Camp-Meeting Association was incorporated by special act of the legislature approved February 19, 1873, to be composed of the presiding elders of the Methodist Episcopal Church of the East Maine Conference, with the preachers under their charge, and with the tent masters from Methodist Episcopal societies. It was empowered to acquire real and personal property, and to sell the same, and "to establish such by-laws and regulations as are necessary for the further and proper management of their affairs, consistent with the laws of this state." The principal purpose of the incorporators was to acquire and manage real estate for camp-meeting purposes. The corporation afterwards acquired the fee in that tract of land in Northport known as the "Northport Camp Ground," and which is a well-known summer resort. It laid out this land into cottage lots, with streets, squares, etc., and has leased the most of these lots *in perpetuum* to the owners of cottages thereon. The most of the cottages on the lots thus perpetually leased are occupied by their owners or others during the summer season. The streets leading through and across the grounds are open to public travel, except during camp-meeting week, when toll is taken at the entrance to the grounds. The only restriction stated in the case as existing in the perpetual leases is that they are "subject to such rules and regulations as the association may from time to time adopt."

The defendant has a place of business outside of, but near, these grounds of the association, where he sells groceries, fruits, and provisions, mainly, of course, to the summer residents on the grounds. He has been wont to go round to the cottages occupied by his customers upon the grounds, and take orders for his goods, which orders he filled at his store outside the grounds, and then delivered the goods so ordered to his customers at their cottages on the grounds. In doing this, he passed over the streets on the grounds open (except during camp-meeting week) to public travel. The plaintiff association owned a store on the grounds for the sale of various goods, which it leased for a rental.

In 1898 the trustees of the association voted that "any person or persons taking any order or orders for goods, wares, merchandise, fruit, or produce, or peddling groceries, upon said grounds, shall pay the sum of \$15 for the season." The defendant was duly apprised of this new rule, but continued to visit his customers upon the grounds, and take their orders for goods, and refused to pay the \$15. This action is to recover that sum.

The question raised by the parties in the statement of the case is whether the trustees can lawfully impose this revenue tax on the business of taking orders for fruit, groceries, and provisions from cottagers upon the

grounds of the association; there being no suggestion of any other purpose of the vote.

It is common knowledge that it is now an almost universal practice in cities, villages, and summer resorts for dealers in such articles to go or send to the residences of the customers for orders for goods to be delivered there. The great convenience and comfort of this practice to families, especially those in summer cottages, are obvious. If the trustees of the plaintiff association can impose a revenue tax on that practice, they can make the tax so high as to break it up, and compel the occupants of the cottages on the lots held by them under perpetual leases to trade exclusively with some favored dealer on the grounds, or to go some distance to find a dealer outside of the grounds. Clearly, the cottagers cannot be subjected to such arbitrary power, unless it is plainly expressed in the terms of the leases under which they occupy. The only condition or restriction in the leases stated in the case is that they are "subject to such rules and regulations as the association may from time to time adopt." What the context might show we do not know. We are confined to the particular extract stated.

We think that condition or restriction imports only rules and regulations of a police nature, such as may be adopted for the preservation or improvement of the health, morals, religion, comfort, and convenience of all the occupants of the grounds. We do not think it can be extended to include an indefinite power to impose taxes directly or indirectly upon the cottagers at the discretion of the trustees, or even to abridge their comfort or convenience for mere purposes of revenue to the association, when the enjoyment of that comfort or convenience is in no way hurtful to the health, morals, religious sentiment, comfort, or convenience of that particular community.

It is argued that the tax is imposed upon the grocer, not on the cottager, and that the association is under no obligation to the grocer, and can exclude him from the grounds entirely, or impose upon him any conditions of entrance, including the payment of a revenue license fee.

The power of the association is not so absolute as that. It has laid out its grounds into lots, streets, and squares, and has invited people to take leases of lots, build cottages thereon, and occupy them as residents. It has thrown open the streets and squares to the free use of all persons occupying the cottages, or having business or social relations with the cottagers, at all times, except during camp-meeting week, when a toll is charged at the entrance. This state of things has existed for more than twenty years. While, as before stated, the association has retained full power to make reasonable rules and regulations of a police nature, it has not apparently reserved, if it ever possessed, the power to prevent the use of the streets by the cottagers, or by those having business or social relations with them, or to impose a tax for such use in the ordinary intercourse of life, or, in other

words, to shut off, or impose revenue conditions upon, the intercourse of the cottagers with the rest of the town or state.

It is again argued that the charter gave the association authority "to establish such by-laws and regulations as are necessary for the further and proper management of their affairs," and that license fees like that imposed in this case are necessary for requisite revenue. Granting, for the purpose of the argument only, that in making its leases and opening its streets, etc., the association might have reserved the power to impose such license fees as conditions or restrictions, it

does not appear to have done so. The rights of the cottagers in their cottages and in the streets, and to the use of them for business and social intercourse, acquired under the perpetual lease of the lots, cannot now be abridged without their consent, to enable the association to raise a revenue. A corporation has no power to adopt rules or regulations injuriously affecting the rights of others under prior contracts, by annexing conditions not embraced in the contracts. *Illinois Conference Female College v. Cooper*, 25 Ill. 148.

Plaintiff nonsuit.

PENNSYLVANIA SUPREME COURT.

Re Opening of ORKNEY STREET.

(194 Pa. 425.)

Property abutting on a previously opened portion of a street constituting a cul de sac cannot be assessed for benefits to pay the cost of an extension which will convert the cul de sac into an open street, as the owners, by dedication or otherwise, have already borne their full share of the cost of the original improvement, and cannot be assessed again to pay the cost of extending that improvement through other properties.

(January 29, 1900.)

A PPEAL by the City of Philadelphia from a judgment of the Superior Court affirming an order of the Court of Quarter Sessions for Philadelphia County sustaining exceptions by abutting owners to the action of the jury in assessing damages upon their property for the opening of a highway. *Affirmed.*

The facts are stated in the opinion of the Superior Court, which was as follows:

"Prior to these proceedings, Orkney street was laid out upon the confirmed plan of the city of Philadelphia, and, according to the plan, extended from Ontario to Westmoreland; but a portion of it, running through land of Broklehurst and Ewing, had not been opened. The result was that the properties of these exceptants were upon a cul de sac. It does not affirmatively appear that they had been assessed for the cost of the opening of the street to Broklehurst's and Ewing's land, but we are left to infer from what is stated in the opinion of the court below and at bar that the owners had dedicated the land over which that portion of the street extends. At all events, it was a paved and curbed street, and open to public travel from Ontario street to the point above mentioned, long before the adoption of the ordinance about to be referred to. An ordinance was adopted opening the street through its en-

tire length to Westmoreland, and viewers were appointed to assess the damages of Broklehurst and Ewing. They reported that these were \$4,400, and that of this sum the sum of \$1,333.24 should be paid by the city, and the balance should be paid by the property owners on the previously opened portion of the street, for benefits. The question is as to the validity of these assessments for benefits.

"If this had been an open street throughout its entire length from Ontario to Westmoreland, and one end had been closed by vacation proceedings, these exceptants would have had a right in law to claim damages. Why? Because by reason of the closing of the street they would have sustained an injury in their property rights peculiar to themselves, and different in kind from the injury which would have been sustained by those who used the street for travel only. The injury is not of the same kind, differing in degree only. It is an additional injury, caused by the impairment of an entirely distinct right,—the special right of ingress and egress." *Re Melon Street*, 182 Pa. 397, 38 L. R. A. 275, 38 Atl. 482. This being so, it is argued that the converse of the proposition must be true, namely, that the conversion of the cul de sac into an open street, thus giving two modes of access to their properties where only one existed before, was, or at least may have been, a peculiar benefit, different in kind, and not merely in degree, from that accruing to properties fronting on another street, or on another block of the same street. But, before pursuing this line of argument further, it will be well to consider whether or not the liability of properties, situate as these are, to special assessments to pay the cost of public improvements, is an open one, and whether another principle does not enter into the case. In *Re Morewood Avenue*, 159 Pa. 20, 23 Atl. 123, 132, Mr. Justice Green, after an exhaustive review of the earlier cases, including *Re Hancock Street*, 18 Pa. 26, which is much relied on here, states the

NOTE.—For some authorities on the question of the right to impose assessments for repaving a street after the property owners have been assessed once for paving it, see note to *Birmingham v. Klein* (Ala.) 8 L. R. A. on page 571.

See also *Adams v. Beloit* (Wis.) ante, 441; and *Carson v. Sewerage Comrs.* (Mass.) post, 277.

doctrine established by them in this way: 'As we have repeatedly decided, the doctrine of assessment for benefits to pay for public improvements can only be defended upon the ground that the benefits are local, and essentially peculiar to the very property assessed, and then it can only be done once. This can only be the case when the property assessed abuts directly upon the line of the improvement. Having their own burdens to bear in this respect, the owners cannot be subjected to the discharge of similar burdens upon other properties, whether situate on the same street or in the same neighborhood.' The rule as thus stated was reiterated in *Re Fifty-fourth Street*, 165 Pa. 8, 30 Atl. 503.—a case of grading, paving, and curbing, where the property assessed abutted on the same street, but not on the part improved. It is to be noticed, also, that it was alleged on the argument of that case that the only outlet for the property was over part of the improvement; but this allegation was not referred to in the opinion, as it doubtless would have been if the supreme court had deemed it sufficient to distinguish the case from *Re Morewood Avenue*. The order sustaining the exception to the assessment was affirmed upon the ground that, as the property did not abut directly upon the line of the improvement, it was not subject to an assessment for benefits. *Re Morewood Avenue* has been followed, and the principle upon which it was decided applied to sewer assessments, notwithstanding the argument that a public sewer is a special benefit to all the properties situate in the same watershed. *Re Park Avenue Sewers*, 160 Pa. 433, 32 Atl. 574; *Witman v. Reading*, 160 Pa. 375, 32 Atl. 576; *Re Beechwood Avenue Sewer*, 179 Pa. 490, 36 Atl. 209. We may also refer in passing to the case of *Specr v. Pittsburg*, 160 Pa. 86, 30 Atl. 1013, where it was held that the words, 'majority in interest and number of owners of property abutting on the line of the proposed improvement' (act May 16, 1891 [Pub. Laws, 75] § 9), mean the majority on the portion of the street to be opened, and not the majority on the whole street. 'Any other construction,' said the court, 'would be contrary to the letter as well as manifest spirit of the act.' In *Re Verona's Appeal*, 4 Pa. Super. Ct. 608, we followed the ruling in *Re Morewood Avenue* and applied it to a case precisely like the present. It is vain to argue that *Re Morewood Avenue* can only be regarded as a binding authority where the proceedings are under the act of 1891. It not only construes that act, but it also lays down a general rule, based upon a consideration of the nature of local assessments for public improvements, and of the limitations of the power of the legislature in that regard, which, although the act were as broad in terms as the act of April 1, 1864 (Pub. Laws, 206), would defeat any assessment of nonabutting property for paving or sewerage, or other improvement of the same kind. If these cases are to be distinguished from the present, it must be on some other ground than that the act of 1864 authorizes such assessments, and that the act of 1891 does not.

"It is argued that assessments for street openings are in a different class from assessments for sewers, and for grading, paving, and curbing, and that, in laying down the rule quoted at the outset of this opinion, the supreme court has no thought of including assessments of the former class. We do not think we would be warranted in denying application of the rule to the present case upon any such assumption. The ruling was made, said Mr. Justice Green, 'after much deliberation and the most mature consideration.' *Re Fifty-fourth Street*, 165 Pa. 8, 30 Atl. 503. And, whilst it is true that all of the street-opening cases were not referred to in the opinion, yet it is also true that the leading case upon that subject was critically examined and reviewed. Speaking of that case (*Re Hancock Street*, 18 Pa. 26), the court said that the constitutional question whether the act was void as to lots located away from the line of the improvement was neither discussed nor decided; and, even if the case had decided that such lots could be assessed for benefits, it would have to be regarded as practically overruled by the later case of *Re Washington Avenue*, 69 Pa. 352, 8 Am. Rep. 255, in which the question was met and decided the other way. *Re Chestnut Avenue*, 68 Pa. 81, and *Re Main Street*, 37 Pa. 590, 20 Atl. 711, were not referred to; but, judging from the reports of those cases, the remark that the constitutional question under consideration was neither discussed nor decided would apply as well to them as to the *Hancock Street Case*.

"It may be said that the constitutional question did not necessarily arise in the *Morewood Avenue Case*. Possibly not. But it was raised by counsel, and, after a thorough consideration of it, the court decided it. When liability of nonabutting property to assessment is defended against upon constitutional as well as statutory grounds, and both grounds of defense are held to be good by the court of last resort, and either of those questions arises in a later case, will any other state court be justified in holding that the precedent is not of binding authority in that case, because, forsooth, the decision might have been based on the other ground exclusively? We think it more in accordance with sound principle to say that the general rule upon the subject laid down by the supreme court in such a case ought to be followed by all the other courts of the state until it is modified or qualified, unless it can be shown that the particular case for decision differs in essential facts, is clearly not within the reason of the rule, and therefore presumably was not intended to be embraced within the rule itself. Is this such a case? Granting, for the sake of the argument, that it is not within the reason of the first branch of the rule, what is to be said of the application of the second branch? It may well be that the properties of the exceptants are enhanced in value by the opening of the street through to Westmoreland street; and, in view of the decision in the *Melon Street Case*, it would seem inconsistent to declare, as a matter of law, that the

additional mode of ingress and egress that is to be given is in no sense a special benefit. But there remains the objection that, by dedication or otherwise, these properties were made to bear their full share of the cost of the original improvement. Can they be assessed again to pay the cost of extending that improvement through other properties? Can a street be opened piecemeal, and the properties abutting on the part first opened be assessed for benefits to pay the cost of extending the improvement a second or a third time? The repaving of a street is, in a sense, a special benefit to the properties abutting on it, but it is settled beyond all controversy that it cannot be done at their expense. *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Williamsport v. Beck*, 128 Pa. 147, 18 Atl. 329. The same is true of the extension of a pavement. What is the distinction? We are unable to answer these questions in accordance with the appellant's contention, and at the same time reconcile the decision with the rule laid down in *Re Morwood Avenue*, and followed by us in *Verona's Appeal*. If that rule is to be modified, we do not think it will be done upon the ground that an assessment according to benefits in a grading and paving case is so different in essential particulars from a similar assessment in a street-opening case that in the former case a property abutting on the street can be assessed but once for the improvement, whilst in the latter case it may be assessed and reassessed as often as the street is extended. It seems to us that the rule is a general one, and ordinarily is as applicable in one case as in the other. Whilst the decision in the *Melon Street Case* does suggest a possible distinction, yet it does not distinguish the two classes of cases in every particular. If for this or any other reason the rule is to be modified, and exceptions recognized, our duty to wait until it is done by the supreme court is plain. An opposite course, even if we were disposed to adopt it, would simply lead to confusion. We conclude, therefore, that the learned judge of the court below was right in holding that the cases above cited were of binding authority, and were applicable to the present case, notwithstanding the fact that the proceedings were under the act of 1864, and not the act of 1891. This conclusion renders it unnecessary to express any opinion upon the question as to the authority of the jury to go on with the proceedings after the next term succeeding their appointment, without a formal continuance of the order made during that term. Order affirmed."

Messrs. John L. Kinsey, Norris S. Barratt, and James Alcorn, for appellant:

The legislature may in proceedings to open a street authorize the assessment of benefits against property benefited though it does not abut upon the portion of the street opened.

In most, if not all, of the cases which declare the assessment of benefits invalid, it was not because the property was nonabutting, but because the act of assembly did not authorize such benefits, or the method of their assessment was illegal, or the improv-

ment was of such a public character that no local or special enhancement in value occurred to the property assessed.

Hammett v. Philadelphia, 65 Pa. 146, 3 Am. Rep. 615; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

The power to assess benefits originates in the power of taxation.

Illinois C. R. Co. v. Decatur, 147 U. S. 198, 37 L. ed. 134, 13 Sup. Ct. Rep. 293.

The act of April 1, 1864, has always been held to authorize the assessment of benefits against nonabutting, as well as abutting, property.

Re Sedgely Avenue, 88 Pa. 509; *Re Howard Street*, 142 Pa. 601, 21 Atl. 974; *Re Melon Street*, 182 Pa. 397, 38 L. R. A. 275, 38 Atl. 482; *Re Berks Street*, 12 W. N. C. 10; *Large v. Philadelphia*, 35 Pa. 231, note; *Re Powelton Avenue*, 1 Legal Gaz. Rep. 112; *Re Chestnut Street*, 11 Phila. 411; *Re Berks Street*, 15 Phila. 381; *Re Walnut Street*, 23 W. N. C. 51; *Re Hansberry Street*, 7 Pa. Dist. R. 505; *Re Moyer Street*, 6 Phila. 81; *Re Chestnut Avenue*, 3 Phila. 265.

The act permits the assessment of benefits against nonabutting property.

Re Hancock Street, 18 Pa. 26; *Re Chestnut Avenue*, 68 Pa. 81; *Main Street*, 137 Pa. 590, 20 Atl. 711.

To sustain the judgment of the court below that the legislature has no authority to make an assessment of benefits against nonabutting property is for the court to arbitrarily determine that nonabutting property is not specially benefited by the improvement.

Re Mount Pleasant Avenue, 171 Pa. 38, 32 Atl. 1122, 1124; *Re Melon Street*, 182 Pa. 397, 38 L. R. A. 275, 38 Atl. 482; *Masters v. Com.* 3 Watts, 292; *Fenelon's Petition*, 7 Pa. 173; *Re Hancock Street*, 18 Pa. 26; *Com. use of Pittsburgh v. Woods*, 44 Pa. 113; *Re Fifth Avenue Sewer*, 4 Brewst. (Pa.) 364; *Re Berks Street*, 12 W. N. C. 10; *Re Chestnut Avenue*, 68 Pa. 81; *Re Main Street*, 137 Pa. 590, 20 Atl. 711.

In *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860, it was held proper to assess benefits for the appropriation of land for a public park against all property benefited within the benefit district.

The councils had the right to determine the depth to which all abutting land should be assessed for an improvement.

Coates v. Norwood, 16 Ohio C. C. 196.

A special assessment may be made on property benefited by the improvement, whether it is abutting and contiguous to the improvement or not.

Louisville & N. R. Co. v. East St. Louis, 134 Ill. 656, 25 N. E. 962; *McCormick v. Omaha*, 37 Neb. 829, 56 N. W. 626.

A statute is not unconstitutional because it authorizes assessments upon property not bordering on the street to be improved, if the property is near to and specially benefited by the improvement.

Ray v. Jeffersonville, 90 Ind. 567; *Little Rock v. Katzenstein*, 52 Ark. 107, 12 S. W. 198; *Guild v. Chicago*, 82 Ill. 472; *Lansing v. Lincoln*, 32 Neb. 457, 49 N. W. 650; 25 Am. & Eng. Enc. Law, p. 494.

Local assessments can be levied to the ex-

tent of the benefit conferred, and, to that extent, the legislature has authority to authorize such an assessment.

Bauman v. Ross, 167 U. S. 589, 42 L. ed. 288, 17 Sup. Ct. Rep. 966; *Seely v. Pittsburg*, 82 Pa. 360, 22 Am. Rep. 760; *Michener v. Philadelphia*, 118 Pa. 535, 12 Atl. 174.

The dedication of a street does not exempt the property from liability for benefits for the opening of the street.

State, Moran, Prosecutor, v. Hudson, 34 N. J. L. 25.

Messrs. H. B. Gill and Charles Knittel, for appellees:

The rule prohibits the assessment of benefits on nonabutting property.

Morewood Avenue, 159 Pa. 20, 28 Atl. 123, 132; *Re Park Avenue Sewers*, 169 Pa. 433, 32 Atl. 574; *Witman v. Reading*, 169 Pa. 375, 32 Atl. 576; *Re Beechwood Avenue Sewer*, 179 Pa. 490, 36 Atl. 209; *Re Fifty-fourth Street*, 165 Pa. 8, 30 Atl. 503; *Verona's Appeal*, 4 Pa. Super. Ct. 608.

Per Curiam:

We quite agree with the court of quarter sessions and the superior court in their disposition of this case. The opinion of the court is so thorough and exhaustive, and so entirely correct, that we can add nothing to it.

We affirm the order of the court below upon the opinion of the Superior Court.

MASSACHUSETTS SUPREME JUDICIAL COURT.

W. H. CARSON

v.

SEWERAGE COMMISSIONERS OF BROCKTON.

(.....Mass.....)

1. An assessment of an annual charge for the use of a common sewer under Pub. Stat. chap. 50, §§ 1-3, authorizing just and equitable annual charges or rents for the use of such sewers to be paid by everyone who enters his sewer into the common sewer, is not unconstitutional because of the fact that the person assessed therefor had previously paid part of the cost of building the sewer, if the assessment for its use is proportional to, and not in excess of, the benefits received therefrom.

2. An ordinance fixing the rate per thousand gallons to be paid for discharging a sewer from private premises into a common sewer is not invalid for failure to provide for a hearing on the question as to the rate to be fixed, although there is a mere possibility that the rate fixed may in fact exceed the benefit received.

(January 30, 1900.)

PETITION for a writ of certiorari to quash an assessment of annual charge for use of a sewer. *Denied*.

The facts are stated in the opinion.

Mr. W. H. Carson in propria persona.

Mr. F. M. Bixby, for respondents:

It has always been recognized that cities have the right to charge for water supplied by them to its takers.

Parker v. Boston, 1 Allen, 361.

Why is it not as legal to charge for disposing of it?

Holmes, Ch. J., delivered the opinion of the court:

This is a petition for a writ of certiorari

for the purpose of quashing the assessment of an annual charge for the use of a common sewer. The assessment was authorized by Stat. 1892, chap. 245, § 1, and by an ordinance in pursuance of that section. It is objected that both statute and ordinance are unconstitutional.

By the statute, the city council of any city except Boston, or a town with sewers laid out under Pub. Stat. chap. 50, §§ 1-3, or with a system of sewerage under § 7, may establish just and equitable annual charges or rents for the use of such sewers, to be paid by everyone who enters his sewer into the common sewer. The ordinance charges for "unmetered" water service \$8, and for "metered" water service 30 cents per thousand gallons of sewage delivered to the sewer, but no charge to be less than \$8, subject to certain possible discounts. It is argued that the statute is subject to the objections which prevailed in *Sears v. Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876, that the charge is a tax which properly should be borne by the public generally, and that there are no provisions for a hearing.

We are of opinion that the petitioner received special benefit for which he might be charged, and that this case is free from the elements which in *Sears v. Boston Street Comrs.* led to the conclusion that the petitioner was assessed without regard to the benefits received by him. No one denies that it was a special benefit to the petitioner to have a sewer built in front of his land. That benefit was the probability that the sewer would be available for use in the future. But the city, by building it and receiving a part of the cost from the petitioner, did not impliedly bind itself or the general taxes that the sewer should be maintained forever, and that the petitioner should be at liberty to use it free of further expense. If building a sewer was a special benefit, keeping the sewer in condition for use by such further expenditure as was necessary was a further special benefit to such as used it.

The charge allowed by the act is a charge

NOTE.—As to effect of previous payment of assessment on liability for a new assessment, see also *Re Orkney Street* (Pa.) ante, 274, and footnote thereto.

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for using the sewer,—a benefit distinct from that originally conferred by building it. By the statute, the charge must be a “just and equitable” charge. These words have been held insufficient to save the constitutionality of a statute in *State, New Brunswick Rubber Co., Prosecutor, v. Commissioners of Streets and Sewers*, 38 N. J. L. 190, 20 Am. Rep. 380, and in *Burnes v. Dyer*, 56 Vt. 469. But the facts of those cases were too different to make them conclusive. Here the words are applied solely to those who actually use the sewer. Therefore the benefit to the parties assessed is established. The assessment, in order to be equitable, must be proportional to the benefit, and not in excess of it. The words in this connection sufficiently express an intent to confine the charge within constitutional limits. They are so construed by the ordinance; for by the ordinance the charge is in proportion to the extent of the use, which is a reasonable way of estimating the extent of the benefit received. See *Parker v. Boston*, 1 Allen, 361, 367. There is no charge unless the sewer is used. The charge to the plaintiff was \$42.53, and therefore, under the terms of the ordinance which we have stated, must have been determined by meter.

It is said that there is no provision for a hearing. But, under the ordinance, the only questions are whether the petitioner's sewer enters the common sewer, and what amount of sewage is shown by the meter readings to have been delivered to the sewer. If the petitioner wished to be heard on either of these facts, no doubt he could resort to the courts. On the rate per thousand gallons fixed by the ordinance, he was not entitled to be heard. So far as appears, if he is dissatisfied with the rate, he is not obliged to use the sewer. But if he were compelled by law to use it, and to pay, as now, for the use (Stat. 1890, chap. 132), and recognizing, as we must, the possibility that, in spite of the meaning which we attribute to the statute, the rate fixed by the ordinance might be in excess of the benefit received, still, in our opinion, the act and ordinance would be valid notwithstanding that mere possibility, in the absence of any allegation that the rate fixed did exceed in fact the benefit received. In cases of this sort, the petitioner has no right of appeal to a jury. *Hove v. Cambridge*, 114 Mass. 388. The final decision must be somewhere, and may as well be left to the city council as to anyone. *New London Northern R. Co. v. Boston & A. R. Co.* 102 Mass. 386–388. If it is left to them, they are not obliged to hear the several parties who may be affected before fixing a general rate. Clearly, the rate might have been fixed by the legislature without a hearing. *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521. And whatever differences there may be between the legislature of the state and inferior, although legislative, bodies, in cases where particular property is to be valued, still, when a uniform and self-adjusting rate is adopted, under which no question as to proportion can arise, or any other question ex- 48 L. R. A.

cept the general one whether the rate is high, we are of opinion that the legislature has power to authorize a city council to determine that question, as it has done here. *United States v. New Orleans*, 98 U. S. 381, 25 L. ed. 225; *Railroad Commission Cases*, 116 U. S. 307, sub nom. *Stone v. Farmers' Loan & T. Co.* 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Spencer v. Merchant*, 125 U. S. 345, 356, 31 L. ed. 763, 767, 8 Sup. Ct. Rep. 921; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 459, 33 L. ed. 970, 982, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 302, 394, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047. See, further, *Leominster v. Conant*, 139 Mass. 384, 2 N. E. 690.

If, under the pretense of fixing an equitable rate, the ordinance should do what amounted to the taking or destruction of property, very possibly that might afford a ground for judicial interference, as in other cases where the legislature fixes rates. *Smyth v. Ames*, 109 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *St. Louis & S. F. R. Co. v. Gill*, 150 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702. See *Parker v. Boston*, 1 Allen, 361.

Petition denied.

Hannah A. FITZPATRICK

v.

Annie B. WELCH

(.....Mass.....)

1. Ordinary care is not the full measure of the duty of one who arranges a roof and gutter in such a way that the first will collect water and the second discharge it through an aperture upon a neighbor's land.
2. One who causes the fall of a wall on a neighbor's land by allowing water collected from a roof to be discharged through an aperture in a gutter upon the other's land is not relieved from liability for the damage because of the fact that the wall was not well constructed.

(June 30, 1899.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action to recover damages for the unlawful casting of water upon plaintiff's land which resulted in a verdict in plaintiff's favor. *Overruled.*

The facts are stated in the opinion.

Mr. M. F. Farrell for defendant.

Mr. W. Frederick Kimball, for plaintiff:

No man has a right so to construct his roof that it will discharge upon his neighbor's land water which would not naturally

NOTE.—As to liability for injury by surface water, see *Tremont, E. & M. Valley R. Co. v. Harlin* (Neb.) 36 L. R. A. 417.

fall there, or to cause the water which collects on his roof in rain or snow to be discharged upon his neighbor's land either in a current, stream, or drops. A roof is a non-natural or artificial structure for the convenience of its owner, and the owner allows the water to collect thereon at his peril, and if it flows upon the land or structure of his neighbor, the owner of the roof is liable for all damage.

Shipley v. Fifty Associates, 106 Mass. 194; Washb. Easem. 390; *Reynolds v. Clarke*, 2 Ld. Raym. 1399; *Martin v. Simpson*, 6 Allen, 102; *Fletcher v. Rylands*, L. R. 1 Exch. 265; Gould, Waters, 2d ed. § 293, p. 551; *Copper v. Dolvin*, 68 Iowa, 757, 56 Am. Rep. 872, 28 N. W. 59; 1 Wood, Nuisances, §§ 96-111 and cases cited.

The owner of the roof is liable, although the neighbor's wall upon which the water fell was not well built.

Gould v. McKenna, 86 Pa. 297, 27 Am. Rep. 705.

Holmes, J., delivered the opinion of the court:

The plaintiff's case was that water flowing from the roof of the defendant's stable into a gutter along the side of the stable was discharged upon the plaintiff's land in large quantities through an aperture in the gutter, and thus did the damage for which suit is brought. If these were the facts, a ruling that the defendant was bound to use only ordinary care properly was refused.

One who arranges a roof and gutter in such a way that the first will collect water, and the second manifestly will discharge it upon a neighbor's land unless prevented, has notice that he threatens harm to his neigh-

bor of a kind which the law, in its adjustment of their conflicting interests does not permit him knowingly to inflict. *Bates v. Westborough*, 151 Mass. 174, 181, 7 L. R. A. 156, 23 N. E. 1070. The danger is so manifest, so constant, and so great that although, no doubt, a possibility of harm does not always require more than the exercise of ordinary care to prevent it (*Quinn v. Crimmins*, 171 Mass. 255, 42 L. R. A. 101, 50 N. E. 624), and although in some states only ordinary care is required in cases like this (*Underwood v. Waldron*, 33 Mich. 232, 238, 239; *Garland v. Towne*, 55 N. H. 55, 20 Am. Rep. 164), the requirement here and elsewhere is higher, and sometimes is stated as absolute, to prevent at one's peril the harm from coming to pass (*Shipley v. Fifty Associates*, 106 Mass. 194, 199; *Jutte v. Hughes*, 67 N. Y. 267, 272).

If the defendant is liable, she is liable for damage to artificial structures upon the plaintiff's land (*Copper v. Dolvin*, 68 Iowa, 757, 56 Am. Rep. 872, 28 N. W. 59; *Martin v. Simpson*, 6 Allen, 102, 105; and cases below); and, if the discharge of water caused the wall to fail, she is liable for it, whether the wall was well constructed or not. The request which was refused would have exonerated the defendant if the wall was ill constructed, even though the bad construction did not contribute to the damage. It is not necessary to consider this question more nicely, as it appears that full instructions were given, and the only exception is to the refusal of the defendant's request. *Underwood v. Waldron*, 33 Mich. 232, 236, 237; *Gould v. McKenna*, 86 Pa. 297, 27 Am. Rep. 705.

Exceptions overruled.

MISSOURI SUPREME COURT. (In Banc.)

SEABOARD NATIONAL BANK of New York, Assignee of Barber Asphalt Paving Company, *Appt.*,

v.

Frederick WOESTEN *et al.*, *Respts.*

(147 Mo. 467.)

1. The construction of a street, and its maintenance for a term of years at a cost sufficient to preserve good work and good material from becoming imperfect from natural and unavoidable causes, may be included in a single contract by a municipality having complete control over the construction and repair of its streets, where the object is to obtain a better quality of construction, although the charter provides for letting the contract for "repairs" to the lowest bidder, which are to be paid for out of the general fund, while the cost of construction is to be charged on adjoining property.
2. That the price for maintenance of a pavement is below what would be

fair compensation for the work is not sufficient to avoid, in favor of the abutting owner, a contract covering its construction and maintenance, under a charter requiring the city to pay for maintenance and the abutting owner for construction, where there is nothing to show that the contract price for construction is not fair and reasonable, and the contract is in fact but for a single work,—that of construction with a guaranty of endurance.

3. The fraudulent purpose of the public authorities in fixing the minimum price to be paid for maintaining at public expense a pavement constructed at the expense of the abutting owner, both of which items are included in a single contract, so low that an unlawful burden will be cast on the abutting owner, will not, after the completion of the pavement, defeat the contractor's right to recover on the tax bills, unless he participates in the fraud.
4. An undertaking to maintain a new pavement for a series of years, required as a guaranty of the perfection of the work, is

NOTE.—As to provision for repairs in contract for street improvement, see *note* to *Portland v. Portland Bituminous Paving & Improv. Co.* (Or.) 44 L. R. A. 527; also *Robertson v.* 48 L. R. A.

Omaha (Neb.) 44 L. R. A. 534; and *State ex rel. Wilson v. Trenton* (N. J.) 44 L. R. A. 540. See also the case of *Barber Asphalt Paving Co. v. Hezel* (Mo.) *post*, 285.

not a contract for repairs within the meaning of a statute requiring contracts for repairs to be let to the lowest bidder.

(December 24, 1898.)

(*Gantt, Ch. J., and Burgess, J., dissent.*)

A PPEAL by plaintiff from a judgment of the Circuit Court for the City of St. Louis in favor of defendants in a proceeding brought to enforce a street-paving assessment. *Reversed.*

The facts are stated in the opinion.

Messrs. Boyle, Priest, & Lehmann, for appellant:

Whenever, in the judgment of its officers having that matter in charge, it is expedient and wise to reconstruct a street, even if it has been constructed and reconstructed, it may again reconstruct and tax the expense thereof against the property.

McCormack v. Patchin, 53 Mo. 33, 14 Am. Rep. 440; *Farrar v. St. Louis*, 80 Mo. 379.

The effect of the mode of letting adopted, in addition to insuring careful, honest, faithful, and efficient work in reconstructing, is to protect the property owners from the more costly improvement of a reconstruction in the near future.

There is no fraud charged against either the contractor or the board of public improvements. How, then, have the defendants suffered a wrong?

Morse v. West Port, 110 Mo. 509, 19 S. W. 831; *Gibson v. Owens*, 115 Mo. 267, 21 S. W. 1107.

Messrs. Hiram J. Grover and Denis Devoey, for respondents:

The general provisions of § 542, Revised Ordinances of the city of St. Louis, directing reconstruction of streets and the maintenance of all streets so reconstructed, to be let together, are absolutely null and void.

Steckert v. East Saginaw, 22 Mich. 104; *Dallas v. Ellison*, 10 Tex. Civ. App. 28, 30 S. W. 1128; *Cooper v. Freeman Lumber Co.* 61 Ark. 36, 31 S. W. 981, 32 S. W. 494; *Welty, Assessments*, § 519; *Galbreath v. Newton*, 30 Mo. App. 398; *Coke*, Third Inst. p. 181; 2 *Robinson, Patents*, § 9; 2 *Cooley's Bl. Com.* 3d ed. p. 159; *Mo. Rev. Stat.* 1889, § 6561.

Neither the state nor any subdivision thereof can lawfully agree to pay public money to a monopoly whose existence is prohibited by the laws of the state.

People v. North River Sugar Ref. Co. 121 N. Y. 582, 9 L. R. A. 33, 24 N. E. 834; *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650, 15 L. R. A. 598, 19 S. W. 274, 279; *Nester v. Continental Brewing Co.* 2 Pa. Dist. R. 177; *Vulcan Powder Co. v. Hercules Powder Co.* 96 Cal. 516, 31 Pac. 581; *Warren v. Barber Asphalt Paving Co.* 115 Mo. 578, 22 S. W. 490; *Re Manhattan Sav. Inst.* 82 N. Y. 142; *Sterling v. Galt*, 117 Ill. 20, 7 N. E. 471; *Kankakee v. Potter*, 119 Ill. 324, 10 N. E. 212; *Lery v. Chicago*, 113 Ill. 650; *Labs v. Cooper*, 107 Cal. 656, 40 Pac. 1042.

It was unlawful for the board to advertise and let together in one contract and to the same contractor the contract for reconstruction and maintenance.

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Brown v. Jenks, 98 Cal. 10, 32 Pac. 701; *People ex rel. Hall v. Maher*, 56 Hun, 81, 9 N. Y. Supp. 94; *Schenectady v. Union College*, 66 Hun, 179, 21 N. Y. Supp. 147; *Gilmore v. Utica*, 131 N. Y. 27, 29 N. E. 841.

Macfarlane, J., delivered the opinion of the court:

This is an action to recover the amount of a special tax bill assessed against the property of defendants in favor of the Barber Asphalt Company, and assigned to plaintiff. The petition charges that the assessment was made pursuant to authority of ordinance No. 16,943, approved November 26, 1893, which provides for the reconstruction of Grand avenue, upon which defendants' said property abuts. The answer is in the nature of a cross bill in equity. It sets out in detail the provisions of the charter of the city of St. Louis, the general ordinance providing for the construction and reconstruction of streets, and the proceedings under which the improvement of Grand avenue was made. It charges that for various specified reasons, which will be stated in the opinion, the ordinances, contract, and tax bill are null and void, and prays that the tax bill be set aside. The reply is, in effect, a general denial of the new matter charged in the answer.

The case was tried upon the facts, most of which were agreed upon. Judgment was for defendants, and plaintiff appealed to the St. Louis court of appeals, where it was affirmed on authority of the decision of this court in the case of *Verdin v. St. Louis*, 131 Mo. 32, 33 S. W. 480, and 36 S. W. 52. Afterwards, on motion for a rehearing, the appeal was certified to this court, 144 Mo. 407, 46 S. W. 201, on account of a supposed conflict between that decision and the later decision in the case of *Barber Asphalt Paving Co. v. Ullman*, 137 Mo. 543, 38 S. W. 458.

The following is a summary of the charter provisions, the ordinances, and proceedings under which the improvement of Grand avenue, which resulted in the tax bill, was made, as the same appears from the agreed statement of facts and from the evidence:

Section 27, art. 6, of the charter provides: "The assembly shall have no power directly to contract for any public work or improvement, or repairs thereof, contemplated by this charter, or to fix the price or rate therefor; but the board of public improvements shall, in all cases, except in case of necessary repairs requiring prompt attention, prepare and submit to the assembly estimates of costs of any proposed work, and, under the direction of the ordinance, shall advertise for bids, as provided for purchases by the commissioner of supplies, and let out said work by contract to the lowest responsible bidder subject to the approval of the council. Any other mode of letting out work shall be held as illegal and void."

Section 18 of said article 6 requires "the repairs of all streets" to be paid for out of the general revenue of the city, and the paving of all streets to be "charged upon the adjoining property as a special tax," not exceed-

ing the amount of 25 per cent of its assessed value.

By § 26, art. 3, the mayor and assembly are given the most ample power and control over the streets of the city, and general authority to construct, pave, and keep them in repair.

General ordinance 564 (the same as 542, considered in the *Verdin Case*) provides, in detail, for letting contracts for street construction, and for what the contract shall require. Among other matters, it provides: "Whenever a street is to be improved, either on the motion of the board of public improvements or on petition of the adjoining property owners, the board of public improvements may submit to the municipal assembly a bill for letting in one contract the work of constructing or reconstructing such street and of maintaining it in good condition for a term of years; and after such bill has become a law the board of public improvements shall advertise for proposals including the construction or reconstruction and maintenance under the same regulations as are provided for the improvement of streets; but the advertisement shall, in addition to what is prescribed for other street improvements, state the term during which the street is to be maintained in good condition." It requires further: "The contract shall provide that the obligation of the contractor to maintain the streets in good condition shall commence one year after the completion and acceptance of the work of construction or reconstruction, and the contract price shall be paid semiannually out of the city treasury, on the certificate of the street commissioner that the work has been performed in accordance with the contract and specifications."

In canvassing the proposals, the lowest bid is required to be ascertained "by taking the aggregate amount of the cost of construction or reconstruction, as the case may be, and the total cost of maintenance, for the term of years designated by the ordinance."

The board of public improvement submitted to the assembly, and that body passed and the mayor approved, a special ordinance (No. 16,942) for the improvement of Grand avenue between St. Louis avenue and Montgomery street. Section 1 of this ordinance directs the board of public improvements to cause Grand avenue, from St. Louis avenue to Montgomery street, to be reconstructed with the best quality of Trinidad Lake asphalt, and to contract for the maintenance thereof for a period of nine years, commencing one year after the work of reconstruction is completed and accepted. Sections 2 and 3 recited the specifications, and are unimportant in this contest. Section 4 provides for a lien for the cost of reconstruction against abutting property. Section 5 makes an appropriation for the cost of reconstruction above 25 per cent of the assessed value of the abutting property; while § 6, the last of the ordinance, makes an appropriation, in general terms, out of a fund set

apart for street repairs—"reconstructed streets"—for the cost of maintenance.

Pursuant to the mandate of this ordinance, the board of public improvements advertised to let the authorized work to bidders under letting notice No. 3,844, "for reconstructing, with best quality of Trinidad Lake asphalt, Grand avenue, from St. Louis avenue to Montgomery street, and for the maintenance of the same. Deposit required \$435. The street to be maintained in good condition for a term of nine years, beginning one year after the completion and acceptance of the work. Bond for \$5,910 must be given for the maintenance in addition to the bond for reconstruction when contract is executed.

Plans, specifications, and forms of contract may be seen at the office of the street commissioner." In response to this advertisement, there was but one bidder, either for the work of reconstruction or the maintenance, who was the Barber Asphalt Paving Company. Its bid was as follows:

Taking up old roadway.....	\$ 1,379 00
New 6" curbing.....	1,680 00
Old curbing reset.....	10 00
Asphalt pavement on 6" concrete	11,820 00
Maintenance per annum.....	1,773 00

Total \$16,662 00

Pursuant to this bid, the work was let to the Barber Asphalt Paving Company, and the contract entered into under date of February 9, 1893. The contract is very elaborate in the specifications of the required work, following the requirements of § 564. The contract contains this agreement in regard to maintenance: "The said the Barber Asphalt Paving Company, party of the first part, expressly guarantees to maintain at grade and surface in good order the aforesaid work of reconstruction, for the full period of nine years, commencing one year after the said work of reconstruction is completed and accepted, and binds himself, his heirs and assigns, to make all repairs which may, from any imperfection in said work or materials, become necessary within that time; and the party of the first part shall, whenever notified by the street commissioner that repairs are required, at once make such repairs, at his own expense."

It appears from the evidence that, prior to 1883, the durability of new pavements was unsatisfactory, and the board concluded that a remedy could be secured by including in the contracts a requirement that the contractor should maintain his work for a term of years. In order to enforce this remedy, the assembly, in 1883, passed an ordinance which is now § 564 of the general ordinances of the city. Since the adoption of this ordinance, all contracts for construction and reconstruction of streets has contained a maintenance clause similar to the one found in this contract, and all contracts have been let in the manner required by the ordinance. The evidence shows that there was an unwritten agreement or understanding among the members of the board of public improvements that no bid for maintenance should

be accepted which was in excess of 50 cents per square per annum. This rule was never promulgated by an order of the board or put upon record in any form, but was an unwritten rule, which was uniformly enforced. There was no direct evidence that the contractors were notified of this rule, but as bids for maintenance thereafter seldom, if ever, went beyond the amount so fixed, and so far as appears no bid for a greater amount was ever accepted, it may be inferred that contractors were advised thereof. Mr. Fladd and Mr. McMath, who had been members of the board, testified as witnesses in regard to the adequacy of the price fixed for the maintenance of streets newly paved. Mr. McMath was of the opinion that 50 cents per square had not compensated contractors for maintenance. It appears that he opposed the rule. Mr. Fladd was of the opinion, from his knowledge and experience, that the price fixed for maintenance was generally reasonable and adequate, but in some cases was not. "It was about the best we could do."

The objections made to the tax bills by the answer in this case are in most particulars the same as those stated in the petition in the *Verdin Case*. For full statement, see report of that case. The provisions of the charter, the ordinances, the advertisement for proposals, and the manner of ascertaining the lowest bidder, as charged in the petition, were, in every material particular, the same as were shown by the evidence in the trial of this case. The petition in that case charged that 50 cents per square per annum would not compensate the contractor for maintaining the work for ten years, and the bid for construction was made proportionately higher, in order to secure fair compensation for the entire contract, by which an unjust and illegal charge was imposed upon the property. In this case we have the evidence bearing upon that charge. In the *Verdin Case*, upon the facts stated in the petition, the truth of which the demurrer admitted, the contract was held invalid. By their answer defendants, for the same reason, charge the invalidity of this contract. The question in this case must be determined from the evidence.

1. It appears very conclusively from the ordinances, the advertisement for bids, the bids made by the Barber Asphalt Paving Company, the terms of the contract, and the other evidence, when taken together, that the obligation required of the contractor to maintain the completed work was intended to secure an improvement that would endure for ten years without reconstruction, and at the same time to avoid casting upon the property owner the burden of bearing the cost that might necessarily be incurred in securing such durability. The obligation imposed upon the contractor to maintain his work was clearly intended to constitute a part of the original contract for the reconstruction of the street, and was not intended as a contract for repairing streets which were not good enough for use and were not

bad enough for reconstruction. This purpose appears very clearly from the known evils the ordinances were intended to remedy, the terms of the advertisement for proposals and the stipulations contained in the contract. Under the contract, the Asphalt Paving Company guarantees the work for nine years, and binds himself to make "all repairs which may, from any imperfection of the work or materials, become necessary within that time."

The question, then, is whether or not the municipal authorities had the power to require the guaranty found in this contract, and, if they had such power, was the manner of exercising it violative of the constitutional or charter rights of the landowner whose property is chargeable with the cost of reconstruction. In the *Verdin Case*, upon the facts stated in the petition, it was held that the requirement of § 542 (which is the same as § 504 of the general ordinances as revised), that the contractor should maintain the pavement for a term of years, could not be distinguished from a contract for "repairs," within the meaning of § 27 of article 6 of the charter; that a contract for repairs is required to be let to the lowest bidder, and therefore § 504 of the general ordinances, authorizing a contract for reconstruction and maintenance to be let together to the lowest average bidder, was in violation of said section of the charter, and the contract was null and void. Since the decision in the *Verdin Case*, this court has held (*Barber Asphalt Paving Co. v. Ullman*, 137 Mo. 543, 38 S. W. 458) that an agreement by a contractor to maintain, at his own cost for five years, a pavement he had contracted to construct, was not an agreement to make repairs on a street, within the meaning of a charter (Rev. Stat. 1889, § 1424) which required that "the cost of repairing and keeping in repair the paving and macadamizing of all streets and avenues shall be paid out of the general revenue of the city." *Barber Asphalt Paving Co. v. Ullman*, 137 Mo. 543, 38 S. W. 463.

The general powers granted St. Louis over its streets are very comprehensive. "The mayor and assembly shall have power by ordinance to establish, open, vacate, alter, widen, extend, pave, or otherwise improve and sprinkle all streets, avenues, sidewalks, alleys, wharves, and public ground and squares, and provide for the payment of the costs and expenses thereof in the manner in this charter prescribed; and also to provide for grading, lighting, cleaning, and repairing the same, and to condemn private property for public uses, as provided for in this charter; to construct and keep in repair all bridges, streets," etc., "and to regulate the use thereof." These broad grants imply the power to make all necessary contracts for grading and paving its streets, and keeping them in repair, unless such powers are restrained by special provisions of the charter or by constitutional limitations. There would seem to be no doubt that, under these general powers, the municipality would have

the same right, in order to secure good and durable work, to require of the contractor any guaranties that a private person might take in order to secure the perfection of work done for him. Municipal officers who, in contracting for such public work, should neglect to take from a contractor some kind of guaranty of the perfection of the work and materials, would be derelict in their duty, and unfitted for the trust with which they had been invested. The kind of guaranty should be left to their discretion and business sense. We think no wiser or more adequate provision for securing perfection in the completed work could be devised than that of requiring the contractor to maintain it for a reasonable time, at such cost as would compensate for the repairs necessary to preserve good work and good material from becoming imperfect from natural and unavoidable causes. *Morse v. West Port*, 110 Mo. 509, 19 S. W. 831.

We are able to discover nothing in § 27 of article 6 of the charter which prohibits such a guaranty. The restraint placed upon the assembly is that it shall not directly contract for making repairs of streets. It requires that "proposed work" (which includes repairs) shall be let to the lowest bidder. It also requires estimates of the cost of such work to be submitted to the assembly by the board of public improvements. It is manifest that the repairs contemplated in this section are such as are needed at the time the ordinance authorizing the work is passed. It is "proposed work," and estimates thereof must be made. The charter does not prohibit a contract for the work necessary to preserve in good condition the improved street, or, in other words, a guaranty of the efficiency of the completed work. The general powers conferred by the charter give ample authority to require of contractors such guaranties, and no prohibition is found, or necessarily implied, in § 27 of article 6. The validity of the ordinances should be presumed, and the ordinances upheld, unless a repugnance to the charter clearly appears.

2. But it is said, in the next place, that the contract is void for the reason that the methods provided by ordinance, and followed in the advertisements for bids and in the contract, impose upon the property owner burdens which are unauthorized by the charter; that, under the charter, the property adjacent to the street is only chargeable with the cost of the constructed pavement, and the cost of repairs are payable out of the general revenue of the city; and letting a contract for paving the street, and one for maintaining it, under one bid, gives the contractor and the city the opportunity, by collusion, to impose upon the property a part of the cost of maintenance. It is argued that this result was reached in this case, for, counsel say, it is shown that the price for maintenance was required to be taken at a rate below what would be fair compensation for that work, and the price for reconstruction was therefore made proportionately higher, in order to secure fair compensation

for the entire work. Admitting, for argument, that 50 cents per square was not adequate compensation for maintaining the street, there was no evidence tending to prove that the contract price for reconstruction was not fair and reasonable. No complaint is made to the quality of the work or to the reasonableness of the contract price therefor. The landowner, except as a citizen and general taxpayer, is not interested in the cost of maintaining the work. No issue in this case involves his rights as a general taxpayer. The issue is really one of fraud and collusion, and the burden rests upon defendant to prove that, by letting the work of construction and of maintenance to the lowest average bidder, an unauthorized charge was imposed upon his property.

It may be said here that municipal officers, under the charter of St. Louis, are selected presumably on account of their fitness and integrity. They have no private ends to subserve. We should therefore presume that their intentions are honest, and that, in the performance of their public duties, they deal fairly and justly with the citizen and property owner. It should be kept in mind, also, that in matters of control over streets, and of keeping them in condition for public use, the authorities act in a business capacity, and much latitude of discretion should be allowed them in matters of detail. The charter powers in these particulars are general, and very broad, and matters of detail are necessarily left almost entirely to the discretion of those intrusted with the duty. *Gibson v. Owens*, 115 Mo. 267, 21 S. W. 1107. The ordinances under which Grand avenue was improved require the contractor to maintain his work for nine years, commencing one year after its completion. No one can doubt the wisdom of this requirement, looking at it from a business standpoint. The evidence shows that previous work of this kind had been wanting in durability. The most careful inspection of the construction of a pavement, as it progresses, will not detect all imperfections in the materials and in the manner of construction. This the board of public improvement had learned from experience. They believed that a street, paved in a proper manner with asphaltum, would not require reconstruction for ten years, if properly cared for and preserved. They recognized the fact that its preservation from the effects of use and natural decay would require constant attention and the expenditure of money and labor. In these circumstances, the ordinances were passed and the contract in question was made.

The ordinance requires the contractor to maintain his work for ten years. But the property is, under the charter, only chargeable with the work of reconstruction. Provision was therefore made for separating the cost of construction and the cost of maintenance, and requiring separate bids or estimates for each work. The contract was for but a single work; that is, of reconstruction, with a guaranty that the pavement would

endure the ordinary uses for ten years. The lowest bidder is the person who offers to construct the pavement and maintain it in good condition for the requisite period. The ordinance provides for ascertaining the lowest bid for the entire contract of construction and maintenance as follows: "In canvassing the proposals, the lowest bid shall be ascertained by taking the aggregate of the cost of construction, or reconstruction, as the case may be, and the total cost of maintenance, for the term of years designated by the ordinance." No objection can be seen to this method; indeed, in no other way could the lowest bid be justly ascertained.

In canvassing the bids, the board has before it the estimates of construction and maintenance made by the engineer, together with the separate bids for construction and maintenance. If the bid for either work is too high, or if the aggregate bid is too high, the board has power to reject it. Assuming, as we must, that the board acts fairly between the city and the property owner, we are unable to see how the latter can be injured, unless the accepted bid makes the cost of reconstruction more than it ought to be. This result may follow the letting of a contract in any method imaginable, as long as contractors work in their own interest, and not wholly for the public good. The discretion must therefore be left with the municipal authorities, to whom the duty has been intrusted by the people.

3. But it is said that the board of public improvements fixed the cost of maintenance at 50 cents per square, which was inadequate, to preserve the pavement for ten years, and would accept no higher bid on that work; thus compelling the contractor to increase his bid for reconstruction in order to make the entire contract profitable. In answer to this, it may be said, as has already been said, that there is no evidence that the contract price for reconstruction is more than it should have been for the character of work required. Again, if the mode adopted for letting such contract is not in violation of the charter, then the contractor should not suffer on account of the fraudulent purpose of the board unless he participated in the fraud. Objections come too late after the improvement has been completed. *Warren v. Barber Asphalt Paving Co.* 115 Mo. 580, 22 S. W. 490.

But we do not think the evidence bears out the charge against the board. The board had the right, in its discretion, to reject a bid in which, in its judgment, the charge for maintenance was excessive. If the board, with its experience and information, and with the estimates before it, was unwilling to accept a bid in which the charge for maintenance was over 50 cents per square per annum, we can see no reason why contractors should not have been advised that bids in excess of that charge would not be considered. The only limitation on the discretion of the city authorities in contracting for such public works is that contracts shall be let to the lowest bidder. The rule adopted

by the board does not prevent contractors from proposing to maintain their work for less than 50 cents per square. Two witnesses, who were members of the board when the rule was adopted, testified on the trial. Mr. McMath testified: "As near as I can recollect, the first thing I ever heard concerning this matter was in discussions of the board concerning the price at which maintenance had been let in the first contracts, and the opinion was expressed that \$1 a square was too much; and, as near as I can recollect, Gen. Turner expressed the opinion that about 50 cents a square was about sufficient compensation for the keeping of all the pavements in repair; and that opinion of his seemed to be—was concurred in by the other members of the board. There never was any action taken whatsoever, so far as I have ever learned. I have examined the records. Probably a year ago I had occasion to. There is no record whatever of any formal action ever taken by the board in regard to that matter." This witness testified that, in his opinion, the sum of 50 cents has not compensated the contractor for the maintenance. Mr. Fladd testified that the members of the board concluded that they would not award a contract at more than 50 cents. He regarded that a reasonable price for maintenance. A majority of the board was evidently of the same opinion. There is nothing in the evidence tending to prove that the board did not act in good faith, for the best interests of all concerned, nor does the evidence tend to prove that an unjust burden was put upon the property of plaintiff by the proceedings followed in awarding the contract. In the *Ullman Case*, 137 Mo. 543, 33 S. W. 463, a contract was sustained which imposed the entire cost of maintenance for five years upon the adjacent property. In this case the cost of maintaining the pavement is paid by the city. The evidence, in our opinion, does not establish the complaint that the cost of reconstruction was rendered unjust on account of proceeding as directed by the ordinance and the rule followed by the board of public improvements.

Some other questions are discussed bearing upon the legality of the bid for maintenance. If the contract for reconstruction was fairly let to the lowest bidder, and the work was done in a proper manner, according to contract, defendant can have nothing of which to complain, as his property is not chargeable with the maintenance. Indeed, the maintenance clause of the contract is beneficial to the property owner if, as the board thought would be the case, a necessity of reconstruction would thereby be prevented for a longer period. *Morse v. West Port*, 110 Mo. 509, 19 S. W. 831. We distinguish this from the *Verdin Case* in the fact that the evidence shows that the word "maintenance," as used in the ordinance and contract, has not the same application as the word "repairs," used in the charter. The obligation to "maintain," required by the ordinance, is imposed as a mere guaranty of the perfection of the work when completed.

and the duty to preserve from decay and ordinary use. The work of "repairs," required by the charter to be let to the lowest bidder, is a restoration of a street already defective from use and decay. We distinguish the cases further, in the fact that it does not appear from the evidence in this case that the bid for construction was higher, on account of the maximum bid fixed by the board for maintenance, than it would have been for perfect work, without the guaranty. This case is also distinguishable from the *Ullman Case*, in that the landowner is not chargeable with the cost of maintenance. The judgment of the circuit court ought to be reversed, and it is so ordered.

Per Curiam:

The foregoing opinion, prepared by our late associate, Judge Macfarlane, is adopted as the opinion of the court. *Sherwood, Robinson, Brace, and Williams, JJ.*, concurring therein. *Gantt, Ch. J., and Burgess, J.*, dissenting. *Marshall, J.*, not sitting.

The judgment of the Circuit Court is therefore reversed, and the cause remanded, with directions to the trial court to proceed in accordance with the views expressed in the opinion.

BARBER ASPHALT PAVING COMPANY,
Appt.,
v.

Morris HEZEL et al., Respts.

(.....Mo.....)

1. The construction of a street and its maintenance for a term of years at a cost sufficient to preserve good work and good material from becoming imperfect from natural and unavoidable causes, may be included in a single contract by a municipality having complete control over the construction and repair of its streets where the object is to obtain a better quality of construction, although the charter provides for letting the contract for "repairs" to the lowest bidder, which are to be paid for out of the general fund, while the cost of construction is to be charged on adjoining property.
2. That the price for maintenance of a pavement is below what would be fair compensation for the work is not sufficient to avoid, in favor of the abutting owner, a contract covering its construction and maintenance, under a charter requiring the city to pay for maintenance and the abutting owner for construction, where there is nothing to show that the contract price for construction was not fair and reasonable, and the contract is in fact but for a single work,—that of construction with a guaranty of endurance.
3. The fraudulent purpose of the public authorities in fixing the minimum price to be paid for maintaining at public expense a pavement constructed at the ex-

NOTE.—In connection with this case, which may be taken as establishing the doctrine in Missouri, see the preceding case of *Seaboard Nat. Bank v. Woesten* (Mo.) ante, 279.

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pense of the abutting owner, both of which items are included in a single contract, so low that an unlawful burden will be cast on the abutting owner, will not, after the completion of the pavement, defeat the contractor's right to recover on the tax bills, unless he participates in the fraud.

4. An undertaking to maintain a new pavement for a series of years, required as a guaranty of the perfection of the work, is not a contract for repairs within the meaning of a statute requiring contracts for repairs to be let to the lowest bidder.

(*Gantt, Ch. J., and Burgess, J., dissent.*)

(March 13, 1900.)

APPEAL by plaintiff from a judgment of the Circuit Court for the City of St. Louis in favor of defendants in an action brought to enforce a street paving assessment. *Reversed.*

The facts are stated in the opinion.

Messrs. W. C. Searritt and Adiel Sherwood, for appellant:

The property owner, having stood by in silence while the work was being done, cannot now object; in short, he is estopped.

Lafayette v. Fowler, 34 Ind. 146; *State, Malone, Prosecutor, v. Jersey City Water Comrs.* 30 N. J. L. 247; *State, Hampson, Prosecutor, v. Paterson*, 36 N. J. L. 162; *New Haven v. Fair Haven & W. R. Co.* 38 Conn. 432, 9 Am. Rep. 399; *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187; *Ferguson v. Landram*, 5 Bush, 230, 96 Am. Dec. 350; *New York v. Sonneborn*, 113 N. Y. 423, 21 N. E. 121; *Hoboken v. Harrison*, 30 N. J. L. 73; *Warren v. Barber Asphalt Paving Co.* 115 Mo. 580, 22 S. W. 490; *St. Louis v. Ran Ken*, 96 Mo. 497; *St. Louis v. Excelsior Brewing Co.* 96 Mo. 877; *Com. use of Pittsburgh v. Woods*, 44 Pa. 114; *Wray v. Pittsburgh*, 46 Pa. 369; *Johnson v. Duer*, 115 Mo. 378, 21 S. W. 800; *Herman, Estoppel & Res Judicata*, § 1221; *Palmier v. Stumph*, 29 Ind. 329; *Hellenkamp v. Lafayette*, 30 Ind. 192; *Bigelow, Estoppel*, 585, 586, 665; *Gibson v. Owens*, 115 Mo. 258, 21 S. W. 1107; *People ex rel. Curtis v. Utica*, 65 Barb. 21; *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 432; *Ritchie v. South Topeka*, 38 Kan. 374, 16 Pac. 332; *Darst v. Griffin*, 31 Neb. 673, 48 N. W. 819; *Seaboard Nat. Bank v. Woesten*, 147 Mo. 483, ante, 279, 48 S. W. 939; *Story, Eq. Jur.* §§ 64, 707.

The maintenance ordinance, § 564, Rev. Ord., is a valid enactment; and so, also, is ordinance No. 17,151, under which the work was done.

Seaboard Nat. Bank v. Woesten, 147 Mo. 467, ante, 279, 48 S. W. 939; *Morse v. West Port*, 110 Mo. 509, 19 S. W. 831; *St. Louis v. Schoenbush*, 95 Mo. 622; *State, Trenton Horse R. Co., Prosecutor, v. Trenton*, 53 N. J. L. 132, 11 L. R. A. 410, 20 Atl. 1076; *Elliott, Roads & Streets*, 335; 1 Kent, Com. 464; *Bishop, Statutory Crimes*, 127; *Johnson's Case*, 1 Me. 230; *Sutherland, Stat. Constr.* § 341; *Grover v. Huckins*, 26 Mich. 476; *Dullam v. Willson*, 53 Mich. 393, 19 N. W. 112, 51 Am. Rep. 128; *Atchison Street R. Co. v. Missouri P. R. Co.* 31 Kan. 660, 3 Pac. 284;

Hannibal v. Winchell, 54 Mo. 172; *Estes v. Owen*, 90 Mo. 113, 2 S. W. 133; *McCormack v. Patchin*, 53 Mo. 33, 14 Am. Rep. 440; *Schenectady v. Union College*, 66 Hun, 179, 21 N. Y. Supp. 147; *Hollyman v. Hannibal & St. J. R. Co.* 58 Mo. 480; *Sturtevant v. Alton*, 3 McLean, 393, Fed. Cas. No. 13,580; *Miller v. Milwaukee*, 14 Wis. 642; *Matthiessen & W. Sugar Ref. Co. v. Jersey City*, 26 N. J. Eq. 247; *State, Taintor, Prosecutrix, v. Morristown*, 33 N. J. L. 57; *Atty. Gen. v. Boston*, 142 Mass. 200, 7 N. E. 722; *Nagle v. Augusta*, 5 Ga. 546; *Re Burke*, 62 N. Y. 229; *Re Burmeister*, 76 N. Y. 181; *Morley v. Carpenter*, 22 Mo. App. 640; *Gurnee v. Chicago*, 40 Ill. 165; *Housmon v. Trenton Water Co.* 119 Mo. 313, 23 L. R. A. 146, 24 S. W. 784; *Gibson v. Owens*, 115 Mo. 270, 21 S. W. 1107; *Schenley v. Com. use of Allegheny*, 36 Pa. 60; *Farrar v. St. Louis*, 80 Mo. 393; *Schenectady v. Union College*, 66 Hun, 179, 21 N. Y. Supp. 147.

A public-improvement ordinance is an exercise of the taxing power, and the authority granted by it is not subject to the control of the courts.

McCormack v. Patchin, 53 Mo. 33, 14 Am. Rep. 440; *Keating v. Kansas*, 84 Mo. 415; *Ruggles v. Collier*, 43 Mo. 353; *Giboney v. Cape Girardeau*, 58 Mo. 141; *Welty, Assessments*, §§ 308, 309.

The courts assume that where discretion is vested in a municipal body exercising functions of a legislative character, good reasons exist for the adoption of the ordinance.

New York & H. R. Co. v. New York, 1 Hill. 588.

Being a reasonable ordinance in all of its provisions, no allegations of fact can affect the prima facie case thus made.

Warren v. Barber Asphalt Paving Co. 115 Mo. 572, 22 S. W. 490; *State ex rel. Wood v. Schweickardt*, 109 Mo. 496, 19 S. W. 47.

The word "repairing" seems not to carry the idea of new creations, but restoring what had been prostrated.

McClenahan v. Curcin, 3 Yeates, 374; *Ardesco Oil Co. v. Richardson*, 63 Pa. 162; *Re Fulton Street*, 29 How. Pr. 429.

The assembly may provide for doing "all that is necessary, usual, or fit" for keeping streets in repair by this maintenance ordinance.

Farrar v. St. Louis, 80 Mo. 393; *Rosetta Gravel Co. v. Payne* (La. Ct. App.); *People ex rel. Hall v. Maher*, 56 Hun, 81, 9 N. Y. Supp. 94; *Schenectady v. Union College*, 66 Hun, 179, 21 N. Y. Supp. 147.

The word "maintain" does not mean to provide or construct, but means to keep up, to keep from change, to preserve.

Moon v. Durden, 2 Exch. 21.

A maintenance clause is nothing more than a guaranty of good materials and workmanship.

Kansas City v. Hanson, 60 Kan. 833, 58 Pac. 474; *Robertson v. Omaha*, 55 Neb. 718, 44 L. R. A. 534, 76 N. W. 442; *Allen v. Davenport*, 107 Iowa, 90, 77 N. W. 532; *Wilson v. Trenton*, 61 N. J. L. 599, 44 L. R. A. 48 L. R. A.

540, 40 Atl. 575; *Cole v. People ex rel. Barnswolt*, 161 Ill. 16, 43 N. E. 607; *Osburn v. Lyons*, 104 Iowa, 160, 73 N. W. 650; *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255; *Barber Asphalt Paving Co. v. Ullman*, 137 Mo. 543, 38 S. W. 458; *Seaboard Nat. Bank v. Wooten*, 147 Mo. 483, ante, 279, 48 S. W. 939.

This tax bill presents a prima facie cause of action in the same way as is done by a promissory note, and it is only necessary for the holder of the tax bill to prove the signatures of the city officials, and rest, and that was all that was done in this case.

American Ins. Co. v. Smith, 73 Mo. 368.

Messrs. **Hiram J. Grover and Denis Devoy**, for respondents:

The charter does not use the word "maintenance." It always uses the word "repairs." Authority to contract for maintenance can be found, if at all, only under the provisions which authorize contracts for repairs.

Maintenance for nine years means repairs for nine years.

Verdin v. St. Louis, 131 Mo. 87, 33 S. W. 480, 36 S. W. 52.

There is no necessary connection or dependence between construction and maintenance.

Verdin v. St. Louis, 131 Mo. 86, 33 S. W. 480, 36 S. W. 52.

Special taxation for local improvements on public streets must be based upon, and be limited by, the amount of the special benefits resulting to the abutting property, over and above the benefit which the public derives from the same improvements.

Asberry v. Roanoke, 91 Va. 562, 42 L. R. A. 636, 22 S. E. 300; *Detroit v. Judge of Recorder's Ct.* 112 Mich. 588, 42 L. R. A. 638, 71 N. W. 149; *Weed v. Boston*, 172 Mass. 28, 51 N. E. 204, 42 L. R. A. 642; *Violet v. Alexandria*, 92 Va. 561, 31 L. R. A. 382, 23 S. E. 909; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *State, Agens, Prosecutor, v. Newark*, 37 N. J. L. 415, 18 Am. Rep. 729; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Hutcheson v. Storrie*, 92 Tex. 685, 45 L. R. A. 289, 51 S. W. 848; *Fay v. Springfield*, 94 Fed. Rep. 409; 2 Dill. Mun. Corp. 4th ed. pp. 932, 936.

The right of a municipal government to open, construct, or reconstruct or repair a public street is based upon public necessity, and primarily the public should pay for it.

Guest v. Brooklyn, 69 N. Y. 506.

Legislative enactments, charters, or ordinances cannot pre-determine the fact in advance, by an unimpeachable fiat, that the abutter is, and shall be at all future time, specially benefited to the extent of the cost of the work which may at any time in the future be done in front of his property.

Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Hutcheson v. Storrie*, 92 Tex. 685, 45 L. R. A. 289, 51 S. W. 848; *Detroit v. Judge of Recorder's Ct.* 112 Mich. 588, 42 L. R. A. 638, 71 N. W. 149.

There is no duty or burden upon the abutter to show that he is not benefited to the extent of the charge.

Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Hutcheson v. Storie*, 92 Tex. 685, 45 L. R. A. 289, 51 S. W. 848.

Brace, J., delivered the opinion of the court:

This is an action to recover the amount of a special tax bill assessed by the proper authorities of the city of St. Louis against the property of defendants abutting on Jefferson avenue, in favor of the plaintiff, for work done in reconstructing and paving said avenue. Upon a trial in the circuit court judgment was rendered for the defendants, and the plaintiff appealed to this court. Upon a motion to dismiss the appeal for want of jurisdiction the case was transferred to the St. Louis court of appeals (138 Mo. 228, 39 S. W. 781) where the judgment of the circuit court was reversed, in pursuance of the opinion of a majority of that court (76 Mo. App. 135), delivered on the 21st of June, 1898. *Biggs, J.*, sitting therein (148 Mo. 63, 43 L. R. A. 845, 50 S. W. 293) dissenting, and, in his dissenting opinion, deeming the decision rendered therein contrary to the previous decision of this court in *Verdin v. St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52. The case was certified here for final determination.

This is one of several suits pending on like tax bills. The litigation in regard to these tax bills was commenced in the St. Louis city circuit court, by the *Verdin Case*, in July, 1893. That case was a proceeding in equity against the city of St. Louis, the Board of Public Improvements, and the plaintiff in this case, to restrain the issuance and collection of these tax bills. The case went off in the circuit court upon a demurrer by the city to the bill, which was sustained by the circuit court, and the plaintiff appealed from the judgment on the demurrer, to this court, where the judgment of the circuit court was reversed, and the cause remanded to the circuit court, and upon the dismissal thereof in that court, suits were instituted upon the tax bills. The *Verdin Case* was decided at the October term, 1895. The opinion of the majority of the court was delivered by *Burgess, J.*, who in the third paragraph thereof said:

"3. It is contended that § 542 of the revised ordinances of the city is repugnant to the letter and spirit of the provisions of the charter of the city of St. Louis, and therefore null and void and of no effect, and that the action of the city in letting the contract for reconstruction and maintenance, together, is obnoxious and unlawful. Said section is as follows:

"Sec. 542. Whenever a street is to be improved, either on the motion of the board of public improvements or on petition of the adjoining property owners, the board of public improvements may submit to the municipal assembly a bill for letting in one contract the work of constructing or reconstructing such street, and of maintaining it in good condition for a term of years; and aft-

er such bill has become a law the board of public improvements shall advertise for proposals, including the construction or reconstruction and maintenance under the same regulations as are provided for the improvement of streets; but the advertisement shall, in addition to what is prescribed for other street improvements, state the term during which the street is to be maintained in good condition, and the amount of bond which the contractor will be required to furnish to secure the execution of the contract for maintenance, in addition to the bond which under existing regulations has to be furnished for all contracts for street improvements. The letting of the work, the awarding of the contract, and the approval of the contract and of the bonds shall be carried out as now provided for other street improvements. In canvassing the proposals, the lowest bid shall be ascertained by taking the aggregate amount of the cost of construction or reconstruction as the case may be, and the total cost of maintenance, for the term of years designated by the ordinance. The special tax bills against the adjoining property for the work of construction or reconstruction shall be issued whenever the work has been completed and accepted. The contract shall provide that the obligation of the contractor to maintain the streets in good condition shall commence one year after the completion and acceptance of the work of construction or reconstruction, and the contract price shall be paid semiannually out of the city treasury, on the certificate of the street commissioner that the work has been performed in accordance with the contract and specifications. The bond to be given to insure the maintenance of streets during the term agreed upon shall be \$15 for every square (of one hundred superficial feet) of the street embraced in the contract. The contract shall provide that the contractor shall, whenever notified by the street commissioner that any repairs are required, at once make such repairs at his own expense, and if they are not made within proper time the street commissioner shall have power to cause such repairs to be made, and the cost thereof shall be paid out of the fund provided for the payment of contracts for street maintenance, and the amount shall be deducted from any money then due under the contract, or which may thereafter become due. And it shall further provide, that if at any time during the term for which the contract for the maintenance of the streets is in force the pavement of such street or any part thereof has deteriorated to such an extent as to require in the opinion of the board of public improvements, reconstruction, the street commissioner may, with the approval of the board of public improvements and of the mayor, notify the contractor that reconstruction is necessary, and that the contractor shall, within three months after receiving such notice, reconstruct the whole or such part of the pavement with the same kind of material as heretofore applied, or with some other material approved by the board of public im-

provements. And the contract shall also provide that if the contractor fails to reconstruct the street within three months after having been notified, the board of public improvements may, with the approval of the mayor, cancel the contract and relet the work of reconstructing the pavement, and that the cost of such reconstruction shall be paid by the city and the amount collected by suit from the contractor or his sureties, not to exceed \$15 per square of pavement, included in the contract. And the contract shall provide that whenever any repairs of the street are made necessary from the construction of sewers, the laying of pipes or telegraph wires or from any other disturbance of the pavement by parties acting under permits issued by the city, the contractor for the maintenance of the street shall, on notification from the street commissioner, immediately make all necessary repairs in conformity with the specification for this class of work. The cost of all such repairs, exclusive of trenching and back-filling, which shall be done by the parties who hold the permits and in a manner as now required by existing ordinances, shall be paid for at the full contract price for a superficial square of new pavement out of the fund set apart for the payment of contracts for the maintenance of streets, and the amount shall be certified by the street commissioner to the auditor, who shall reimburse, by transfer, the aforesaid fund from the funds of the proper department, if the repairs were made necessary by the construction of any public improvement; and out of the funds to be deposited by persons obtaining permits for opening streets before such permits are granted, if the repairs are made necessary by work done under such permits. And the contract shall further provide that the contractor for the maintenance of such streets shall have the right to make all repairs which become necessary by the construction of any public improvement, or by the work done by private parties under permits given by the city.

"It is argued that the maintenance of Jefferson avenue for nine years amounts to nothing more than 'repairs' on the street for nine years, within the meaning of § 27, art. 6, of the city charter; that it involves expenditures for labor and material, and is public work, within the meaning of the section; that it is a separate matter from reconstruction, and should have been let to contract separately and independently thereof; that ordinance 17,151, for the maintenance and reconstruction of Jefferson avenue, is null and void, because, as an ordinance for maintenance—being for the public work for the repair of Jefferson avenue for nine years—it should specify the material to be used in such repairs, and an estimate of the cost of maintenance, as required by § 15, art. 6, of the charter.

"By said § 27, art. 6, it is provided that any public work, or repairs thereof, and to fix the price or rate therefor, shall be let out by the contract to the lowest responsible bidder, subject to the approval of the council,

and any other mode of letting out work shall be null and void. Does the maintenance of Jefferson avenue for nine years, within the meaning of said section, mean, or amount to, repairs?

"It must be conceded that such work amounts to the expenditure of labor and money, and that it has no direct connection with the work of reconstruction. While it is the duty of the board of public improvements, in all cases, except in case of necessary repairs requiring prompt attention, to prepare and submit to the assembly estimates of costs of any proposed work, and, under the direction of the ordinance, advertise for bids, and to let out such work by contract to the lowest responsible bidder, subject to the approval of the council, no such thing was ever done in this case. The costs and expenses attending the maintenance of streets are paid by the city out of the funds set apart annually for street repairs—reconstruction of streets. Sec. 6, Ord. 17,151. The costs of repairs of all streets and highways, and cleaning the same, are also paid out of the general fund of the city. § 18, art. 6, *supra*.

"The word 'maintain' does not mean to provide or construct, but means to keep up; to keep from change; to preserve (Worcester Dict.); to hold or keep in any particular state or condition; to keep up (Webster Dict.).

"In *Moon v. Durden*, 2 Exch. 21, it was said: 'The verb to "maintain" . . . signified to support what has already been brought into existence.' See also *Louisville, N. A. & C. R. Co. v. Godman*, 104 Ind. 490, 4 N. E. 163.

"'To repair' means to restore to a sound or good state after decay, injury, dilapidation or partial destruction. (Webster Dict.)' *Gulf City Street R. & Real Estate Co. v. Galveston*, 69 Tex. loc. cit., 660, 663, 7 S. W. 520. See also *Pittsburg & B. Pass. R. Co. v. Pittsburg*, 80 Pa. loc. cit., 76.

"It will thus be seen that 'maintenance' and 'repair' when applied to a street practically mean one and the same thing. Maintenance, being a separate and distinct public work, must be contracted for like any other public work. The material with which it is to be done must be specified by the board, and an estimate of the cost should be sent to the municipal assembly, together with an ordinance recommending such repairs. Nothing of that kind was done in this case, but the bid for reconstruction and maintenance were both let together, at the same time and to the same party, with no estimate as to the cost of the latter, which could only be made, under the charter, after the repairs became necessary. There was no legal obstacle in the way to one person becoming the contractor for both the reconstruction and maintenance, if under the city charter and ordinance the contract could be let to the lowest bidder; but in any event as the costs of reconstruction are assessed against the property holders, while the costs of maintenance are paid by the city, the lettings must neces-

sarily have been separate and upon different estimates.

"The board of public improvements of the defendant city had, previous to the time of letting the contract for reconstruction and maintenance to the Barber Asphalt Paving Company, publicly announced as a rule for the conduct of said board that no bid for maintenance which should exceed 50 cents per square would be considered or recommended, which was estimated to be about cost, or less than cost, and by letting the contract maintenance and reconstruction together the bidder was enabled to make a bid for such maintenance at about cost, and thereby protect himself against any possible loss on account of his contract for maintenance by bidding a higher price for reconstruction.

"Under § 18, art. 6, *supra*, the paving, curbing, guttering, sidewalks, and the materials for the roadways, the repairs of alleys and sidewalks, are charged upon the adjoining property as a special tax, while the cost of their maintenance is paid by the city, and there is no apparent reason why this work could not be done as well by one contractor as another. But by letting to the defendant, the Barber Asphalt Paving Company, the contract for reconstruction, and at the same time, and as part of the same contract, the contract for the maintenance of Jefferson avenue for the period of nine years at the price of \$1,962, the contractor was enabled to obtain from the property holders, in advance, payment in whole or in part for the maintenance which, under the charter, is required to be paid by the city; and if, after the work of reconstruction is completed, the property holders refuse to pay at once, a special tax bill is immediately issued, which is a lien upon the property for the cost of the work of maintenance, which has not been done, and which the contractor may never do.

"*People ex rel. Hall v. Maher*, 56 Hun, 81, 9 N. Y. Supp. 94, was upon objections filed to the letting of a contract to the National Vulcanite Company for grading and paving a street in the city of Albany, New York, with Trinidad sheet asphalt. The contract was objected to because of the fact that it contained a provision which required the contractor to keep in repair the pavement, laid in pursuance of the provision thereof, for the period of seven years, from and after the acceptance by the city, without expense to said city or to the abutting property owners. It was held (we quote from the syllabi), "that the necessary effect of this contract was to charge upon the property owners the cost of keeping the avenue in repair for seven years, in violation of the provision of the act of the legislature which charged such expense upon the city at large. That anything in the contract which imposed upon the property owners more than the obligation of having the pavement well constructed in the outset, was unjust to them."

"In the case in hand, by letting the reconstruction, and maintenance of the street together, plaintiffs were compelled to pay part of the expense of maintenance, which by law

they were only responsible, if at all, for the expense of reconstruction.

"Moreover, ordinance number 17,151 provides for the reconstruction of Jefferson avenue, by taking up and removing the old pavement of the roadway, preparing the roadbed, renewing and readjusting the curbing, laying a roadway pavement of best quality of Trinidad Lake asphalt on a concrete base, except between the rails of the street railway occupying the street, which last-mentioned space was to be paved with granite blocks, laid on a bed of sand, the curbing to be of limestone; while ordinance No. 542 provides for the letting of such work all in one contract, which is in direct conflict with § 27, *supra*, of the charter, which provides for the letting of such contracts to the lowest bidder, as provided for purchases by the commissioner of supplies, while by § 29, art. 4, of the charter it is provided that, "in advertising for proposals to furnish supplies, quantity and quality of all articles shall be fully stated, and any bidder may bid for any one article named."

"The notice of the letting of the contract said nothing as to the different kinds of work to be done, or materials to be furnished in reconstruction, although estimates for such work and materials were properly made, but simply gave notice that the board of public improvements would hold a special meeting at a time fixed, at its office in the city hall, for the purpose of considering the matter of reconstructing with asphaltum Jefferson avenue and other streets. As to work and material, other than asphaltum, there was no notice at all, and even if there had been no one could have bid on any part or parcel thereof, because of the fact that the ordinance provides for the reconstruction with Trinidad Lake asphalt, a monopolized article, in one contract, which not only prevented competition in bidding as to that part of the contract, but for any other work or materials also.

"No part of the cost of maintenance of the street could be imposed upon the plaintiffs, in the absence of express authority under the charter to do so. We, therefore, conclude that § 542 of the revised ordinances of the defendant city is in conflict with, and contrary to, the meaning and spirit of the city charter, and null and void.

"Nor do we think the fact that the contractor is required to give bond for the maintenance of the streets legalizes the contract. Here the contract for reconstructing the street and the maintenance of it after construction were entirely different matters, having no immediate or necessary connection whatever with each other.

"Moreover, ordinance 17,151, which provides for the reconstruction of Jefferson avenue, being for public work, should have specified the material to be used in such maintenance as required by § 15, art. 6, of the charter, and, as it failed to do so, is also null and void."

Gantt and Macfarlane, JJ., concurred in so much of that paragraph "as holds the ordi-

nances in question in requiring contracts for reconstruction and maintenance to be let in one contract as stated in the petition, to be in violation of the charter of the city and void," and in the result, as did Barclay, J., who, in a separate opinion said:

"2. The scheme of procedure adopted by the board of public improvements under ordinance 542 (Rev. Ord. St. Louis, 1887) in respect of reconstruction and maintenance of the proposed street is illegal, because the plain effect and obvious intent of the scheme are to put upon the owner of the real property (properly chargeable by special tax with the cost of reconstruction) a portion of the expense of repairs of the improved street for a long term of years. The latter expense the city is bound by the charter to bear, and cannot shuffle off upon the adjacent property in the mode attempted by the scheme referred to, as described in the petition in this suit.

"3. 'Maintenance' is a word whose meaning is greatly influenced by its context. As used in the ordinance (542) before the court, it appears to me to include the idea of putting on the repairs needed to maintain the street in its completed condition. The city cannot lawfully cast upon the adjacent property (under the guise of reconstruction) a part of the burden of repairs, which the charter requires the city to bear. By calling that burden 'maintenance' the nature of the work is not changed, nor is the liability of the property owner under the charter enlarged.

"4. The two charges for reconstruction and maintenance have been so blended (by the scheme of special taxation adopted in the case before the court) that the valid charge for reconstruction cannot be definitely ascertained, and severed from the invalid charge for repairs sought to be thrown upon the adjacent property. Some part of the expense properly chargeable to the city for repairs is embodied in the special tax laid upon plaintiff's property for alleged reconstruction of the street. That is the effect (and obviously the intended effect) of the scheme originating in ordinance 542, as worked out by the board of public improvements, according to the account given of it by the petition. Hence the assessment for reconstruction (as now made) cannot be enforced, containing, as it does, an unascertained and uncertain illegal element."

From the opinion of the majority and their decision, Sherwood and Robinson, JJ., and Brace, Ch. J., dissented, their reasons for such dissent being expressed in an exhaustive opinion by Sherwood, J., 131 Mo. 103 et seq. 33 S. W. 480, 36 S. W. 52.

Afterwards at the October term, 1896, the case of *Barber Asphalt Paving Co. v. Ullman*, 137 Mo. 543, 38 S. W. 458, was decided, the plaintiff in that suit and in the one in hand being the same. That suit was an action upon a special tax bill, issued in regular form by the authorities of the city of St. Joseph, in favor of the plaintiff against an abutting property owner, for the improvement of one of its streets under a contract

made in pursuance of an ordinance in which the plaintiff guaranteed the pavement for five years, and agreed "to keep the same in repair during the period of said guaranty," and although the charter required that "the cost of repairing and keeping in repair the paving and macadamizing of all streets and avenues shall be paid out of the general revenue of the city," the contract was sustained and the tax bill upheld. The opinion in that case was written by Barclay, J., and concurred in by Sherwood, Macfarlane, and Robinson, JJ., and by Brace, Ch. J.

In the opinion, the learned judge distinguished the case from the *Verdin Case*, but as Gantt and Burgess, JJ., could not "perceive the distinction," in principle, they dissented and expressed their views in a dissenting opinion written by Gantt, J., 137 Mo. 572 et seq. 38 S. W. 458.

In the meantime one of the suits upon the St. Louis tax bill having been tried, and judgment thereon rendered in the circuit court in favor of the defendants, the plaintiff appealed to the St. Louis court of appeals, where the judgment of the circuit court was at first affirmed on the authority of the *Verdin Case*, but afterwards on motion for rehearing was certified to this court on account of a supposed conflict between the decision in that case, and the later decision in the *Ullman Case*. In due course, the case came on for hearing in this court, and was decided at the October term, 1898. *Seaboard Nat. Bank v. Woesten*, 147 Mo. 467, ante, 279, 48 S. W. 939. The tax bill upon which that suit was brought was issued under an ordinance drawn in the same language, and under a contract let under the same circumstances and conditions as the tax bill sued on in this case; about the only difference between the two cases being in the names and amounts; and that the *Seaboard* tax bill was for paving on Grand avenue, and the *Hazel* tax bill for paving on Jefferson avenue. The opinion in the *Seaboard Case* was written by Macfarlane, J., and after mature consideration was concurred in by Sherwood, Robinson, Brace, and Williams, JJ., and dissented from by Gantt, Ch. J., and Burgess, J. In the opinion, the *Verdin* and *Ullman Cases* were reviewed, and the *Seaboard Case* distinguished from them. Whatever may be thought of these distinctions, the conclusions therein reached, and the reasoning upon which it rests, meet with our approval. And as the case in hand cannot be distinguished from that case, but is on all fours with it, presenting the same facts for judgment that passed into judgment under the opinion in that case, and as the argument on the question has been exhausted in that and the foregoing cases, we are content to sustain the contract and uphold the tax bill herein, upon the authority of that case; holding in this, as in that, case, that the ordinance and contract were not in violation of any of the provisions of the city charter, and that the special tax bill sued on is a legal charge against the property of the defendant.

It follows that the judgment of the Cir-

cuit Court should be reversed, and the cause remanded to that court with directions to enter up judgment in favor of the plaintiff, in accordance with the views expressed in this opinion. It is accordingly so ordered.

Robinson, Sherwood, Marshall and Valliant, J.J., concur; **Gantt, Ch. J.,** and **Burgess, J.,** dissent.

(Division 2.)

Jacob **ARNOLD et al.,** Appts.,
v.

City of **ST. LOUIS et al.,** Respts.

(.....Mo.....)

1. A city cannot be held liable for the drowning of children in a pond which is situated partly upon a street and partly upon private premises, on the ground that the pond is a nuisance which the city has failed to abate, where it does not appear that the accident happened upon that portion of the pond which is located upon the street.

The drowning of children in a pond while skating on the ice formed upon it does not render the owner of the land liable in the absence of anything to show that the children were there by permission or invitation.

(November 14, 1899.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for the City of St. Louis in favor of defendants in an action brought to recover damages for the drowning of plaintiff's children which was alleged to have been caused by defendants' negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. T. J. Rowe, for appellants:

Unguarded premises supplied with dangerous attractions are regarded as holding out an implied invitation to children, which will make the owner of the premises liable for injuries to them, even though they be technical trespassers. Whether or not the dangerous premises were so attractive to children as to suggest the probability of the accident, and thus render the owner liable, is a question for the jury.

Pekin v. McMahon, 154 Ill. 141, 27 L. R. A. 206, 30 N. E. 484; *Lepnick v. Gaddis*, 72 Ill. 200, 26 L. R. A. 686, 16 So. 213.

The owner of property abutting on a public highway is bound to keep his premises in a condition reasonably safe for the public who have occasion to travel on the highway.

Buesching v. St. Louis Gas Light Co. 73 Mo. 220, 39 Am. Rep. 503; *Clark v. Famous Shaw & Clothing Co.* 16 Mo. App. 464; *Kirkpatrick v. Knapp*, 28 Mo. App. 427.

The city is bound to keep its streets in a condition safe for the public to travel thereon.

NOTE.—As to liability for dangerous condition of premises lying open beside a highway or frequented path, see note to *Lepnick v. Gaddis* (Miss.) 26 L. R. A. 686, and the subsequent cases of *Pekin v. McMahon* (Ill.) 27 L. R. A. 206.

Indianapolis v. Emmelman, 108 Ind. 530, 58 Am. Rep. 65, 9 N. E. 155.

Messrs. B. Schnurmacher and Charles Claflin Allen, for respondent city of St. Louis:

Municipal corporations are not required to keep all of their streets in good repair, but only such as are necessary for the use of the traveling public, and which have been actually opened for travel.

Bassett v. St. Joseph, 53 Mo. 290, 14 Am. Rep. 446; *Brennan v. St. Louis*, 92 Mo. 482, 2 S. W. 481.

And they are then only "bound to keep the streets and highways in a proper state of repair, free from obstructions, so that they will be reasonably safe for travel."

Smith v. St. Joseph, 45 Mo. 449.

Those not using the streets for purposes of travel cannot complain of their condition. The liability of the corporation extends only to travelers injured therein.

Kiley v. Kansas, 87 Mo. 103, 56 Am. Rep. 443; *Russell v. Columbia*, 74 Mo. 480, 41 Am. Rep. 325; *Bassett v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446; *Smith v. St. Joseph*, 45 Mo. 449.

A city is not bound to guard its streets or bridges so as to prevent children from playing thereon and exposing themselves to danger, and is not liable for injuries which may be thus received.

Schauf v. Paducah, 20 Ky. L. Rep. 1796, 50 S. W. 42; *Dehanitz v. St. Paul*, 73 Minn. 385, 76 N. W. 48; *Gavin v. Chicago*, 97 Ill. 66, 37 Am. Rep. 99.

The existence of the pond was not the proximate cause of the accident, and therefore the city is not liable.

Dill. Mun. Corp. § 1007; Butz v. Cavanaugh, 137 Mo. 503, 38 S. W. 1104.

If it occurred on the Dawson property the city was not liable, because a municipal corporation is not liable for its failure to abate a nuisance on private property.

Harman v. St. Louis, 137 Mo. 494, 38 S. W. 1102; *Butz v. Cavanaugh*, 137 Mo. 503, 38 S. W. 1104; *Moran v. Pullman Palace Car Co.* 134 Mo. 641, 33 L. R. A. 755, 36 S. W. 659; *Witte v. Stifel*, 126 Mo. 295, 28 S. W. 891; *Overholt v. Vieths*, 93 Mo. 422, 6 S. W. 74.

Mr. L. Frank Ottoby, for respondent Dawson:

The owner of real estate is not liable in damages to a trespasser who falls into an excavation thereon, but only to one lawfully passing along the street who is accidentally injured while lawfully using the public highway as a traveler.

Overholt v. Vieths, 93 Mo. 422, 6 S. W. 74; *Witte v. Stifel*, 126 Mo. 295, 28 S. W. 891; *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L. R. A. 847, 28 S. W. 1069; *Moran v. Pullman Palace Car Co.* 134 Mo. 641, 33 L. R. A. 755, 36 S. W. 659; *Butz v. Cavanaugh*, 137 Mo. 503, 38 S. W. 1104; *Heckler v. St.*

A. 206; Moran v. Pullman Palace Car Co. (Mo.) 33 L. R. A. 755; *Dobbins v. Missouri, K. & T. R. Co.* (Tex.) 38 L. R. A. 573; *Stendal v. Boyd* (Minn.) 42 L. R. A. 288; *Cooper v. Overton* (Tenn.) 45 L. R. A. 591.

Louis, 13 Mo. App. 277; *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915; *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365; *Klix v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854, 32 N. W. 223; *Charlebois v. Gogebio & M. River R. Co.* 91 Mich. 59, 51 N. W. 812; *Greene v. Linton*, 7 Misc. 272, 27 N. Y. Supp. 891; *Clark v. Manchester*, 62 N. H. 577; *O'Connor v. Illinois C. R. Co.* 44 La. Ann. 339, 10 So. 678; *McGuinness v. Butler*, 159 Mass. 233, 34 N. E. 259; *Benson v. Baltimore Traction Co.* 77 Md. 535, 20 L. R. A. 714, 26 Atl. 973.

The allegation of the petition that at the time of the accident "the ice on said pond was so thin that it was dangerous to go thereon" is sufficient to sustain the demurrer. This was the proximate cause of the accident, and it is held, regardless of other considerations, that children thirteen and fourteen years of age are guilty of contributory negligence under such circumstances.

Butz v. Cavanaugh, 137 Mo. 503, 38 S. W. 1104.

Burgess, J., delivered the opinion of the court:

This is an action by plaintiffs, who were, at the time of the injury complained of, husband and wife, and as such prosecute this suit to recover from defendants, the city of St. Louis and Isabella Dawson, the sum of \$10,000 damages for the death of their two minor children, Arthur James Arnold and Amanda Mary Arnold, who were drowned in the city of St. Louis on the 12th day of January, 1897, while skating upon the ice which had formed upon a pond of water which it is alleged had formed upon a portion of Taylor avenue, one of the public streets of said city, between Margaretta and Kossuth avenues, and upon land of the defendant Isabella Dawson, abutting the west side of said Taylor avenue. The petition is in two counts. The first is to recover \$5,000 on account of the death of the boy, and the second is to recover the same amount on account of the death of the girl. This is the only material difference between the two counts. They both aver that the children were minors and unmarried; that the city of St. Louis is and was a municipal corporation; that Taylor avenue, between Margaretta and Kossuth avenues, is a public highway, and that defendant Isabella Dawson at the times mentioned in the petition was the owner of certain real estate fronting on the west side of Taylor avenue between the streets mentioned; that on January 12, 1897, and for a long time prior thereto, the defendants carelessly, negligently, wrongfully, and unlawfully suffered and permitted a large body of water, 200 feet long, 100 feet wide, and 20 feet deep, to collect and remain on the above portion of Taylor avenue and on the real estate of defendant Dawson; that said body of water had collected and remained on said street and said premises for more than a year prior to January 12, 1897, which fact was well known to the defendant city, and that it was the duty of said defendant to so guard said body of water that it would not be dangerous to the public. The petition further alleges 48 L. R. A.

that the water so collected was in the vicinity of the Ashland School (one of the public schools of the city of St. Louis), and that when frozen over it was attractive to children of tender years, and to the deceased children of plaintiffs, who were drawn there for the purpose of skating upon the ice; that, upon the day just named, ice had formed upon the pond, attracting children from said school, and other children, to skate thereon; "and that the ice on said pond was so thin that it was dangerous to go thereon." The petition proceeds to allege that on January 12, 1897, the children of plaintiffs, attracted as aforesaid, went upon the pond to skate, and the ice broke, and that they were immediately drowned. It is also averred in each of said counts that the fact that a large number of children were in the habit of skating upon said ice was well known to defendants, and that the death of the children was caused "by the carelessness and the negligence and wrongful action of the defendants in wrongfully suffering and permitting said pond to form on said Taylor avenue and said real estate above and heretofore described herein, and to remain thereon unguarded, so that when it was frozen over it would attract children to skate thereon." To this petition each of the defendants filed a general demurrer on the ground that the same does not contain facts sufficient to constitute a cause of action, which demurrers were sustained by the court. Plaintiffs declining to plead further, final judgment was entered in favor of defendants on the demurrers, and plaintiffs brought the case to this court by appeal.

The petition shows very conclusively that the action is not based upon the ground that Arthur James Arnold and Amanda Mary Arnold were travelers upon the street of defendant city, and that by reason of its unsafe condition it was dangerous to persons passing along and upon it, in consequence of which they were drowned, but upon the ground that the pond, when covered with ice, was attractive to children; so that, as deceased were not using the street at the time of the accident for the purpose of travel, the rule of law which requires municipalities to keep their streets in a reasonably safe condition for that purpose does not govern in this case, for the city owed them no such duty. *Smith v. St. Joseph*, 45 Mo. 449; *Bassett v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446; *Russell v. Columbia*, 74 Mo. 480, 41 Am. Rep. 325; *Kiley v. Kansas*, 87 Mo. 103, 56 Am. Rep. 443; *Brennan v. St. Louis*, 92 Mo. 482, 2 S. W. 481. At Taylor avenue, where the accident occurred, it seems that the water covered the street to the depth of 20 feet, and that the children went upon the ice which had accumulated over it on the pond, and were skating thereon, in consequence of which they were drowned; so that, unless the city was negligent in permitting the pond to remain in its uninclosed or unguarded condition, it cannot be held to respond in damages in consequence of the death of the children. In the case of *Schauf v. Paducah*, 20 Ky. L. Rep. 1796, 50 S. W. 42, there was a pond in the commons of the city, some dis-

tance from any highway; and while plaintiff's son, about seven years of age, was crossing the commons, he caught a bird, and, seeing some children fishing at the pond, he went over to where they were. The bird got away from him and fluttered out into the water, and he waded out after it, and in doing so ventured too far, and got over his depth and was drowned. It was ruled that the city was not liable. The court said: "Accumulations of water are common about all cities, especially river towns. A large part of the farm houses of this state have ponds about them. The city was under the same obligation as any other lot owner, and no more. The child did not lose his life from the dangerous proximity of the pond to a highway, or from any secret danger, such as a great depth of water near the bank, but from his voluntarily wading out in the pond some 10 feet after the bird. It was not the duty of the city to provide against such a contingency as this. In *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365, a boy eight years old, while fishing in a well in an old brickyard, fell in it and was drowned,—a stronger case for the plaintiff than we have here,—yet it was held that there could be no recovery. The court said: 'We are unable to see anything in this case to charge the defendants with negligence in not inclosing their lot or guarding the well. There was no concealed trap or deadfall, as in *Hydraulic Works Co. v. Orr*, 83 Pa. 332. The well was open and visible to the eye. No one was likely to walk into it by day, and this accident did not occur at night. A boy playing upon its edge might fall in, just as he might in any pond or stream of water. In this respect the well was no more dangerous than the river front on both sides of the city, where boys of all ages congregate in large numbers for fishing and other amusements. Vacant brickyards and open lots exist on all sides of the city. There are streams and pools of water where children may be drowned; there are inequalities of surface where they may be injured. To compel the owners of such property either to inclose it or fill up their ponds, and leave the surface so that trespassers may not be injured, would be an oppressive rule. The law does not require us to enforce any such principle, even where the trespassers are children. We all know that boys of eight years of age indulge in athletic sports. They fish, shoot, swim, and climb trees. All of these amusements are attended with danger, and accidents frequently occur. It is part of a boy's nature to trespass, especially where there is tempting fruit; yet I never heard that it was the duty of the owner of a fruit tree to cut it down because a boy trespasser may fall from its branches. Yet the principle contended for by plaintiff would bring us to this absurdity, if carried to its logical conclusion. Moreover, it would charge the duty of protection of children upon every member of the community except their parents.'" In *Dchanitz v. St. Paul*, 73 Minn. 345, 76 N. W. 48, there was within the city of St. Paul a slough, which during high wa-

ter in the Mississippi river filled with water, and had no outlet. The streets in this part of the city were dedicated to the public, but never by the city opened, kept, or used, although the tract was an open common. In this slough was an open basin, 60 to 75 feet across, which was contiguous to James street. For a long time the city had used this hollow basin as a place for dumping garbage and manure, which during high water floats upon the water, and forms a crust, upon which grows vegetation similar to that upon surrounding land. The plaintiff's intestate, a girl ten years old, left James street, upon which she had been traveling, and, either for convenience or pleasure, attempted to cross over this crust on her way to a packing house, one fourth of a mile distant, when the crust broke, and she fell into the water and was drowned. It was not alleged in the petition that the public had ever traveled over this dumping ground, or used it as an open common. It was held, on demurrer to the petition, that the city owed no duty of protection or warning in respect to the girl going upon this dumping ground or crust as a traveler, and hence was not liable in damages for her death.

The principle announced in these cases seems to be decisive of the case in hand, for although the petition avers that Taylor avenue, between Margaretta and Kossuth avenues, is a public highway, which implies that it was open to the use of the public, the subsequent allegation that it was covered with water 20 feet deep shows that it was impossible that it could have been used for such a purpose. The act of the children in venturing upon the ice was entirely voluntary upon their part, and is wholly unlike that class of cases where a person is traveling with proper care upon a sidewalk in a city, and by reason of its defective condition, or its close proximity to some hole or dangerous place, falls and is injured; for in such case the city will be held to respond in damages for the injury, upon the ground that as to such persons it is bound to keep its sidewalks in a reasonably safe condition for pedestrians both by day and by night, while, as to persons not using its sidewalks for the purposes for which they are intended (for instance, skating upon ice formed thereon on a pond 20 feet deep), it owes no such duty. Plaintiffs, however, rely upon *Lepnick v. Gaddis*, 72 Miss. 200, 26 L. R. A. 686, 16 So. 213, as supporting their contention. In that case Gaddis owned a lot at the intersection of two streets. A storehouse which stood thereon was burned down some years before the accident, leaving an uncovered cistern on the vacant lot. It was alleged in the petition that by the invitation and by the license of the defendant the public, in passing from street to street, crossed over his lot by two commonly traveled paths, which became well defined, and each of which ran near by the cistern. It was also alleged "that, during the winter of 1893, appellant, a stranger, while carefully using the highway (the night being dark, rainy, and cloudy, and there being nothing to show where the highway

ended and the vacant lot began), strayed therefrom, and, whilst so bewildered and lost, fell into said cistern and was injured." Held, upon demurrer to the petition, that it stated a good cause of action. It will be obvious that there is a very material difference between the facts in that case and in the one in hand, in this: In that case the injured party did not knowingly and voluntarily enter a place of danger, while in the case in hand they did. *Indianapolis v. Emmelman*, 108 Ind. 530, 9 N. E. 155, is another case relied upon by plaintiffs. In that case the defendant city, while constructing a bridge, made an excavation in the bed of a shallow stream, where it was crossed by a street, and constructed a levee from the bank to the excavation, and, knowing that the children of persons residing near were accustomed to play in the vicinity, left it, in the absence of workmen, without safeguards of any kind, by reason of which a child — years of age, while at play, without any fault on the part of its parents, fell into the excavation and was drowned. It was held that the city was liable. But that case, it will be seen, was botomed upon the negligent act of the city in digging a hole in the street, in which water accumulated, and into which plaintiff's child fell and was drowned. *Pekin v. McMahon*, 154 Ill. 141, 27 L. R. A. 206, 39 N. E. 484, is another case relied upon by plaintiffs. That was an action against the city as the owner of land next to one of its streets, upon which land there was a deep hole or pit, in which water had accumulated, and upon which floated logs and planks, which was alleged to be a source of attraction to children in the locality, who resorted there to play. Plaintiff's child, eight years of age, while so engaged was drowned; and it was held that plaintiff might recover. But that case is not in line with the rulings of this court in

Overholt v. Vieths, 93 Mo. 424, 6 S. W. 74; *Witte v. Stifel*, 126 Mo. 303, 28 S. W. 891; and *Butz v. Cavanaugh*, 137 Mo. 503, 38 S. W. 1104. In the case last cited it was held that the owner of land was not responsible for injuries sustained by a boy twelve years of age who voluntarily went into an excavation on private property near a street, and burned his feet in a smouldering fire therein. The petition does not allege that the accident happened in that portion of the pond which is located in the street; which was absolutely necessary in order to hold the city upon the ground that the pond was a nuisance; and, if the accident happened upon that portion of the pond located upon the land of Isabella Dawson, the city cannot be held liable for an injury occurring upon the land of another, upon the ground that the place where it occurs is a nuisance, and that the city had failed to abate it. *Moran v. Pullman Palace Car Co.* 134 Mo. 641, 33 L. R. A. 755, 36 S. W. 659; *Harman v. St. Louis*, 137 Mo. 494, 38 S. W. 1102.

As to the defendant Isabella Dawson, if the children were drowned upon that part of the pond which is upon her land, there is nothing in the petition which tends to show that they were there by her permission or invitation, in the absence of which it must be inferred that they were trespassers, and their representatives without remedy against her. *Witte v. Stifel*, 126 Mo. 303, 28 S. W. 891; *Moran v. Pullman Palace Car Co.* 134 Mo. 641, 33 L. R. A. 755, 36 S. W. 659; *Overholt v. Vieths*, 93 Mo. 424, 6 S. W. 74; *Butz v. Cavanaugh*, 137 Mo. 503, 38 S. W. 1104.

For these considerations, we affirm the judgment.

Gantt, P. J., concurs. Sherwood, J., absent.

NEBRASKA SUPREME COURT.

Nellie M. RICHARDSON, *Plff. in Err.*,

v.

COUNTY OF SCOTTS BLUFF.

(.....Neb.....)

*A contract by which a person agrees to draft a bill, have it introduced in a legislature, explain it to, and make arguments in its favor before, committees of the legislature, and do all things needful and proper to secure its passage, such party to receive no compensation unless the passage of the bill (an appropriation act) is procured, if successful the fees not fixed, but to be liberal, is vicious, illegal, and void, and, in the event of the passage of the bill, there can be no recovery of a fee in a suit upon the contract, nor as upon an implied contract, nor a quantum meruit for the services performed.

(December 10, 1899.)

*Headnote by HARRISON, Ch. J.

NOTE.—As to validity of contract to procure legislation, see *note* to *Houlton v. Dunn* (Minn.) 30 L. R. A. 737; and the subsequent cases of 48 L. R. A.

ERROR to the District Court for Scotts Bluff County to review a judgment in favor of defendant in a suit brought to recover compensation for services rendered in procuring from the legislature an appropriation to meet the expenses of a criminal trial affirmed.

The facts are stated in the opinion.

Messrs. M. B. Reese, C. A. Robbins, and F. L. Foss, for plaintiff in error:

The services rendered by the plaintiff for the defendant before the legislature in securing the passage of the bill for the relief of the defendant were lawful services.

Foltz v. Cogswell, 86 Cal. 542, 25 Pac. 60; *Kansas P. R. Co. v. McCoy*, 8 Kan. 533; *Stanton v. Embrey*, 93 U. S. 548, 23 L. ed. 983.

If the contract was legal it would not be made illegal by misconduct on the part of the plaintiff in carrying it out.

Houlton v. Nichol (Wis.) 33 L. R. A. 166, and *Crichfield v. Bermudez Asphalt Paving Co.* (Ill.) 42 L. R. A. 347.

Barry v. Capen, 151 Mass. 99, 6 L. R. A. 808, 23 N. E. 735.

There is no taint of illegality in the contract set forth in the petition in this case, and no evidence of the use of improper or unlawful means in its performance by the plaintiff. Illegality is not specially pleaded in the answer, and the question of its existence cannot arise under the issues framed and tried.

Dillon v. Darst, 48 Neb. 803, 67 N. W. 783.

The county board had the power and authority to employ the plaintiff as attorney or agent to present the merits of the county's claim against the state to the legislature.

Smith v. Sacramento City, 13 Cal. 531; *Hornblower v. Duden*, 35 Cal. 670; *Clarke v. Lyon County*, 8 Nev. 181; *Ellis v. Washoe County*, 7 Nev. 291; *Tatlock v. Louise County*, 46 Iowa, 138; *Memphis v. Adams*, 9 Heisk. 518, 24 Am. Rep. 331; *Broune v. Cumina County*, 31 Neb. 362, 47 N. W. 1050; *Hamilton County Comrs. v. Webb*, 47 Kan. 104, 27 Pac. 825.

The defendant is estopped to claim that the contract of employment was irregular.

Grand Island Gas Co. v. West, 28 Neb. 852, 45 N. W. 242; *Gutta Percha & Rubber Mfg. Co. v. Ogallala*, 40 Neb. 775, 59 N. W. 513.

Where such a contract has been performed by one party, and the other has received the benefits arising from such performance, the latter is estopped to plead that the execution of the contract was *ultra vires*.

State Bd. of Agri. v. Citizens' Street R. Co. 47 Ind. 407, 17 Am. Rep. 702; *Brown v. Merrick County Comrs.* 18 Neb. 355, 25 N. W. 356; *Northampton County's Appeal*, 30 Pa. 305; *Natchez v. Mallery*, 54 Miss. 499; *Argenti v. San Francisco*, 16 Cal. 255; *Clark v. Dayton*, 6 Neb. 192; *Hull v. Kearney County Comrs.* 13 Neb. 539, 14 N. W. 529; *Fister v. La Rue*, 15 Barb. 323; *Power v. May*, 114 Cal. 207, 46 Pac. 6; *Hamilton County Comrs. v. Webb*, 47 Kan. 104, 27 Pac. 825; *Ellsworth v. Rossiter*, 46 Kan. 237, 26 Pac. 674; *Cincinnati v. Cameron*, 33 Ohio St. 336; *Ward v. Forest Grove*, 20 Or. 355; *Hauk v. Marion County*, 48 Iowa, 472; *Kneeland v. Gilman*, 24 Wis. 39; *Allegheny City v. McClurkan*, 14 Pa. 81; *Beers v. Dallas City*, 16 Or. 334; *Brown v. Atchison*, 39 Kan. 49, 17 Pac. 456.

Mr. J. H. Broady, also for plaintiff in error:

The plaintiff's service was legal and a clear gain to defendant.

State ex rel. Sayre v. Moore, 40 Neb. 854, 25 L. R. A. 774, 59 N. W. 755; *Omaha & R. Valley R. Co. v. Brady*, 39 Neb. 49, 57 N. W. 767; *Foltz v. Cogswell*, 86 Cal. 542, 25 Pac. 60.

The county cannot retain the fruit of service, and deny the employment.

4 *Thomp. Corp.* §§ 5258, 5985; *Beach, Pub. Corp.* §§ 224, 227, 243, 623; *State ex rel. West v. Des Moines*, 96 Iowa, 521, 31 L. R. A. 186, 65 N. W. 818.

A principal who ratifies a contract made for him by another must adopt all the in-

strumentalities employed by such agent to bring it to a consummation.

Hall v. Hooper, 47 Neb. 111, 66 N. W. 33. No more effective ratification can be made than receipt of the fruits with full knowledge of the service that brought it.

Thomas v. City Nat. Bank, 40 Neb. 506, 24 L. R. A. 263, 58 N. W. 943; *People's Bank v. Manufacturers' Nat. Bank*, 101 U. S. 181, 25 L. ed. 907.

Nor can defendant take advantage of its own wrong to escape this just principle by omitting to keep any records of what it has done.

Itagoes v. Cuming County, 36 Neb. 375, 54 N. W. 683; *Cincinnati v. Cameron*, 33 Ohio St. 336; *Hauk v. Marion County*, 48 Iowa, 474; *Kneeland v. Gilman*, 24 Wis. 39; *Kansas P. R. Co. v. McCoy*, 8 Kan. 538; *Allegheny City v. McClurkan*, 14 Pa. St. 81; *Fister v. La Rue*, 15 Barb. 323; *Northampton County's Appeal*, 30 Pa. 305; *Argenti v. San Francisco*, 16 Cal. 255.

Messrs. M. J. Huffman, T. M. Morrow, and George W. Heist, for defendant in error:

The county commissioners cannot transact any business binding on the county when not in legal session at the place prescribed by statute.

Merrick County Comrs. v. Batty, 10 Neb. 170, 4 N. W. 959; *Follmer v. Nuckolls County Comrs.* 6 Neb. 213; 4 Am. & Eng. Enc. Law, pp. 375, 376; *Paola & F. River R. Co. v. Anderson County Comrs.* 16 Kan. 302; *Morris v. Merrell*, 44 Neb. 423, 62 N. W. 865.

Those contracting with county commissioners are charged with knowledge of the limits of their authority.

Lebeher v. Custer County Comrs. 9 Mont. 315, 23 Pac. 713.

The knowledge of two members of the board of county commissioners that plaintiff was expecting remuneration for her services is not sufficient to show that the board of county commissioners had knowledge that the plaintiff was working in the interests of the county before the legislature, and was expecting remuneration for said work.

Stoner v. Keith County, 48 Neb. 279, 67 N. W. 311; *Fouke v. Jackson County*, 84 Iowa, 616, 52 N. W. 71.

The alleged contract upon which plaintiff seeks to recover as set up in her petition and explained in the evidence introduced by her in support of her claim for work performed thereunder is clearly void as against public policy.

Clippinger v. Hepbaugh, 5 Watts & S. 315, 40 Am. Dec. 519; *Harris v. Roof*, 10 Barb. 480; *Rose v. Truax*, 21 Barb. 361; *Marshall v. Baltimore & O. R. Co.* 16 How. 314, 14 L. ed. 953; *Trist v. Child*, 21 Wall. 441, *sub nom. Burke v. Child*, 22 L. ed. 623; *Mills v. Mills*, 40 N. Y. 543, 100 Am. Dec. 535.

Harrison, Ch. J., delivered the opinion of the court:

There was filed in this action in the district court of Scotts Bluff county a petition which was in part as follows: "The plaintiff complains of the defendant, and alleges

that on or before the 1st day of January, 1893, the plaintiff was a duly-authorized attorney at law, and admitted to practice in the courts of the state of Nebraska, and as such attorney at law was engaged in the practice of her profession in accepting retainers, and prosecuting and defending such claims and cases as came within her employment as such attorney at law. That prior to said date and time, to wit, on or about the 1st day of September, 1889, a criminal action was tried in said county of Scotts Bluff, wherein the state of Nebraska prosecuted George S. Arnold for the crime of murder in the first degree, and such proceedings were had therein as resulted in a conviction of said Arnold. That the whole costs of said prosecution and trial amounted to about the sum of \$7,016.01. That at said time the said county of Scotts Bluff had but recently been organized, and, being compelled to pay said costs, the same became a heavy burden upon the people and taxpayers of said county, and the said county determined to make an attempt to obtain back the said expenses from the state by means of an appropriation by the legislature, and to do all things necessary or available to that result. Accordingly, thereupon, about the 14th day of January, 1893, two of the county commissioners of said Scotts Bluff county, being a majority of all the county commissioners of said Scotts Bluff county, for and on behalf of said county, orally employed this plaintiff to prepare a suitable appropriation bill, appropriating and paying to the said county sufficient funds from the treasury of the state of Nebraska to reimburse the said Scotts Bluff county the money so paid out and expended by the said county, and to argue the merits of said bill before the proper legislative committees, and to do all things needful and proper to procure the passage thereof and the money sought, and agreed to pay plaintiff, on condition of success, a very liberal fee and compensation for said services; all of which plaintiff agreed to do. Thereupon, at the instance and request of a majority of the county commissioners of said county of Scotts Bluff, acting for and on behalf of said county, and in pursuance of the said agreement of employment, on or about the said 16th day of January, 1893, this plaintiff entered upon said employment, and went to the city of Lincoln, the capital of said state, where and when the legislature of the state of Nebraska was in session, and, under and by virtue of said employment, prepared and drafted said appropriation bill, and appeared before the proper committees of the senate and house of representatives, and the various members of said bodies, in public, and, as attorney and agent of said county, presented to said committees and members the merits, legality, and justice of said bill, and procured and caused the said bill to be passed, appropriating to said Scotts Bluff county for said purpose the sum of \$7,495.73, and which bill, known as 'House Roll 276,' became a law of said state April 6, 1893, and the said sum of money was duly appropriated to and for the use and benefit

of said Scotts Bluff county. That at all times the said Scotts Bluff county, and the officers thereof, had full knowledge and notice of the services of plaintiff, and of her claim to remuneration therefor, and, so knowing of her said services and claim under the said contract, received and accepted the money so appropriated by said legislature to the said county. That the board of county commissioners of Scotts Bluff county, with the full knowledge of the said services of plaintiff, and that by means thereof the said appropriation was made, and of her said claim to remuneration, in session accepted and received said money so appropriated by the state as aforesaid, and all the fruits of plaintiff's services in the premises, and thereby ratified the agreement of employment between the members of the board of county commissioners for and in behalf of said county and the plaintiff as aforesaid, and the request of said two members of the board to this plaintiff to perform said services. The said board of county commissioners in session as a board have, with full knowledge of the services of the plaintiff in the premises, and that the receipt of said money from the state as aforesaid was the fruit of plaintiff's services in the premises, without which the said money would not have been obtained by said county, appropriated and distributed to the use of said county all the said money received as aforesaid from the state. That in procuring the passage of said act and the appropriation of said money the plaintiff expended a large amount of time, to wit, about three months, and a large amount of money in the defraying of her expenses, and her services in connection therewith are of the value of \$1,500 and more. That plaintiff complied with all the conditions of said contract of employment on her part to be performed, but defendant wholly failed to comply with the conditions thereof on its part, and has paid plaintiff nothing thereon. That the sum of \$1,500 is justly due and owing to plaintiff from defendant, with interest thereon at the rate of 7 per cent per annum from April 6, 1893."

In the answer there were admissions of the trial of the criminal case alleged in the petition, and that the costs were as stated in the petition; also that a bill or act for the "relief of Scotts Bluff county" had been prepared. It was pleaded that it was done by Hon. William Nevill, and was introduced by a member of the house of representatives, and, in the due course of legislation, became law, and by it there was appropriated to the purpose of the act the sum of \$7,495.73, which was afterwards received by the county. It was further pleaded in the answer that: "Defendant, further answering, alleges that after the passage and approval of the said bill, as aforesaid, and before the said money had been paid by the state to the defendant, to wit, on the 20th day of June, 1893, the plaintiff herein filed a pretended attorney's lien with the auditor of public accounts of the state of Nebraska, claiming the sum of \$1,500 as attorney's fees for prosecuting the passage of said bill through the legislature.

That the treasurer of the defendant, the county of Scotts Bluff, was thereby compelled, in order to obtain said money, to sue out of the supreme court of the state of Nebraska a peremptory writ of mandamus, at the cost of \$369.62, to defendant, directing the auditor to pay the said sum of money over to defendant. That afterwards, on or about the 20th day of June, 1894, plaintiff filed a claim against the defendant with the board of county commissioners of the county of Scotts Bluff, which claim was wholly disallowed, for the reason that defendant was not and is not indebted to plaintiff in any sum whatever, from which disallowance this appeal is taken. (6) Defendant, further answering, denies that it ever, at any time or at any place, in any manner, by its board of county commissioners, or any part of said board, in session or out of session, or by any means whatever, acting for and on behalf of defendant, employed plaintiff, either orally or in writing, or any other way, to prepare said appropriation bill, and present and argue the same to and before any of the committees of either house of said legislature on behalf of said defendant, or any other purpose, and is not indebted to plaintiff in any sum whatever." The reply was a denial of the new matter in the answer. A trial was had to the court, a jury being waived, and the defendant was given judgment. The plaintiff has prosecuted error to this court.

Evidence was introduced for plaintiff, but none on part of defendant. The theory of the county in the trial court, gathered from the arguments in the brief filed, was, and is now, that there may have been some talk between the plaintiff and individuals of the county board with reference to a proposed application of the county to the state or the legislature for relief in the matter of the costs in the criminal case which was alluded to in the pleadings, but no negotiations or agreements with the board; that the plaintiff could not recover, for the reason that the contract asserted by plaintiff was illegal and void, and the services rendered were in lobbying for the passage of the bill, and no recovery could be had for them. For the plaintiff, it is argued, to the contrary, that the contract was made, and valid, and enforceable. If not properly made with the board, there was, in effect, a ratification by the board, and there was an acceptance of the services and fruits and benefits thereof, and the county must pay for the work done by plaintiff. The application to the legislature, as is disclosed by the petition, was not predicated upon matter of claim which had a legal basis. It was said in *State ex rel. Sayre v. Moore*, 40 Neb. 834. 25 L. R. A. 774. 59 N. W. 755, in regard to this appropriation, that it was "in the nature of a donation,"—"a gift, in fact." In regard to the services to be performed by the plaintiff, as we have seen, the petition stated she was to do all things needful and proper to procure the passage of the bill, and her fee was to be a liberal one, contingent, however, and dependent

upon her procuring the passage of the bill. The plaintiff testified as follows:

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. You may commence at the beginning, and tell what took place between you and the commissioners with reference to obtaining an appropriation from the legislature, and tell what occurred between you and the commissioners.

A. In the spring or first of the year 1893, Elmer Morse, one of the board of commissioners,—chairman of the board of commissioners of Scotts Bluff county, I think he was,—spoke to me about going to Lincoln, and asked me if I thought I could procure the passage of a reimbursing bill. I told him I thought I could, but asked why Mr. Huffman, the county attorney, could not go. He said he thought Mr. Huffman—(Defendant objects to what was said about Mr. Huffman. Overruled. Exceptions.) He said he wished me to go because Mr. Huffman said he would have no influence with an independent legislature, while, if I wanted to go, he thought I could get a bill through the legislature. We talked about the matter of fee. He desired that if I went down that my expenses should all be paid, and said that, while he would hardly be willing to pay a fixed amount, I could have a very liberal percentage if I secured the passage of the bill. There was no amount agreed upon. The contract between him and myself was that I should have a very liberal fee.

Q. What if you did not obtain any appropriation?

A. I was not to receive anything. Mr. Decker agreed to the same thing.

One of the county commissioners testified as follows:

January, 1893, I made a verbal contract with the plaintiff, as an attorney and agent of Scotts Bluff county, Neb., to procure the passage of a bill by the legislature of Nebraska for the purpose of reimbursing Scotts Bluff county for the expense incurred in the trial of one George S. Arnold for the crime of murder. Said plaintiff was to prepare said bill, procure its introduction to the legislature, to argue the merits of said bill as agent and attorney of said Scotts Bluff county, Neb., and do whatever was necessary to secure the passage of said bill.

Q. For what compensation was the plaintiff in this case to carry out this contract on her behalf?

A. There was no specified sum mentioned. If the bill passed for only a part of the original sum sought, she was not to receive as much; but, in any event, she was to receive a very liberal fee in the event of success, which fee to be proportioned to the amount secured. The plaintiff was to pay all expenses, the county not to be held liable for any expense or compensation in the event that no amount sought in the bill was secured. On account of plaintiff taking the case conditionally, she was to receive a larger fee, in

case she succeeded in securing the passage of the bill mentioned, than she would have received if Scotts Bluff county had guaranteed her expenses or a fee in any case.

A member of the senate, at the time the appropriation bill referred to herein was passed, testified as follows:

Do you know the amount of work and labor that Mrs. Richardson actually expended in the matter of procuring a favorable report from the committee on claims in the house, and also the same committee in the senate, and in procuring the passage of said bill through both branches of the legislature?

A. I know she was there when the session opened, and was there continuously, until after the bill was passed and approved by the governor and became a law, as far as was necessary for the legislature and its approval was concerned, which was very near the close of the session, and that she worked continuously for that bill. I know that she went to every member of the senate time and time again in working for the bill, and I also know that the sentiment of the senate was against the bill until turned the other way by her.

A party who was a member of the house when the bill passed stated, in testimony in this case:

I myself, with other members, was asked to listen to her narrative of the case and circumstances very early in the session,—I think the first week; and it continued until the passage of the bill, the date of which I don't remember, but it was very late in the session. She was constantly interviewing myself and other members of the house by urging us to look into the merits of the bill, and in advancing her arguments to show the merits of the case.

Q. State, if you remember, any of the difficulties and adverse report that had to be overcome to get the bill through?

A. Why, the committee on claims reported once—the first time that they reported—to allow one half of the claim. She fought the report after it came back to the house, and got it recommitted. The committee were not satisfied. The members of the committee expressed themselves dissatisfied with her refusal to take one half of the claim, and finally reported it back to be indefinitely postponed. She then came upon the floor, and mustered members enough to defeat it,—the report for indefinite postponement,—and had it ordered to the general file, and later she secured enough members to call it up out of its regular order, and considered it in open

house, and finally secured the passage of the bill for the full amount asked.

Q. Speaking from your experience as a legislator, what would you say about the efficiency of her work and the legality of her means employed?

A. It was the shrewdest piece of work I ever saw done in the way of legislation, and the fact of her being a woman created a great deal of comment. She was the most persistent worker I ever saw, and the arguments she made, both before the committee and the members individually, were such as would have done credit to any attorney in the state.

In regard to contracts of the nature of the one which is herein asserted by plaintiff, it was stated in *Wood v. McCann*, 6 Dana, 366, quoted in Cooley, Const. Lim. 6th ed. 163, 164, and in an article by Samuel Maxwell in 28 Am. L. Rev. p. 211, on the subject of "Necessity for the Suppression of Lobbying," that "a lawyer may be entitled to compensation for writing a petition or even for making a public argument before the legislature or a committee thereof; but the law should not help him or any other person to a recompense for exercising any personal influence in any way in any act of the legislature. It is certainly important to just and wise legislation, and therefore to the most essential interests of the public, that the legislature be perfectly free from any extraneous influence which may either corrupt or deceive the members or any of them." The contract declared upon, and especially as shown by the evidence, was both specific and general in its terms relative to what was to be done by the plaintiff, and, moreover, it provided for a contingent fee,—an indefinite sum, but a liberal one, if the act passed; nothing, if it failed. The contract, if ever made, was vicious and illegal, and there could be no recovery under it, nor as upon an implied contract, nor upon a *quantum meruit*. *Wood v. McCann*, 6 Dana, 366; *Marshall v. Baltimore & C. R. Co.* 16 How. 315, 14 L. ed. 953; *Coquillard v. Bearss*, 21 Ind. 479, 83 Am. Dec. 362; *Harris v. Roof*, 10 Barb. 489; *Wood v. Black*, 2 MacArth. 268; *Chippewa Valley & R. R. Co. v. Chicago, St. P. M. & O. R. Co.* 75 Wis. 224, 6 L. R. A. 601, 44 N. W. 17. It was decided in the cases just quoted that a contract, the nature of the one in suit, which provided for contingent fee or compensation, is illegal and void, because such fee or compensation is a "direct and strong incentive to the exertion of not merely personal, but sinister, influence upon the legislature."

It follows that the judgment of the District Court must be affirmed.

NEW YORK COURT OF APPEALS.

Alfred Lyman DARROW *et al.*, *Appts.*,

v.

Lyman Darrow CALKINS *et al.*, *Respts.*

(134 N. Y. 503.)

1. Nonresident infants are not bound by a judgment settling their rights in real estate belonging to a partnership of which their deceased father was a member, entered before the service of summons by publication was complete, so that there was no jurisdiction to appoint a guardian *ad litem* for them.
2. Partnership real estate retains its character of realty in the absence of any express or implied agreement to the contrary between the partners, for the purpose of adjusting the rights of a surviving partner and the heirs of a deceased one, except so far as is necessary to adjust the partnership obligations and the accounts between the partners.
3. The intention to convert real estate into personalty is manifested by its purchase for partnership purposes with partnership funds, and its use in the partnership business indiscriminately with chattel property.
4. A conveyance of his interest in the partnership real estate by one partner to the other in trust to hold as partnership property, and to return the proper portion of the proceeds at the winding up of the partnership, is not in contravention of § 55 of the statute of uses and trusts, which contemplated merely the creation of original trusts.
5. A conveyance of his undivided half in the partnership real estate by one partner to the other, to be held as partnership property, with power to manage and sell, and to pay over to the grantor, his heirs, assigns, or other legal representatives "such portion thereof as shall, at the closing of the partnership business," belong to the grantor, discloses an intention to change the interest of the grantor and his representatives from one in lands to one in the surplus which shall remain after a sale of the property and the adjustment of the partnership affairs.
6. The heirs of a deceased partner are not necessary parties to a proceeding to adjust the partnership affairs, although a part of the assets consists of real estate, if, as between the partners and their representatives, it has been converted into personalty.

(December 17, 1897.)

APPPEAL by plaintiffs from an order of the Appellate Division of the Supreme Court, Second Department, granting a new trial upon exceptions heard before it in the first instance after verdict in plaintiffs' favor at a Special Term for Kings County in an action brought to obtain partition of certain lands which were alleged to have been part of the partnership assets of a firm of which plaintiffs' ancestor was a member. *Affirmed.*

NOTE.—On the general question when real estate will be considered partnership property, see *Robinson Bank v. Miller* (Ill.) 27 L. R. A. 449, and *note*.

As to rights of partners *inter se* in partnership real estate, see *Yorks v. Tozer* (Minn.) 28 L. R. A. 86, and *note*.

As to the position of tenants in dower and by 48 L. R. A.

Statement by **Andrews**, Ch. J.:

The action was for partition of certain lands in the city of Brooklyn. The plaintiffs, as children and heirs at law of one Edwin J. Darrow, who died intestate November 13, 1864, claimed title to one undivided half of such land, subject to the dower right of two of the defendants, as set forth in the complaint. The defendants, Calkins, are the widow and three children of one Daniel O. Calkins, who died intestate July 20, 1887. It is alleged in the complaint that Edwin J. Darrow, at the time of his death, "was seised in fee simple" of the undivided one half of the premises sought to be partitioned, and Daniel O. Calkins of the other undivided one half. It alleges that on the 25th day of September, 1861, the said Edwin J. Darrow, together with his wife, Lucy P. Darrow, made and executed "a certain deed in trust" bearing date on that day, which was recorded in the county of Kings, January 19, 1865, whereby the said Edwin J. Darrow and his wife conveyed all their estate in the aforesaid real property to the said Daniel O. Calkins "to have and to hold, to control and manage, sell and convey the whole or any part of said premises as part of the partnership property of the aforesaid Calkins and Darrow, and to pay over to the said Darrow, his heirs and assigns, or other legal representatives, such portion thereof as shall, at the closing of the partnership business of said Calkins and Darrow, belong to or be due or coming to the said Darrow, his heirs, executors, assigns, or other legal representatives." It alleges, in substance, that a copartnership had existed up to the death of Darrow in 1864, between him and Calkins, under the firm name of Calkins & Darrow; that the trust upon which the deed of September 25, 1861, was made had not been performed; that no accounting had been had to "these plaintiffs or to any court having jurisdiction in the matter;" that the copartnership had long since ceased and terminated; that there were no outstanding debts of the firm, and that the purpose of the said trust had ceased to exist, and the trust, if ever operative, had terminated.

The interests of the respective parties, as claimed by the plaintiffs, are set forth, in substance, that the plaintiffs are each entitled to an undivided fourth part of the premises, and the children of Calkins to the other one-half part, subject to dower interests as stated.

The complaint further states that a "certain pretended" judgment was entered on the 31st day of October, 1867, in the supreme court of the state of New York, in an action brought by Lucy P. Darrow (the widow of

the curtesy, and of the heirs and personal representatives of a deceased partner in relation to partnership real estate, see *Woodward-Holmes Co. v. Nudd* (Minn.) 27 L. R. A. 340.

The position of surviving partners in partnership real estate is also discussed in *Galbraith v. Tracy* (Ill.) 28 L. R. A. 129.

Edwin J. Darrow), as administratrix of his estate, against Daniel O. Calkins and others, for the purpose of ascertaining "what interest such administratrix had, if any, in the copartnership effects of the firm of Calkins & Darrow," by which judgment it was decreed that the plaintiffs (in this action) had no title or interest in the lands or real estate described in the complaint in that action, which included the premises sought to be partitioned in this action; that the present plaintiffs were infants and nonresidents of the state when the former action was brought, and that they were not legally brought in as parties to that action, and were not bound by the appearance of the guardian *ad litem* for them therein, and that the judgment as to them was without jurisdiction and void. The complaint prayed judgment for partition according to the interests as set forth in the complaint.

The defendants, Calkins, answered the complaint, and, among other things, alleged that Daniel O. Calkins, at the time of his death, was the sole owner of the lands described in the complaint, and that prior to his death he had fully performed all the terms and conditions contained in the deed of September 25, 1861, and that upon his death the lands descended to his children and heirs at law, subject to the dower right of his widow. The defendants, Calkins, further set up the judgment rendered in the action brought by the administratrix of Edwin J. Darrow against Daniel O. Calkins in bar of the present action, and also the statute of limitations.

On the trial the plaintiffs put in evidence deeds of four parcels of land, comprising forty-eight city lots in the city of Brooklyn, including the premises sought to be partitioned in this action, executed to Daniel O. Calkins and Edwin J. Darrow in the years 1850, 1852, 1853, and 1854. Also the deed of September 25, 1861, from Darrow and his wife to Calkins, hereinbefore referred to. This deed purported to convey to Calkins for the consideration expressed of \$1, all the right, title, and interest of Daniel and his wife in and to the real estate described therein in full and ample terms, as in a deed of bargain and sale, followed by the habendum in the words hereinbefore stated. The plaintiffs further read from the answer of Daniel O. Calkins in the suit brought against him by the administratrix of Darrow (as admissions binding upon the defendants in this action), certain paragraphs for the purpose, among other things, of showing that at the time of the commencement of that action there were assets of the firm in the hands of Calkins (other than the real property of the partnership) sufficient to pay all the debts of the firm and to adjust the accounts as between the partners. The plaintiffs then rested.

The defendants thereupon offered in evidence the judgment roll in the former action brought by the administratrix of Darrow. Its admission was objected to by the plaintiffs on the ground that the judgment in that action was not binding upon them, for the reason that it was rendered before the

court had acquired any jurisdiction over their persons. The court sustained the objection and excluded the judgment, except that it was admitted for the single purpose of laying the foundation of a title by adverse possession under the statute of limitations. The defendants then gave evidence tending to establish that from the time of the rendition of the judgment of October 31, 1867, Daniel O. Calkins and his children had been in adverse possession of the lands in question, claiming title under the judgment.

The following facts are disclosed by the record in the former action: In general, the action was brought by the administratrix of the deceased partner in the firm of Calkins & Darrow against Calkins, the surviving partner, and certain persons to whom he had contracted to sell certain of the lands conveyed to him by the deed of September 25, 1861, for an accounting of the affairs of the partnership, and to have the rights of the respective partners in the partnership property adjudged and determined.

The complaint set out the deed of September 25, 1861; averred that the lands embraced therein were held by Calkins as copartnership property to be by him disposed of as "assets of the firm;" that he had made certain pretended and collusive sales; that no settlement of the partnership accounts had ever been had; that Calkins had neglected and refused to account to the plaintiff as administratrix of Darrow, and in fraud of the partnership was applying the partnership property to his own use, etc.

Calkins, the surviving partner, in his answer denied all allegations of fraud; admitted in substance that the lands held by him under the deed of September 25, 1861, were copartnership property; that upon a settlement of the copartnership business and the sale of the land and real estate held under that deed, a considerable sum of money would be found to be due to the estate of Darrow; that he was anxious to have a settlement of the partnership business, and near the close of his answer he alleged that he was advised that the interest of Darrow "in the proceeds" of the lands was an interest in lands which, on his death, descended to his two infant children (the present plaintiffs); and (the answer proceeds) "he submits to the court that the children and heirs of said Edwin J. Darrow should have been made parties to this action." After the service of the answer the court, on the application of the attorneys for the plaintiff, and on the 15th of October, 1867, made an order amending the summons and complaint by adding the names of the present plaintiffs and defendants, and on the 18th day of October, 1867, made an order for the service of the amended summons upon them by publication, it appearing that they were infants and nonresidents of this state, and resided at Hartford, Connecticut. On the 22d day of October, 1867, the summons was personally served upon them at Hartford. On the 24th day of October, on the petition of their mother, an attorney of the court was appointed their guardian *ad litem* in this action, who put in an answer

submitting their rights and interests to the protection of the court. Thereafter, on the 31st of October, the final decree was entered. By this decree it was, among other things, adjudged that the interest of Edwin J. Darrow in the lands and real estate and the proceeds thereof was personal estate, and belonged to the plaintiff as administratrix; that the infant defendants (the present plaintiffs) had no title or interest therein as heirs of Edwin J. Darrow; that the assets of the copartnership of Calkins and Darrow, including contracts for the sale of real estate, were worth about \$28,000, and that the "plaintiff and defendant Daniel O. Calkins. on a full accounting between them as to said estate, having agreed upon the sum of \$14,000 as the present actual value of the interest of the estate of the said Edwin J. Darrow in the said copartnership property," therefore, etc. The decree further provided that the said Calkins pay the plaintiff as administratrix said sum of \$14,000, and that "thenceforward all the estate, rights, interests, property, and assets of the said firm shall belong to and be the property of the said Daniel O. Calkins as his own proper goods and chattels, and credits, lands, and tenements." Calkins paid the \$14,000 as required by the judgment, and entered into possession of all the real estate embraced in the deed of September 25, 1861, not previously sold.

The defense of the statute of limitations rests upon the following undisputed facts: (1) Death of Darrow (the ancestor) November 12, 1864; (2) he left two infant children (the plaintiffs); (3) adverse possession commenced October, 1867; (4) the infant children of Darrow were then nine and eleven years of age respectively; (5) one became of age in 1877 and one in 1879; (6) this action was commenced in June, 1894, twenty-seven years after the commencement of adverse possession and fifteen years after the youngest child became of age.

Mr. Charles N. Morgan, with Mr. Frederick B. Bailey, for appellants:

In the absence of an express or implied agreement to the contrary, real estate purchased by a copartnership with copartnership funds is at all times and for all purposes real estate, having all the legal qualities and incidents of real estate, and as such descends to the heirs at law of a deceased partner to the extent of his interest or share therein.

The purchase of real estate with funds of the copartnership for use in its business, and such use, have been held to imply an agreement that it should be personal assets for all purposes. Especially where it forms but a minor part of the whole capital, or its value depends largely upon its association with and dependence upon the business.

Dawson v. Parsons, 10 Misc. 428, 31 N. Y. Supp. 73; *McFarlane v. McFarlane*, 82 Hun, 239, 31 N. Y. Supp. 272; *Perin v. McGibben*, 6 U. S. App. 348, 53 Fed. Rep. 86, 3 C. C. A. 443; *Buckley v. Buckley*, 11 Barb. 43.

But when the purchase is a mere incident
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of the business, and made with funds not employed in the business, the legal character and incidents of such real estate are, in the absence of any express agreement to the contrary, to be determined by other and different considerations.

Three theories exist in respect of partnership real estate:

1. That all real estate purchased with partnership funds is *ipso facto* converted into personality for all purposes and in respect of all persons. This is sometimes termed the theory of "out-and-out" conversion.

2. That immediately upon such purchase it is equitably converted into personality and continues to be such until the partnership affairs are finally wound up and adjusted, whereupon there is a reconversion into reality of the surplus remaining of such real estate, which descends to the heir of a deceased partner, and does not go to his personal representatives.

3. That real estate purchased by a partnership remains real estate; that no equitable or other conversion into personality takes place except when and to the extent that it is necessary in order to discharge partnership obligations; that the right of the several partners to require that the property shall be applied to the satisfaction of partnership obligations is of the nature of a lien or charge on the real estate, and that, subject to such lien or charge, such property is and remains always real estate and subject to all the incidents and qualities of real estate.

The third theory only can be logically sustained on principle, or consistently applied; it is sanctioned by the better authorities in this country.

There is no equitable conversion, and no necessity for such conversion.

Fairchild v. Fairchild, 64 N. Y. 471; *Re Codding*, 9 Fed. Rep. 849; *Campbell v. Campbell*, 30 N. J. Eq. 415; *Story*, Eq. Jur. 1243; *Wilcox v. Wilcox*, 13 Allen, 252; *Shearer v. Shearer*, 98 Mass. 107.

The true theory rests wholly in the legal relations between the partners, making each the agent or trustee of the others in respect of the partnership affairs and business.

This right is an equitable right, and the power is an equitable trust power, both having their origin in the legal relation subsisting between the partners as such, and the lawful exercise of such power depends upon the existence of partnership obligations as a condition precedent.

Shanks v. Klein, 104 U. S. 18, 26 L. ed. 635; *Greenwood v. Marvin*, 111 N. Y. 423, 19 N. E. 228; *Buchan v. Sumner*, 2 Barb. Ch. 165, 47 Am. Dec. 305; *Greene v. Graham*, 5 Ohio, 265.

Before equity will aid this equitable trust power by decreeing conveyance by the heir, the necessity therefor must affirmatively appear.

The doctrine of absolute "conversion" and "reconversion" involves, as a necessary corollary, the doctrine of survivorship in respect of all the partnership property, both real and personal.

The doctrine of unlimited survivorship in real estate owned by partners finds no support in text-books or in any controlling case; it is distinctly and uniformly rejected.

1 Washb. Real Prop. p. 668; *Smith v. Jackson*, 2 Edw. Ch. 28; *Buchan v. Sumner*, 2 Barb. Ch. 165, 47 Am. Dec. 305; *Buckley v. Buckley*, 11 Barb. 43; *Fairchild v. Fairchild*, 64 N. Y. 471; *Campbell v. Campbell*, 30 N. J. Eq. 415; *Greene v. Graham*, 5 Ohio, 264; *Wilcox v. Wilcox*, 13 Allen, 252; *Shearer v. Shearer*, 98 Mass. 107; *Re Codding*, 9 Fed. Rep. 849; *Sage v. Sherman*, 2 N. Y. 432.

Darrow was seised in fee of an undivided half of the premises, and his deed to Calkins Sept. 25, 1861, did not convey the legal title to Darrow's half, but, at most, gave a power in trust in respect thereto.

Heermans v. Robertson, 64 N. Y. 332; *Wright v. Delafeld*, 23 Barb. 498.

A trust in Calkins for partitioning the land between the partners or their heirs would be invalid as such, but good as a power in trust.

Cooke v. Platt, 98 N. Y. 35.

All the trusts could be performed through the medium of a power, and a legal estate in the donee of the power will not be implied. *Nicoll v. Walworth*, 4 Denio, 385.

Messrs. William R. Syme and Daniel Daly, for respondents:

The deed of 1861 conveyed the whole estate of Edwin J. Darrow to Daniel O. Calkins, and Darrow retained only a right to share the proceeds of a sale of said property.

Mott v. Richtmyer, 57 N. Y. 49; 4 Kent, Com. 468; 3 Washb. Real Prop. 372; *Jackson ex dem. Bird v. Ireland*, 3 Wend. 100; *Kerney v. Wallace*, 24 Hun, 478.

Even were the appellants' claim maintained, that the conveyance effected by the deed was in trust, they could not maintain partition, for a *cestui que trust* cannot maintain partition.

Harris v. Larkins, 22 Hun, 488; *McLean v. McLean*, 50 N. Y. S. R. 509, 21 N. Y. Supp. 326.

Whether the deed of 1861 be an absolute conveyance, a conveyance in trust, or a power in trust, it certainly contains a power of sale, and is therefore a bar to partition.

Morse v. Morse, 85 N. Y. 53; *Davies v. Davies*, 15 N. Y. Week. Dig. 118, Affirmed in 92 N. Y. 633.

The judgment in the action of *Darrow's Administratrix v. Calkins* would be conclusive upon the appellants, even if they had not been made parties thereto.

As copartnership property it was personality, and not until the copartnership creditors were paid and the interests of the copartners were adjusted, did it resume its character as real estate.

McFarlane v. McFarlane, 82 Hun, 238, 31 N. Y. Supp. 272; *Fairchild v. Fairchild*, 64 N. Y. 471; *Greenwood v. Marvin*, 111 N. Y. 423, 19 N. E. 228; *Van Aken v. Clark*, 82 Iowa, 263, 48 N. W. 73; *Allen v. Withrow*, 110 U. S. 119, 28 L. ed. 90, 3 Sup. Ct. Rep. 517; *Hoyt v. Hoyt*, 69 Iowa, 174, 28 N. W. 500; *Walling v. Burgess*, 122 Ind. 299, 7 L. R. A. 481, 22 N. E. 419, 23 N. E. 1076; *Par-*
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sons, Partn. 14th ed. p. 360, note; *Godfrey v. White*, 43 Mich. 171, 5 N. W. 243; *Holton v. Guinn*, 65 Fed. Rep. 450; *Galbraith v. Gedge*, 16 B. Mon. 631; *Smith v. Jackson*, 2 Edw. Ch. 28; *Davis v. Smith*, 82 Ala. 198, 2 So. 897; *Thornton v. Dixon*, 3 Bro. Ch. 199.

Andrews, Ch. J., delivered the opinion of the court:

We are relieved on this appeal from the inquiry which frequently arises between copartners and copartnership and individual creditors, whether real estate purchased and conveyed to the copartners during the existence of the firm, by a conveyance which in form created a tenancy in common, is to be regarded as belonging to them collectively as partnership property, or as the individual property of each according to the interests disclosed on the face of the deed. The finding of the trial court, which is not assailed by any exception, is express, that the lands purchased by Daniel O. Calkins and Edwin J. Darrow were purchased by them as copartners out of the funds of the firm of Calkins & Darrow, and the deed executed by Darrow to Calkins on the 25th of September, 1861, upon which both the plaintiffs and the defendants rely as determining the character of the ownership, expressly declares in the habendum that the lands were partnership property of Calkins and Darrow. We are to assume, therefore, that the lands were originally purchased out of partnership funds, with the intention on the part of each partner that they should be held as partnership property, subject to administration under the rules governing the rights and interests of copartners in lands purchased by them to be held as the property of the partnership. The partners as between themselves made the lands partnership property, and the rights of creditors of the firm or of the individual partners are not involved. The only question here is between the plaintiffs as heirs of Darrow, and the children of Calkins, and it turns mainly on the question whether upon the death of Darrow in 1864 an undivided half part of the lands to which he acquired the legal title by the deeds running jointly to himself and Calkins, executed between 1850 and 1854, descended to and vested in the plaintiffs as his heirs at law. The plaintiffs at the death of Darrow were infants, and although this action was not commenced until thirty years after his death, nor until fifteen years after the younger of the plaintiffs became of age, it seems, under the case of *Hovell v. Leavitt*, 95 N. Y. 617, the plaintiffs, although they have slumbered upon their rights during an adverse possession of twenty-seven years, were not barred by the statute of limitations. So, also, we think it must be held that they were not barred by the adjudication in the decree of October 31, 1867, in the action brought by the administratrix of Darrow against Calkins for the settlement of the partnership affairs, which declared that "they had no title or interest in the said lands and real estate as heirs of the said Edwin J. Darrow, deceased, or otherwise." The service of the summons on the infants by publication was

not completed when the judgment was entered, and until the period of publication had expired the court could acquire no jurisdiction to appoint a guardian *ad litem* or to render a judgment binding upon them as parties to the action. *Brooklyn Trust Co. v. Bulmer*, 49 N. Y. 84; *Crouter v. Crouter*, 133 N. Y. 55, 30 N. E. 726.

The legal nature and incidents of land purchased by a copartnership with copartnership funds is a subject upon which great diversity of opinion exists in different jurisdictions. The English rule, after many fluctuations, has, as we understand the cases, come to be, that lands so purchased, whether purchased for or used for partnership purposes or not, provided only that they were intended by the partners to constitute a part of the partnership property, become *ipso facto*, in the view of a court of equity, converted into personality for all purposes,—as well for the purpose of the adjustment of the partnership debts and the claims of the partners *inter se*, as for the purpose of determining the succession as between the personal representatives of a deceased partner and the heir at law. *Darby v. Darby*, 3 Drew. 495; *Essex v. Essex*, 20 Beav. 442; Lindley, Partn. 3d ed. 681 *et seq.* This doctrine had its origin in England, and is said to have grown out of the peculiar law of inheritance there, and to remedy the hardship of the rule which excludes all but the eldest child from the inheritance, and of the other rule which exempts real estate in the hands of the heir from all but the specialty debts of the ancestor. *Fairchild v. Fairchild*, 64 N. Y. 471; *Shearer v. Shearer*, 98 Mass. 114. Lindley, in his work on Partnership, bases the rule on the nature of the interest of each partner in the partnership property. He says (p. 687) [5th ed. *343]: "From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts, it necessarily follows that in equity a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal, and not real, estate, unless, indeed, such conversion is inconsistent with the agreement between the parties." The concluding words of the paragraph quoted concede that the intention of the parties will prevent a conversion where that intention is manifested. The general doctrine of "out and out" conversion adopted by the English courts has not been followed to its full extent in this and many other American states. There is no policy growing out of our laws of inheritance or the exemption of lands from liability for simple contract debts, which requires the application of such a doctrine here. The lands of the ancestor are assets for the payment of all debts, and the persons who take by descent and under the statute of distribution are substantially the same. The necessity for an absolute conversion, supposed to be found in the nature of a partnership interest, seems hardly sufficient to justify a fiction which should deprive real estate of a partnership of its descendible 48 L. R. A.

quality when it is admitted on all hands that partnership real estate if the necessity arises is first subject to be appropriated in equity to the discharge of partnership obligations and the adjustment of the equities between the parties.

The clear current of the American decisions supports the rule that in the absence of any agreement, express or implied, between the partners to the contrary, partnership real estate retains its character as realty with all the incidents of that species of property between the partners themselves, and also between a surviving partner and the real and personal representatives of a deceased partner, except that each share is impressed with a trust implied by law in favor of the other partner, that so far as is necessary it shall be first applied to the adjustment of partnership obligations and the payment of any balance found to be due from the one partner to the other on winding up the partnership affairs. To the extent necessary for these purposes the character of the property is in equity deemed to be changed into personality. On the death of either partner, where the title is vested in both, the share of the land standing in the name of the deceased partner descends as real estate to his heirs, subject to the equity of the surviving partner to have it appropriated to accomplish the trust to which it was primarily subjected. The working out of the mutual rights which grew out of the partnership relation does not seem to require that the character of the property should be changed until the occasion arises for a conversion, and then only to the extent required. The American rule commends itself for its simplicity. It makes the legal title subservient in equity to the original trust. It disturbs it no further than is necessary for this purpose. The portion of the land not required for partnership equities retains its character as realty, and it leaves the laws of inheritance and descent to their ordinary operation. It would be useless to review in detail the authorities which seem to us to maintain what has been called the American rule. We refer to a very few of them. *Buchan v. Sumner*, 2 Barb. Ch. 167, 47 Am. Dec. 305; *Collumb v. Read*, 24 N. Y. 505; *Fairchild v. Fairchild*, 64 N. Y. 471; *Shearer v. Shearer*, 98 Mass. 114; *Shanks v. Klein*, 104 U. S. 18, 26 L. ed. 635.

If, as sometimes happens, the title to partnership real estate is in the name of one of the partners only, on the death of the other partner his equitable title descends to his heirs or goes to his devisees, but subject to the primary claims growing out of the partnership relation. *Fairchild v. Fairchild*, 64 N. Y. 471; Parsons, Partn. § 272. But the general principles to which we have adverted are those applied by courts of equity in determining the character and incidents of partnership real estate, in the absence of any agreement, express or implied, between the partners on the subject. It is, however, generally conceded that the question whether partnership real estate shall be deemed absolutely converted into personality for all purposes, or only converted *pro tanto* for the

purpose of partnership equities, may be controlled by the express or implied agreement of the partners themselves, and that where by such agreement it appears that it was the intention of the partners that the lands should be treated and administered as personality for all purposes, effect will be given thereto. In respect to real estate purchased for partnership purposes with partnership funds and used in the prosecution of the partnership business, the English rule of "out and out" conversion may be regarded as properly applied on the ground of intention, even in jurisdictions which have not adopted that rule as applied to partnership real estate acquired under different circumstances, and where no specific intention appeared. The investment of partnership funds in lands and chattels for the purpose of a partnership business, the fact that the two species of property are in most cases of this kind so commingled that they cannot be separated without impairing the value of each, has been deemed to justify the inference that under such circumstances the lands as well as the chattels were intended by the partners to constitute a part of the partnership stock, and that both together should take the character of personality for all purposes; and Judge Denio in *Collumb v. Read*, 24 N. Y. 505, expressed the opinion that to this extent the English rule of conversion prevailed here. That paramount consideration should be given to the intention of the partners, when ascertained, is conceded by most of the cases. See *Howie v. Carr*, 1 Sumn. 183, Fed. Cas. No. 6,802; *Fall River Whaling Co. v. Borden*, 10 Cush. 462; *Collumb v. Read*, 24 N. Y. 505; *Parsons, Partn.* § 267.

The legal title to the real estate which the heirs of Edwin J. Darrow asked to have partitioned in this action was vested in Daniel O. Calkins at the time of the death of Darrow in November, 1864. The plaintiffs on the death of their father took no legal estate in the lands. The legal estate which prior to the 25th day of September, 1861, Darrow held in the undivided one half of the premises was by the deed executed by him on that day conveyed to Calkins. That this was the effect of the deed we have no doubt. The deed is in terms full and ample to convey in fee the interest of Darrow to his grantee. It was coupled, however, with the declaration on the face of the deed that it was to be held by Calkins as partnership property, and the deed contained a power of management and sale, and this was followed by the significant clause, "and to pay over to the said Darrow, his heirs and assigns, or other legal representatives, such portion thereof as shall, at the closing of the partnership business of said Calkins and Darrow, belong to or be due or coming to said Darrow, his heirs, executors, assigns, or other legal representatives." The suggestion that the deed attempted to create an express trust in lands, not within the enumerated trusts permitted by § 55 of our statute of uses and trusts (1 Rev. Stat. 728), and was therefore void as a conveyance, is not well founded. It recog-

nized a pre-existing trust imposed upon the lands, implied by law and arising out of the partnership relation, and that the trust was to continue notwithstanding the conveyance of the legal title. This was not, we think, in contravention of the statute, which contemplated the creation of original trusts, and not the abrogation of existing trusts resulting from or implied by operation of law; nor did it render inoperative the subsequent recognition of such an existing trust in connection with a conveyance of the legal title. We think the legal title to the one-half part of the land passed by Darrow's deed, subject to the performance by Calkins of the trust therein declared. The important question is, whether it operated to convert the partnership lands into personality, and to change the interest of Darrow, or his representatives, from an interest in the land as realty into an interest in the proceeds of the lands, after a sale thereof by Calkins under the power contained in the deed.

We are of opinion that it was the intention of the partners, disclosed on the face of the deed and by the surrounding circumstances, to substitute in place of Darrow's prior interest in the lands, as such, an interest in him and his representatives in any surplus which should remain after a sale by Calkins and the adjustment of the partnership affairs. It is not necessary to decide whether the surplus, when ascertained, would go to the real or personal representatives of Darrow. As between Darrow and his representatives, and Calkins and his representatives, the deed operated as a conversion of the lands into personality. The personal representatives of Darrow were entitled to enforce in an action for an accounting and an adjustment of the partnership affairs, the claims of Darrow's estate. This was the purpose of the action which resulted in the decree of October 31, 1867, and we think that decree was binding upon the plaintiffs, not on the ground that they were parties, but for the reason that no controversy existing as to the original character of the property as partnership property, or as to the subsequent dealing between the partners in respect to it, the heirs of Darrow were not necessary parties to a final adjustment of the partnership affairs, including the interest of the Darrow estate growing out of his relation to the lands under the deed of September 25, 1861. It was open to the plaintiffs on an accounting by the administratrix of the Darrow estate to claim that the \$14,000 received by her under the decree in the action for an accounting should be regarded as real, and not personal, assets, and that they were entitled to it in their character as heirs, and not as distributees.

We think the order of the court below reversing the judgment at Special Term was correct, and it should, therefore, be affirmed, and judgment absolute entered for the defendants on the stipulation, with costs.

All concur.

NEVADA SUPREME COURT.

Charles L. KNOX, Appt.,
v.

Giovanni ROSSI, Resp't.

(.....Nev.....)

State courts are not within the provision of the Federal statute for raising revenue to meet war expenditures, that no instrument not stamped as required by the provisions of the statute shall be used in evidence in any court.

(May 23, 1899.)

APPEAL by plaintiff from a judgment of the District Court for Washoe County in favor of defendant for failure of proof of plaintiff's claim because of the ruling out of certain affidavits which did not contain the proper revenue stamps. *Reversed.*

The facts are stated in the opinion.

Mr. Frank H. Norcross, for appellant: Congress has no authority to declare that a written instrument, unless stamped, shall not be received as evidence in a state court. *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617; *Thomasson v. Wood*, 42 Cal. 417; *Carpenter v. Snelling*, 97 Mass. 452; *Green v. Holway*, 101 Mass. 243, 3 Am. Rep. 330; *Griffin v. Ranney*, 35 Conn. 239; *Latham v. Smith*, 45 Ill. 29; *Bunker v. Green*, 48 Ill. 243; *United States Exp. Co. v. Haines*, 48 Ill. 248; *Craig v. Dimock*, 47 Ill. 308; *Pargoud v. Richardson*, 30 La. Ann. 1286; *Holt v. Hart Bd. of Liquidators*, 33 La. Ann. 673; U. S. Const. art. 1, § 8; U. S. Const. Amend. X.

There is nothing in the act in question which prohibits any person interested in affixing the stamp provided by the law to documents of the character offered as evidence

NOTE.—Effect of omission to stamp an instrument on which the law requires a stamp, or to cancel the stamps on such an instrument.

I. Applicability of revenue laws to state courts.

- a. Provisions excluding unstamped instruments from evidence.
- b. Provisions invalidating unstamped instruments.
- c. Provisions as to recording.

II. Intent as affecting consequences of omitting stamp.

- a. Generally.
- b. Presumption and burden of proof as to intent.

III. Scope of acts, generally; effect of repeal.

IV. Effect of omission.

- a. Generally.
- b. Upon use of instrument as evidence.
 1. As primary evidence.
 2. Secondary and parol evidence; copies.
 3. As collateral evidence.
- c. Upon writs, processes, and orders of court.
- d. In Confederate states.
- e. Miscellaneous.

V. Subsequent stamping.

- a. What remedy available.
 1. By party or collector.
 2. Stamping copies.
- b. Time.
- c. Application to collector.
 1. Who may apply.
 2. To what district.
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 4. Miscellaneous.
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- e. Effect.

VI. Pleading and practice.

- a. Raising objection by demurrer.
- b. Necessity and sufficiency of averments as to omission.
- c. Who may raise or waive objection.
- d. Time of raising objection.
- e. Questions of fact; presumptions generally.
- f. Stamp not part of instrument.

VII. Failure to cancel; defective cancellation.

VIII. Foreign laws.

For effect on criminal prosecution of the omission of a stamp from an instrument requiring a stamp, see note to *Thomas v. State* (Tex. Crim. App.) 46 L. R. A. 454.

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I. Applicability of revenue laws to state courts.

a. Provisions excluding unstamped instruments from evidence.

Many of the state courts held that the provisions of the acts of 1864, 1865, and 1866, excluding unstamped instruments from evidence, did not apply to state courts.

Some of the cases denied the power of Congress to prescribe a rule of evidence for the state courts. Thus, *Bumpass v. Taggart*, 26 Ark. 398, 7 Am. Rep. 623; *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617; *Bennett v. Morris* (Cal.) 37 Pac. 929; *Latham v. Smith*, 45 Ill. 29; *Craig v. Dimock*, 47 Ill. 309; *Bunker v. Green*, 48 Ill. 243; *United States Exp. Co. v. Haines*, 48 Ill. 248; *Hanford v. Obrecht*, 49 Ill. 140; *Wilson v. McKenna*, 52 Ill. 43; *Bowen v. Byrne*, 55 Ill. 467; *Wallace v. Cravens*, 34 Ind. 534; *Hunter v. Cobb*, 1 Bush. 239; *Pargoud v. Richardson*, 30 La. Ann. 1286; *Holt v. Hart Bd. of Liquidators*, 33 La. Ann. 673; *Davis v. Richardson*, 45 Miss. 499, 7 Am. Rep. 732; *More v. Clymer*, 12 Mo. App. 11; *Sporrer v. Elfer*, 1 Helsk. 633; *Schultz v. Herndon*, 32 Tex. 390; *Jacobs v. Spofford*, 34 Tex. 153.

The following cases formally based their decisions that the provision was inapplicable to the state courts upon the language of the acts, rather than upon the want of power in Congress to make them so apply: *Trowbridge v. Addams*, 23 Colo. 518, 48 Pac. 535; *Griffin v. Ranney*, 35 Conn. 239; *Rockwell v. Hunt*, 40 Conn. 328; *Carpenter v. Snelling*, 97 Mass. 453; *Lynch v. Morse*, 97 Mass. 458; *Green v. Holway*, 101 Mass. 243, 3 Am. Rep. 330; *Moore v. Quirk*, 105 Mass. 49, 7 Am. Rep. 499; *Clemens v. Conrad*, 19 Mich. 170; *People ex rel. Barbour v. Gates*, 48 N. Y. 40; *Haight v. Grist*, 64 N. C. 739; *Stewart v. Hopkins*, 30 Ohio St. 502; *Dalley v. Coker*, 38 Tex. 815, 7 Am. Rep. 270; *Hale v. Wilkinson*, 21 Gratt. 75; *Telley v. Robinson*, 22 Gratt. 888; *Weltner v. Riggs*, 3 W. Va. 445.

The decisions in many of these cases, however, were largely influenced by the doubt which the courts entertained as to the power of Congress in the premises. That was true of *Carpenter v. Snelling*, 97 Mass. 452, which was followed by many of the other cases.

In accordance with the foregoing decisions, under the earlier acts it has been held that the provision of the act of 1898, excluding unstamped instruments from evidence, does not

in this case at any time before their admission as evidence.

If the view of the law taken by the lower court was correct, and it is necessary under this revenue law to obtain the consent of the collector of internal revenue in order to have the stamps legally affixed where they are omitted at the time, then the affidavit filed by the plaintiff in support of a new trial upon the ground of accident and mistake which ordinary prudence could not have guarded against shows a sufficient case to justify the granting of a new trial upon this ground.

Hoplock v. Stone, 49 Barb. 524; *Chinn v. Taylor*, 64 Tex. 385; *State v. Williams*, 27 Vt. 724; 14 Enc. Pl. & Pr. 743; *Bank of Tennessee v. Cowan*, 7 Humph. 70.

Messrs. Goodwin & Dodge, for respondent:

The documentary evidence offered, being

apply to the state courts. *Loring v. Chase*, 26 Misc. 318, 50 N. Y. Supp. 312; *People ex rel. Consumers' Brew. Co. v. Fromme*, 35 App. Div. 459, 54 N. Y. Supp. 833; *Gregory v. Hitchcock Pub. Co.* 63 N. Y. Supp. 975; *Cassidy v. St. Germain* (R. I.) 46 Atl. 35.

It seems, therefore, that the majority of the cases decided under the earlier acts, and all those decided under the act of 1898, in which the question has been expressly determined, hold that the provision excluding unstamped instruments from evidence is inapplicable to the state courts.

A number of cases, however, expressly held that it was applicable; thus:

Section 163 of the act of 1864 applies to the state courts, and governs in respect to the admissibility in evidence of unstamped instruments. *Muscattine v. Sterneman*, 30 Iowa, 526, 6 Am. Rep. 685.

Chartiers & R. Turnp. Co. v. McNamara, 72 Pa. 278, 13 Am. Rep. 673, held that the provision of the act of July 13, 1866, excluding unstamped instruments from evidence, was applicable to state courts, and was constitutional as so applied. The court said that the abstract proposition that Congress could not pass laws regulating the competency of evidence in the trial of causes in the several states was true, but was misapplied, and that the purpose of Congress was, not to make rules of evidence, but to stamp the instrument of evidence with a disqualification preventing its use as evidence until the delinquent had paid his tax, and that the provision was a proper exercise of the power of Congress to lay taxes.

The court further said that the power to forfeit the subject of the tax as a consequence of evasion or nonpayment was undeniable, and that the argument which affirmed that Congress could not, in order to secure the payment of the stamp duty, regulate the matter of the admissibility of unstamped paper evidencing the owner's right to money or other property, placed the incident on higher ground than the principle, and made the shadow more sacred than the substance. *Thompson, Ch. J.*, and *Agnew, J.*, dissented upon the ground that the legislation altered a rule of evidence belonging to the state tribunals, and *Sharswood, J.*, also dissented from the decision in the case, on what ground it does not appear.

Howe v. Carpenter, 53 Barb. 382, and *Davy v. Morgan*, 56 Barb. 218, held that the applicability of the provision to the state courts could not be questioned in view of the fact that effect had been frequently given to it. The two latter cases, however, have, in effect, been over-

partly stamped and partly unstamped, or irregularly stamped, it was properly rejected by the court.

War Revenue Law 1898, § 14; *Carpenter v. Johnson*, 1 Nev. 331; *Maynard v. Johnson*, 2 Nev. 16; *Wayman v. Torreyson*, 4 Nev. 124; *Bowker v. Goodwin*, 7 Nev. 135.

Belknap, J., delivered the opinion of the court:

At the trial the plaintiff offered in evidence two depositions taken under a commission issued to a notary public of the city of San Francisco, state of California, with his certificate thereunto attached. One of these was objected to upon the ground that the stamps required by the act of Congress approved June 13, 1898, entitled "An Act to Provide Ways and Means to Meet War Expenditures and for Other Purposes," were not canceled upon the day the certi-

ruled by the later New York cases already cited under this division.

Woodson v. Randolph, 1 Va. Cas. 128, which arose under the act of July 6, 1897, held that Congress could exclude unstamped instruments from evidence as an incident of its power to lay and collect taxes.

In addition to the cases that have expressly held that the provision was applicable to the state courts, there is a large number of cases in which the applicability of the provision has been assumed, or, at least, not questioned. It will be observed, however, that in many of these cases the decision was in favor of the admissibility of the instrument, so that the result was the same as if the provision had been held not to be applicable. Some of them, *e. g.*, *Plessinger v. Depuy*, 25 Ind. 419; *Morris v. McMorris*, 44 Miss. 441, 7 Am. Rep. 695; *Timp v. Dockham*, 29 Wis. 440, and *Grant v. Connecticut Mut. L. Ins. Co.* 29 Wis. 125,—expressly refrained from considering the question. Others, however, held the instruments in question inadmissible, and therefore necessarily implied that the provision was applicable.

b. Provisions invalidating unstamped instruments.

Some of the cases held that neither the validity, nor the admissibility, of unstamped instruments, when the question arose in the state court, was affected by the revenue acts, without apparently making any distinction between the provisions rendering unstamped instruments invalid and those expressly excluding them from evidence. Thus, *Bowen v. Byrne*, 55 Ill. 468; *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617; *Thomasson v. Wood*, 42 Cal. 416; *Wallace v. Cravens*, 34 Ind. 534; *Latham v. Smith*, 45 Ill. 20; *Craig v. Dimock*, 47 Ill. 308; *Bunker v. Green*, 48 Ill. 243; *Hanford v. Obrecht*, 49 Ill. 146; *Sporrer v. Elfer*, 1 Helsk. 633; *More v. Clymer*, 12 Mo. App. 11; *Hunter v. Cobb*, 1 Bush, 239.

It will be observed that neither the decision in *Carpenter v. Snelling*, 97 Mass. 452, nor the principle upon which it was rendered, viz.: that Congress merely intended to prescribe a rule of evidence for the Federal courts, and did not undertake, even if it could constitutionally do so, to prescribe a rule of evidence for the other courts,—reaches the provision rendering unstamped instruments invalid and of no effect. The same is true of the other Massachusetts cases cited under the preceding subdivision, and also of *Clemens v. Conrad*, 19

cate bears date. The other was objected to upon the ground that the certificate was not stamped as required by the provisions of the before-mentioned law. Each objection was sustained, and the evidence excluded. We have not been referred to any adjudication of the provisions concerning stamped instruments offered in evidence under the act of Congress cited, but substantially the same provisions, contained in the internal revenue law of 1862, have frequently been the subject of judicial construction. One of the early cases under this law was *Carpenter v. Snelling*, 97 Mass. 452. After stating that the law did not, in terms, extend to state courts,—and the law of 1898 in this respect is the same,—the decision proceeds: "The language of the enactment is only that no instruments or documents not duly stamped shall 'be admitted or

used as evidence in any court' until the requisite stamps shall be affixed. This provision can have full operation and effect if construed as intended to apply to those courts only which have been established under the Constitution of the United States and by acts of Congress, over which the Federal legislature can legitimately exercise control, and to which they can properly prescribe rules regulating the course of justice and the mode of administering justice. We are not disposed to give a broader interpretation to the statute. We entertain grave doubts whether it is within the constitutional authority of Congress to enact rules regulating the competency of evidence on the trial of cases in the courts of the several states, which shall be obligatory upon them. We are not aware that the existence of such a power has ever been judicial-

Mich. 170, and *People ex rel. Barbour v. Gates*, 43 N. Y. 40. The latter two cases, however, were supplemented by later decisions in the respective courts in which they were rendered. Thus, *Sammons v. Halloway*, 21 Mich. 162, held that Congress had no power to render void a contract made in one of the states between citizens thereof, and which was permitted by the local laws; and *Moore v. Moore*, 47 N. Y. 467, 7 Am. Rep. 466, after stating that the decision in *People ex rel. Barbour v. Gates*, 43 N. Y. 40, *supra*, rested upon the principle that the Federal government could not prescribe a rule of evidence for the state courts, went a step further, and held that Congress could not prescribe a rule for the transfer of property within the state, and accordingly held that a deed was not invalid because not stamped as required by the revenue laws.

Warren v. Paul, 22 Ind. 276; *State ex rel. Lakey v. Garton*, 82 Ind. 1, 2 Am. Rep. 815; *Dawson v. McCarty*, 21 Wash. 314, 57 Pac. 816, and *Jones v. Keep*, 19 Wis. 869,—held that Congress had no power to tax legal proceedings in state courts, and that therefore the omission of a stamp from a writ and process of the state court did not invalidate it.

Walton v. Bryneth, 24 How. Pr. 857, held that Congress might impose a penalty, but could not invalidate the proceedings in an action because of the omission from the summons of the stamp required by the act of 1862.

German Liederkrantz v. Schlemann, 25 How. Pr. 388, on the contrary, held that Congress had power to require summonses in state courts to be stamped, and that a summons issued without such a stamp was ineffectual.

Prather v. Zulauf, 38 Ind. 155, held, upon the authority of *Wallace v. Cravens*, 84 Ind. 534, and *Smith v. Hunter*, 38 Ind. 106, that the want of the required stamp did not render a note invalid.

People ex rel. Consumers' Brew. Co. v. Fromme, 35 App. Div. 459, 54 N. Y. Supp. 833, and *Gregory v. Hitchcock Pub. Co.* 63 N. Y. Supp. 975, hold that neither the provision invalidating unstamped instruments, nor that excluding them from evidence, in the act of 1898, is applicable in the state courts; but, as already shown, there is express authority in the earlier New York cases for the decision in respect to the former, as well as in respect to the latter, provision.

c. Provisions as to recording.

It was also expressly held, under the earlier acts, that for the same reason that the clauses excluding unstamped instruments from evi-

dence must be regarded as inapplicable to the state courts, those relating to the recording of unstamped instruments must be held to apply only to such instruments as are required by Federal legislation to be recorded, and to officers under Federal control. *Moore v. Quirk*, 105 Mass. 49, 7 Am. Rep. 499; *Stewart v. Hopkins*, 30 Ohio St. 502.

A similar decision is made under the act of 1898, by *People ex rel. Consumers' Brew. Co. v. Fromme*, 35 App. Div. 459, 54 N. Y. Supp. 833.

II. Intent as affecting consequences of omitting stamp.

a. Generally.

Section 158 of the act of June 30, 1864, provided that "any person . . . who shall make, sign, or issue . . . any instrument, document, or paper of any kind or description whatsoever, . . . without the same being duly stamped, . . . with intent to evade the provisions of this act, shall for every offense forfeit the sum of \$200, and such instrument, document, or paper shall be deemed invalid and of no effect." This provision was left undisturbed by the act of March 3, 1865, and the only change made by act of July 13, 1866, § 9, was the addition of the words "not being duly stamped according to law" after the words "and such instrument. . . ."

The great weight of authority held, though not with entire unanimity, that the words "with intent to evade the provisions of this act" qualified the clause rendering unstamped instruments invalid and of no effect, as well as the clause prescribing a pecuniary penalty for failure to affix the stamps, and accordingly established the doctrine that such an intent was necessary to invalidate an instrument for want of a stamp.

The following cases so held in respect to instruments governed by the act of 1864 or that of 1865: *Whigham v. Pickett*, 43 Ala. 140; *Craig v. Dimock*, 47 Ill. 308; *Dudley v. Wells*, 55 Me. 145; *Tobey v. Chipman*, 13 Allen, 123; *Govern v. Littlefield*, 13 Allen, 127, note; *Willey v. Robinson*, 13 Allen, 128, note; *Lynch v. Morse*, 97 Mass. 458; *Morris v. McMorris*, 44 Miss. 441, 7 Am. Rep. 695; *Waterbury v. McMillan*, 46 Miss. 685; *Whitehill v. Shickle*, 43 Mo. 537; *Beebe v. Hutton*, 47 Barb. 187; *Vorebeck v. Roe*, 50 Barb. 302; *Howe v. Carpenter*, 53 Barb. 382; *Cagger v. Lansing*, 57 Barb. 421; *Quin v. Lloyd*, 1 Sweeny, 243; *Baird v. Pridmore*, 31 How. Pr. 359; *Davy v. Morgan*, 56 Barb. 222; *New Haven & N.*

ly sanctioned. There are numerous and weighty arguments against its existence. We cannot hold that there was an intention to exercise it, where, as in the provision now under consideration, the language is fairly susceptible of a meaning which will give it full operation and effect within the recognized scope of the constitutional authority of Congress." In *Green v. Holway*, 101 Mass. 243, 3 Am. Rep. 339, the same court said: "The decision in *Carpenter v. Snelling*, 97 Mass. 452, that this enactment must be limited to the courts of the United States, and not be construed to extend to, if,

indeed, it could constitutionally bind, the state courts, was made after full consideration, is in accordance with the judgments rendered, without a doubt being raised upon this point, by the supreme courts of Vermont, Maine, and Pennsylvania in the cases above cited, and with the later adjudications of the very question in *Griffin v. Ranney*, 35 Conn. 239; *Craig v. Dimock*, 47 Ill. 308; *Bunker v. Green*, 48 Ill. 243, and *United States Exp. Co. v. Haines*, 48 Ill. 248, and is in harmony with, if it does not fall within, the principle of construction upon which the amendments of the Consti-

Co. v. Quintard, 37 How. Pr. 29; *Harper v. Clark*, 17 Ohio St. 190; *Gaylor v. Hunt*, 23 Ohio St. 255; *Stewart v. Hopkins*, 30 Ohio St. 502; *McGovern v. Hoesback*, 53 Pa. 176; *Corry Nat. Bank v. Rouse*, 3 Pittsb. 18; *Hitchcock v. Sawyer*, 39 Vt. 412; *Weltner v. Riggs*, 3 W. Va. 445; *Rheinstrom v. Cone*, 26 Wis. 163. 7 Am. Rep. 48.

And the following cases so held in respect to instruments governed by act of 1866: *Campbell v. Wilcox*, 10 Wall. 421, 19 L. ed. 973; *Mobile & G. R. Co. v. Edwards*, 46 Ala. 267; *Foster v. Holley*, 49 Ala. 593; *Perryman v. Greenville*, 51 Ala. 507; *Bibb v. Bonds*, 57 Ala. 509; *Trowbridge v. Addams*, 23 Colo. 518, 48 Pac. 535; *Hallock v. Jaudin*, 34 Cal. 107; *Sawyer v. Parker*, 57 Me. 39; *Ogden v. Forney*, 33 Iowa, 206; *Morgan v. Graham*, 35 Iowa, 213; *Smith v. Hunter*, 33 Ind. 106; *Mitchell v. Home Ins. Co.* 32 Iowa. 421; *Ricord v. Jones*, 33 Iowa, 26; *Brown v. Thompson*, 59 Me. 372; *Emery v. Hobson*, 63 Me. 33; *Black v. Woodrow*, 39 Md. 194; *Holyoke Mach. Co. v. Franklin Paper Co.* 97 Mass. 150; *Green v. Holway*, 101 Mass. 243, 3 Am. Rep. 339; *Moore v. Quirk*, 105 Mass. 49; *Cabbott v. Radford*, 17 Minn. 320, Gil. 206; *Sanborn v. Nockin*, 20 Minn. 178, Gil. 103; *Burnap v. Losey*, 1 Lans. 111; *Boehne v. Murphy*, 46 Mo. 57, 2 Am. Rep. 485; *Frink v. Thompson*, 4 Lans. 490; *Baker v. Baker*, 6 Lans. 509; *Vall v. Knapp*, 49 Barb. 299; *Vorebeck v. Roe*, 50 Barb. 302; *Schermerhorn v. Burgess*, 55 Barb. 422; *Vaughan v. O'Brien*, 57 Barb. 491; *Harris v. Trimble*, 1 Cin. Sup. Ct. Rep. 108; *Atkins v. Plympton*, 44 Vt. 21; *Grant v. Connecticut Mut. L. Ins. Co.* 29 Wis. 125; *Timp v. Dockham*, 29 Wis. 440; *Smith v. Scott*, 31 Wis. 437; *Fenelex v. Hogoboon*, 31 Wis. 172.

As pointed out in the subsequent case of *Green v. Holway*, 101 Mass. 243, 3 Am. Rep. 339; *Carpenter v. Snelling*, 97 Mass. 452, assumed, and necessarily implied, that under § 158 the mere omission to affix the stamp did not render the instrument wholly void.

Trull v. Moulton, 12 Allen, 390, also held that a fraudulent intent was necessary to invalidate an unstamped instrument; but it does not appear what statute governed the case.

Section 13 of the act of 1898 contains a provision substantially like that of § 158 of the act of 1864 as amended by the act of 1866, and it has been held, in conformity with the decisions under the earlier acts, that an intent to evade the provisions of the act must be shown in order to invalidate the instrument. *Cassidy v. St. Germain* (R. I.) 46 Atl. 35.

The cases of *Oxford Iron Co. v. Spradley*, 51 Ala. 171; *Mobile & G. R. Co. v. Edwards*, 46 Ala. 207; *Works v. Hershey*, 35 Iowa, 340; *Dela v. Stanwood*, 61 Me. 51; *Baker v. Baker*, 6 Lans. 509; and *Hale v. Wilkinson*, 21 Gratt. 75,—applied the doctrine of the foregoing cases to instruments executed before the act of June 30, 1864, which introduced the phrase "with intent to evade the provisions of this act," 48 L. R. A.

went into effect. They, however, purport to follow decisions made with reference to the acts of 1864, 1865, and 1866, and do not allude to the change of phraseology introduced by the act of 1864, and upon which the decisions relied on were based.

A few cases held, contrary to the great weight of authority, that the phrase "with intent to evade the provisions of the act" did not qualify the words rendering unstamped instruments invalid and of no effect, and that, therefore, even the inadvertent omission of the required stamp invalidated the instrument. Thus: *Hugus v. Strickler*, 19 Iowa, 413; *O'Hare v. Leonard*, 19 Iowa, 515; *Miller v. Bone*, 19 Iowa, 571; *Botkins v. Spurgeon*, 20 Iowa, 598; *Barney v. Ivins*, 22 Iowa, 163; *Berry v. Boyd*, 28 Iowa, 410; *Muscatine v. Sterneman*, 30 Iowa, 526, 6 Am. Rep. 685; *Maynard v. Johnson*, 2 Nev. 16; *Wayman v. Torreyson*, 4 Nev. 124; *Miller v. Morrow*, 3 Coldw. 587.

The Iowa cases, however, were expressly overruled by *Mitchell v. Home Ins. Co.* 32 Iowa, 421, which was decided on the authority of *Campbell v. Wilcox*, 10 Wall. 421, 19 L. ed. 973, and was followed in *Ricord v. Jones*, 33 Iowa, 26; *Ogden v. Forney*, 33 Iowa, 205, and *Morgan v. Graham*, 35 Iowa, 213.

In *Miller v. Larmon*, 38 How. Pr. 417 (a county court decision), it was held that the omission of a stamp from a constable's return invalidated the return without reference to the intent. The opinion undertakes to distinguish the case from *Beebe v. Hutton*, 47 Barb. 187, by reason of the change of phraseology, which, it says, was introduced by the act of March 24, 1867. The reference to the statute is evidently a mistake, as the change on which the court relies is that already alluded to as made by the act of July 13, 1866,—viz: the addition of the words "not being stamped according to law."

The New York cases heretofore cited as arising under the act of 1866 show that the change was not considered to affect the doctrine already established by the cases arising under the acts of 1864 and 1865.

It will be observed that the provision rendering unstamped instruments invalid and of no effect, and that expressly excluding unstamped instruments from evidence, were incorporated in different sections in the earlier acts, as well as in the act of 1898. The section incorporating the latter provision does not contain the qualifying words "with intent to evade the provisions of this act," and it is not always apparent how the obstacle furnished by it to the admission of unstamped instruments was obviated by those courts which held that the instrument was not invalid because there was no intent to evade the act.

Schermerhorn v. Burgess, 55 Barb. 422, expressed the opinion, but did not authoritatively decide, that the provision excluding unstamped instruments from evidence only ap-

tution of the United States securing fundamental rights in the modes of judicial proceedings have been held to apply to such proceedings in the courts of the United States only, and not to those in the courts of the several states. *Twitchell v. Pennsylvania*, 7 Wall. 321, 19 L. ed. 223, and cases cited; *Livingston v. Moore*, 7 Pet. 482, 531, 8 L. ed. 755, 781; *Com. v. Hitchings*, 5 Gray, 482." Decisions contrary to the views here stated were made in the cases of *Maynard v. Johnson*, 2 Nev. 25, and *Wayman v. Torreyson*, 4 Nev. 124, but when

these cases were decided the effect of congressional legislation upon the jurisdiction and practice of the state courts had not received the careful judicial consideration afterwards given it, and no suggestion was then made that the act of Congress prescribed a rule of evidence for Federal courts only.

Judgment reversed, and cause remanded for a new trial.

Bonnifield, Ch. J., and **Massey**, J., concur.

piled to instruments which were invalid for want of a stamp, *i. e.* when the omission was fraudulent.

That construction of the act may have been assumed by the following cases, which seem to have considered the objection to the admissibility of an unstamped instrument effectually disposed of when it was held that the instrument was not invalid. At all events, they do not otherwise dispose of the provision making unstamped instruments inadmissible as distinguished from the provision making them invalid: *Perryman v. Greenville*, 51 Ala. 507; *Bibb v. Bonds*, 57 Ala. 509; *Ricord v. Jones*, 33 Iowa, 26; *Mitchell v. Home Ins. Co.* 32 Iowa, 421; *Black v. Woodrow*, 39 Md. 194; *Atkins v. Plympton*, 44 Vt. 21.

Beebe v. Hutton, 47 Barb. 187, however, expressly held that the instrument must be stamped before being admitted, even if it were not invalid, and *Whigham v. Pickett*, 43 Ala. 140, reversed the judgment and remanded the cause to give plaintiff an opportunity to have the stamp affixed by the collector, although it held that the instrument was not invalid for want of a stamp.

In *Craig v. Dimock*, 47 Ill. 308, the instrument had been stamped by the collector, and in *Tobey v. Chipman*, 13 Allen, 123, and *Morris v. McMorris*, 44 Miss. 441, 7 Am. Rep. 695, it was stamped in the presence of the court.

In *Beebe v. Hutton*, 47 Barb. 187, plaintiff offered to stamp the instrument, and in *Davy v. Morgan*, 56 Barb. 218, the instrument was excluded, because the intent to evade the act was not negatived.

Again, the provision of the act of June 30, 1864, § 163, excluding unstamped instruments from evidence by its terms, only applied to instruments executed before the passage of the act. As already stated, that section was not disturbed by the act of 1865, and the provision of the act of 1866 with reference to this matter was held to apply only to instruments executed after its adoption (*Rheinstrom v. Cone*, 26 Wis. 163, 7 Am. Rep. 48), so, it would seem, relatively to unstamped instruments executed after the act of 1864, and before the act of 1866, went into effect, that the only obstacle to admissibility was the provision rendering unstamped instruments invalid and of no effect if the omission was with intent to evade the revenue acts.

That view was taken by *Govern v. Littlefield*, 13 Allen, 127, note, after the passage of the act of 1865, and by *Rheinstrom v. Cone*, 26 Wis. 163, 7 Am. Rep. 48, and *Gaylor v. Hunt*, 23 Ohio St. 255, after the passage of the act of 1866. It may also have been the view of *Howe v. Carpenter*, 53 Barb. 382, and *McGovern v. Hoesback*, 53 Pa. 176.

The following cases recognized the necessity of disposing of the express provision excluding unstamped instruments from evidence after holding that an intent to evade the act was necessary to invalidate the instrument, and did so by holding that it did not apply to the 48 L. R. A.

state courts: *Trowbridge v. Addoms*, 23 Colo. 518, 48 Pac. 535; *Carpenter v. Snelling*, 87 Mass. 452; *Lynch v. Morse*, 97 Mass. 458; *Green v. Holway*, 101 Mass. 243, 3 Am. Rep. 339; *Stewart v. Hopkins*, 30 Ohio St. 502; *Quin v. Lloyd*, 1 Sweeny, 253; and *Emery v. Hobson*, 63 Me. 33.

The following cases did not involve the question as to admissibility, but only that of validity: *Hallock v. Jaudin*, 34 Cal. 167; *Smith v. Hunter*, 33 Ind. 106; *Sawyer v. Parker*, 57 Me. 39; *Brown v. Thompson*, 59 Me. 372; *Baird v. Fridmore*, 31 How. Pr. 359; *New Haven & N. Co. v. Quintard*, 37 How. Pr. 29; *Burnap v. Losey*, 1 Lans. 111; *Vorebeck v. Roe*, 50 Barb. 302; *Vall v. Knapp*, 49 Barb. 299; *Vaughn v. O'Brien*, 57 Barb. 491; *Moore v. Quirk*, 103 Mass. 49, 7 Am. Rep. 499; *Cabbott v. Radford*, 17 Minn. 320, Gil. 296; *Hale v. Wilkinson*, 21 Gratt, 75.

b. Presumption and burden of proof as to intent.

The weight of authority in those courts which hold that the intent characterizing the omission is material places the burden of proving an intent to evade the statute upon the party objecting to the admissibility, or questioning the validity, of the unstamped instrument. *Perryman v. Greenville*, 51 Ala. 507; *Bibb v. Bonds*, 57 Ala. 509; *Whigham v. Pickett*, 43 Ala. 140; *Mitchell v. Home Ins. Co.* 32 Iowa, 421; *Trowbridge v. Addoms*, 23 Colo. 518, 48 Pac. 535; *Ricord v. Jones*, 33 Iowa, 26; *Ogden v. Forney*, 33 Iowa, 205; *Works v. Hershey*, 35 Iowa, 340; *Hallock v. Jaudin*, 34 Cal. 167; *Sawyer v. Parker*, 57 Me. 39; *Brown v. Thompson*, 59 Me. 372; *Dela v. Stanwood*, 61 Me. 51; *Black v. Woodrow*, 39 Md. 194; *Morris v. McMorris*, 44 Miss. 441, 7 Am. Rep. 695; *Waterbury v. McMillan*, 46 Miss. 635; *New Haven & N. Co. v. Quintard*, 37 How. Pr. 29; *Cagger v. Lansing*, 57 Barb. 421; *Burnap v. Losey*, 1 Lans. 111; *Baker v. Baker*, 6 Lans. 509; *Quin v. Lloyd*, 1 Sweeny, 253; *Smith v. Scott*, 31 Wis. 437; *Cassidy v. St. Germain* (R. I.) 46 Atl. 35; *McGovern v. Hoesback*, 53 Pa. 176; *Grant v. Connecticut Mut. L. Ins. Co.* 29 Wis. 125; *Timp v. Dockham*, 29 Wis. 440.

Howe v. Carpenter, 53 Barb. 382, however, expressly holds that the burden was upon the party offering an unstamped instrument in evidence or asserting its validity, to negative an intent to evade the statute, and a similar decision was made by *Beebe v. Hutton*, 47 Barb. 187; *Davy v. Morgan*, 56 Barb. 218; and *Baird v. Fridmore*, 31 How. Pr. 359.

Dylington v. Oaks, 32 Iowa, 488, held that the intentional omission of a stamp, the parties denying the constitutionality of the law as applied to the instrument in question, was the equivalent of an "intent to evade."

III. Scope of acts, generally; effect of repeal.

It was unnecessary, under the act of 1863, to affix a stamp to a promissory note executed

in a foreign country and payable generally. *Blunt v. Bates*, 40 Ala. 470.

A note made prior to the passage of the law requiring notes to be stamped is inadmissible until stamped, but is not void, under act of June 30, 1864, § 163, requiring such notes to be stamped before they can be used as evidence in any court, and authorizing parties to affix the requisite stamps in the presence of the court. *McLearn v. Skelton*, 18 La. Ann. 514.

The repeal by U. S. Stat. at L. 1871-72, p. 256, § 36, of all taxes imposed by stamps under and by virtue of schedule B of § 170 of the act of June 30, 1864, and the acts amendatory thereof, except the tax on banks checks, drafts, or orders, did not operate on contracts previously entered into. *Foster v. Holley*, 49 Ala. 593.

The repeal of the stamp acts removed the prohibition against recording unstamped deeds executed while they were in force. *Hoffecker v. New Castle County Mut. Ins. Co.* 5 Houst. (Del.) 101.

Leavitt v. Leavitt, 4 Me. 161, and *Edeck v. Banuer*, 2 Johns. 423, held that the repeal by the act of 1802 of the act of July 6, 1797, did not obviate the objection under that act to the admission in evidence of an unstamped instrument executed while it was in force, unless the holder complied with a proviso of the repealing act by paying the proper stamp duty, and the prescribed penalty, and having the collector make an indorsement to that effect.

Rheinstrom v. Cone, 26 Wis. 163, 7 Am. Rep. 48, held that the provision of act of July 13, 1866, that no deed, instrument, document, writing, or paper required by law to be stamped, which has been signed or issued with a deficient stamp, or any copy thereof, shall be recorded or admitted or used as evidence in any court until a legal stamp or stamps denoting the amount of tax has been affixed thereto as prescribed by law, applied only to instruments executed or issued after that act took effect.

An unstamped written contract, executed after the act of July 1, 1862, went into effect, is not evidence of an existing contract between the parties, notwithstanding the provisions of the amendatory acts that such instrument shall not be deemed invalid and of no effect for want of such stamp, in view of the express provision of those acts that such an instrument cannot be admitted or used in evidence until a legal stamp shall have been affixed. *McMasters v. Pennsylvania R. Co.* 3 Pittsb. 1.

Gibson v. Hibbard, 13 Mich. 214, held that the provision of the act of 1864 for stamping instruments previously executed and thereby validating them was not unconstitutional as depriving one of property without due process of law.

Hoppock v. Stone, 49 Barb. 524, is to the same effect.

The effect of the various acts to limit the time for supplying the omission of the stamp is discussed under subdivision V. b.

IV. Effect of omission.

a. Generally.

The chief justice, who wrote the opinion in *Patterson v. Gile*, 1 Colo. 200, expressed his opinion that, notwithstanding the provision of the revenue act which purported to render instruments invalid and of no effect if the stamp was omitted with intent to evade the provisions of the act, such an instrument could not be regarded as void for want of a stamp, whatever the intent might have been, inasmuch as, under another provision of the act, every instrument not originally stamped might be per-
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fectly stamped and invested with all its legal attributes. He said that an invalid instrument could not be validated by the simple act of a government officer affixing a stamp, and that, if an instrument be absolutely invalid and of no effect, it must remain so until it receives life at the hands of its author. He admitted that the legal status of an unstamped instrument was not easily defined, but said, so long as the law admitted it to be stamped it could not be regarded as a nullity.

Fant v. Miller, 17 Gratt. 47, held that the omission of a stamp merely rendered the instrument inadmissible, and did not invalidate it under a statute of Maryland, which provided that no instrument required to be stamped should be pleaded or given in evidence in any court of the state, or admitted in any such court to be available at law or in equity, or should be valid or available for any purpose whatsoever unless the same was stamped or marked as required by the act, and gave a remedy for curing the omission, after which the instrument was to be "as valid and available as if the same had been or were stamped or marked as by this act required." As shown by the opinion in that case, similar decisions had been made under the English statutes, which were substantially the same as the Maryland statute, in *Rex v. Bishop*, 1 Strange, 624; *Hawkeswood's Case*, 2 East, P. C. 955; *Scott v. Jones*, 4 Taunt. 865; *Reg. v. Watts*, 24 Eng. L. & Eq. 573; *Delay v. Alcock*, 29 Eng. L. & Eq. 83.

Satterthwaite v. Doughty, 44 N. C. (Busbee, L.) 314, 59 Am. Dec. 554, on the contrary, held that the Maryland statute passed upon in *Fant v. Miller*, 17 Gratt. 47, *supra*, rendered the instrument void, and not simply inadmissible in evidence.

Carothers v. Covington (Tex. Civ. App.) 27 S. W. 1040, held that an instrument otherwise legally executed would not be declared void because not written on stamped paper, unless there was some provision of the law that so declared.

Scott v. Jones, 4 Taunt. 865, held that trover might be maintained for an unstamped instrument, since it might upon payment of a penalty and stamp duty be rendered available.

b. Upon use of instrument as evidence.

1. As primary evidence.

So far as this question depends upon the applicability of the stamp laws to the state courts, it has been treated under subdivision I. a; and so far as it depends upon the intent characterizing the omission, it is treated under subdivisions II. a. and b.

A mere memorandum which does not, *per se*, have the binding effect of an agreement is admissible though not stamped, under the English statute. *King v. St. Martin*, 2 Ad. & El. 210.

A written instrument, though coming from the possession of the opposite party, cannot be given in evidence unless it is legally stamped. *Doe ex dem. St. John v. Hore*, 2 Esp. 724.

The act of July 6, 1897, provided that no instrument required to be stamped should be admitted in evidence in any court until stamped. That provision was enforced, and unstamped instruments excluded, by *Leavitt v. Leavitt*, 4 Me. 161; *Edeck v. Banuer*, 2 Johns. 423; and *Woodson v. Randolph*, 1 Va. Cas. 128.

Under the later acts of 1862, 1864, 1865, and 1866, the provisions rendering unstamped instruments invalid or inadmissible in evidence have frequently been enforced, and unstamped

instruments excluded, according to the terms of the acts.

2. Secondary and parol evidence; copies.

The cases applicable to the stamping of copies will be found under V. a. 2, *infra*.

The general rule that oral evidence cannot be substituted for any written contract applies, where the written contract is inadmissible in evidence because not stamped. *Mobile & G. R. Co. v. Edwards*, 46 Ala. 267; *McMasters v. Pennsylvania R. Co.* 3 Pittsb. 1.

Parol evidence of an unstamped agreement for the letting of a tenement at a certain rent, which has been lost, is inadmissible to prove the value of the tenement for purposes of the poor laws. *King v. Castle Morton*, 3 Barn. & Ald. 388.

Where an agreement is executed in duplicate, one draft being stamped and the other not, the latter is admissible as secondary evidence of the stamped draft. *Waller v. Horsfall*, 1 Campb. 501.

When two parts of an instrument are prepared, but only one is stamped, the party having the custody of the unstamped part may give secondary evidence of the contents of the agreement if the other party refuse on notice to produce the stamped part. *Garnons v. Swift*, 1 Taunt. 507.

In *Munn v. Godbold*, 3 Bing. 292, 11 J. B. Moore, 49, 2 Car. & P. 297, the plaintiff had lost his part of an agreement under seal after it had been duly stamped; the defendant upon notice produced his part unstamped, and the plaintiff the draft of the agreement. It was held that the defendant's part unstamped might be received in evidence.

The burden of proving that a lost instrument, a copy of which is offered in evidence, was unstamped, is upon the party objecting, to the admission of the copy, in the absence of any evidence on the point; but the presumption of stamping is at an end, and the burden is shifted, when it appears that at a particular time the original was unstamped.

When an agreement requiring a stamp is lost, and was without a stamp when last seen, it will be taken that it never was stamped, and secondary evidence of it cannot be received. *Arbon v. Fussell*, 9 Jur. N. S. 753, 11 Week. Rep. 26.

Crowther v. Solomons, 6 C. B. 758, 18 L. J. C. P. N. S. 92, held that the presumption that a document was regularly stamped, arising from defendant's refusal after notice to produce the original at the trial, is overcome where the plaintiff, after producing an unstamped copy, admitted on cross-examination that the original was not stamped at the time it was executed and acted upon, and that the copy was properly rejected, it further appearing that the plaintiff's attorney had had inspection of the original shortly before the action.

In an action founded on a document in which both parties have an interest, and which is in the possession of one, but is said by him to have been lost, a judge cannot order that if such party does not produce the document to be stamped a copy duly stamped shall be read in evidence at the trial, and that the original shall not then be produced on the other side, nor objection be taken to the want of a stamp on the original. *Rankin v. Hamilton*, 15 Q. B. 187, 14 Jur. 930.

Pooley v. Goodwin, 4 Ad. & El. 94, 5 Nev. & M. 466, held that upon the production of secondary evidence of a lost order it would be presumed that the original was duly stamped, where such secondary evidence was furnished by a paper admitted by the adverse party's attorney.

to be a true copy of an affidavit sworn to by such adverse party.

In *Rose v. Clarke*, 1 Younge & C. Ch. Cas. 534, the court refused to admit secondary evidence of a declaration of trust, there being strong circumstantial evidence that the original instrument was not stamped.

3. As collateral evidence.

There have been but few American decisions upon the question as to the admissibility of unstamped instruments for collateral purposes.

It has been held, however, that the fact that an instrument is not stamped as required by act of Congress does not render it inadmissible when it is not the foundation of the action but is offered simply as a written admission of the facts therein contained. *Reis v. Hellman*, 25 Ohio St. 180.

A note, though not admissible in evidence *per se* because not stamped, is admissible for the purpose of explaining the testimony of a witness in reference to the date of a settlement between the parties and the amount found due, where suit is brought upon the original consideration. *Israel v. Redding*, 40 Ill. 362.

The English courts have frequently passed upon the question, but it is difficult to derive from the cases any general principle by reference to which the apparently conflicting decisions may be reconciled.

The statute under which most of the English cases were decided went somewhat further than the American cases in describing the effect of the omission of the stamp upon the use of the instrument as evidence. It provided, in effect, that unstamped instruments which were required to be stamped should not be pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity.

The act of 1891 provided, in effect, that unstamped instruments which are required to be stamped shall not, except in criminal proceedings, be given in evidence, or be available for any purpose.

Matheson v. Ross, 2 H. L. Cas. 286, held that a paper purporting to be a receipt, and as such requiring a stamp, but also purporting to be an agreed statement of accounts, which does not require a stamp, may be given in evidence to show the agreed state of accounts, although not stamped.

The opinion of the Lord Chancellor in that case, without attempting to reconcile all the previous decisions, drew from them a general principle in respect to receipts (which by analogy seem to be applicable to other classes of instruments) according to which an unstamped paper purporting to be a receipt is inadmissible, not only when the purpose and end are to prove a simple discharge from an existing debt, but also when the fact of payment is sought to be established, not for the purpose of showing a discharge as between debtor and creditor, but for another and collateral purpose; and is only admissible when the purpose relates to a matter, other than payment and discharge, which is also apparent from the paper, and in respect to which no stamp is necessary.

The opinion admits that it would be difficult to reconcile many of the previous cases, and makes no attempt to do so. How far they support the principle laid down may be judged from the following citations.

An unstamped receipt may be used by a witness who saw it given, to refresh his recollection as to the fact of the payment of the money. *Rambert v. Cohen*, 4 Esp. 213; *Catt v. Howard*, 3 Starkie, 3; *Maugham v. Hubbard*, 18 Barn. & C. 14, 2 Mann. & R. 5.

An unstamped acknowledgment in writing of the receipt of goods and cash is not admissible in evidence *per se*, but it is competent for the plaintiff to prove that upon calling over each article therein named to the defendant he had received the same, and the plaintiff may refresh his memory by referring to the account. *Jacob v. Lindsay*, 1 East, 460.

A receipt on the back of a note, which for want of a stamp is inadmissible, may be shown as the basis of a presumption that there was a principal sum in proportion due. *Manley v. Peel*, 5 Esp. 120.

Lord Chancellor Cottenham held in *Evans v. Prothero*, 2 Macn. & G. 319, 20 L. J. Ch. N. S. 448, 15 Jur. 113, that a receipt for the purchase price of property, not admissible as such because not stamped, was not admissible for the purpose of proving an agreement for purchase of property.

The last case came before the Lord Chancellor, Lord St. Leonards, 1 De G. M. & G. 572, and he held, contrary to the decision of Lord Chancellor Cottenham, that the receipt was admissible as evidence of the contract of purchase.

An unstamped letter cannot be read as evidence of a contract, but that part of it which relates to a collateral matter may be read. *Forsyth v. Jervis*, 1 Starkie, 437.

Upon the trial of an issue of fact raising the question as to the delivery up of a guaranty, the surrender of which was the consideration for the agreement declared upon, the guaranty may be introduced in evidence, although unstamped. *Haigh v. Brooks*, 10 Ad. & El. 409, 4 Ferry & D. 288.

An unstamped bill of exchange may be introduced in evidence by the plaintiff for the purpose of showing that it was unstamped, and thus negating payment of a debt by the delivery of the bill to him, where he has given in evidence in chief a document purporting that the defendant admitted the debt, but that it had been paid by a bill of exchange. *Smart v. Nokes*, 6 Mann. & G. 911, 7 Scott, N. R. 786, 13 L. J. C. P. N. S. 79, 8 Jur. 44.

Jardine v. Payne, 1 Barn. & Ad. 663, held that plaintiff, who sought to recover upon an account stated consisting of a letter admitting that the amount of a bill of exchange was due to the legal holder thereof, but not mentioning the plaintiff, could not, for the purpose of showing that he was such holder, introduce an unstamped bill of exchange indorsed to him.

In *O'Keefe v. Roche*, 2 Fox & S. 129, it was held that unstamped bills of exchange drawn by the plaintiff on third persons and given to the defendants, are inadmissible in support of a count for money had and received. This decision was upon the ground that the bills were essentially necessary proof of the cause of action, since there was not other legal evidence thereof. The court says that if it had been in plaintiff's power to prove by a witness of his own knowledge that a sum of money of the plaintiff's in the hands of the drawees in the draft had been paid by them to the defendants it would have been allowable for him to look at the bills in order to refresh his memory as to the precise amount.

An unsigned and unstamped draft of an agreement between a joint-stock company and one of its directors with reference to the occupation of the latter's house by the company is inadmissible in an action of debt for use and occupation for the purpose of showing that the occupation was to be by the other directors exclusively of himself, thereby removing the obstacle to recovery upon an implied contract. *Chadwick v. Clarke*, 1 C. B. 700.

It is not competent, for the purpose of showing

that plaintiff held property under a certain rent, for a specified time to introduce unstamped papers tending to show that plaintiff, in years, prior to that in question, paid that rate of rent. *Hawkins v. Warre*, 3 Barn. & C. 630.

King v. Pendleton, 15 East, 449, held that although unstamped articles of agreement to work could not be received as evidence for the purpose of proving the agreement between the parties, yet that the court could look at it for the purpose of establishing when it ceased to operate in order to guide them in receiving parol evidence as to services rendered after the expiration of the period covered by the agreement from which it might presume a yearly contract.

In *Vincent v. Cole*, 3 Carr. & P. 481, *Moody & M.* 257, a building contractor sought to recover for extra work. The court held that it could not look at the unstamped contract to ascertain whether the work for which plaintiff sought to recover was included in it, and that the plaintiff was properly nonsuited.

An unstamped note is admissible for the purpose of proving the fact of bribery, in an action of debt under the statute against bribery at elections. *Dover v. Maestaer*, 5 Esp. 82.

Although an unstamped promissory note cannot be received in evidence as a security or to prove a loan of money, it may be looked at by the jury as a contemporary writing to prove or disprove the fraud imputed to the plaintiff, where the defendant claims that he had been made drunk by the plaintiff, and induced to write a note without receiving any money, and asserts that the note bears evidence that it was written by an intoxicated person. *Gregory v. Fraser*, 3 Campb. 454.

An unstamped bill of sale of goods which has been canceled is inadmissible for the purpose of showing that a second bill of sale was made in good faith. If it had tended to show fraud in the subsequent bill it might have been admitted at the instance of the party attacking the second bill, since a party may produce an unstamped instrument for the purpose of defeating it. *Williams v. Gerry*, 10 Mees. & W. 296, 2 Dowl. N. S. 201, 11 L. J. Exch. N. S. 389.

Assumpsit will not lie for necessities furnished to the defendant's apprentice, where the indenture of apprenticeship has not been legally stamped, since it is void until stamped. *Aldridge v. Ewen*, 3 Esp. 188.

In *Reynolds v. Hall*, 1 Fost. & F. 18, an action by assignees of a bankrupt, it was doubted whether an unstamped deed of assignment was admissible in evidence for plaintiff, as proving the act of bankruptcy; and, the point being doubtful, a copy was ultimately admitted by consent.

An unstamped agreement may be introduced to show changes in a prior agreement, and prevent recovery thereon. *Reed v. Deere*, 7 Barn. & C. 261, 2 Car. & P. 624.

It is error to permit the jury to regard an unstamped bill of exchange, and draw from it a conclusion that a previous bill had been canceled by it. *Sweeting v. Halse*, 9 Barn. & C. 365, 4 Mann. & R. 545. The court says that in *Reed v. Deere*, 7 Barn. & C. 261, 2 Car. & P. 624, the court looked at the second instrument to see whether it had the effect of varying the first. The distinction is evidently that in the former case the effectiveness of the unstamped instrument, *per se*, is not material, while in the latter case it is.

The failure of a party who receives a foreign bill in England to see that the adhesive stamp is canceled pursuant to stamp act 17 & 18 Vict. chap. 83, § 5, prevents him from maintaining

an action against the person from whom he purchased the bill to recover back the price, it appearing that the drawer's name had been forged. The statute provides that no person who shall take or receive from any other person such bill upon which the stamp is not canceled, as required by the act, shall be entitled to recover thereon, or to make the same available for any purpose whatever. *Pooley v. Brown*, 11 C. B. N. S. 566, 31 L. J. C. P. N. S. 134, 8 Jur. N. S. 938, 5 L. T. N. S. 730, 10 Week. Rep. 345.

An unstamped agreement for letting a tenement at a certain rent is inadmissible to prove the value of the tenement in an action involving the tenant's settlement for the purpose of the poor laws.

But *King v. St. Martin*, 2 Ad. & El. 210, held that an unstamped entry containing the terms of renting signed by the pauper's wife, who had no authority to bind him, might be used to refresh the recollection of a witness called to prove the pauper's settlement.

c. Upon writs, processes, and orders of court.

Blake v. Hall, 19 La. Ann. 49, held that an appointment of an administrator was a nullity, where neither the bond, appraisement, nor letters of administration had stamps upon them as required by the revenue act. This decision seems to rest on the provision that it shall not be lawful to record any instrument, document, or paper required by law to be stamped, unless a stamp or stamps of the proper amount shall have been affixed, and the record of any such instrument upon which the proper stamp or stamps shall not have been affixed shall be utterly void and shall not be used in evidence.

Werbliskie v. McManus, 31 Tex. 116, is to the same effect.

German Liederkrantz v. Schiemann, 25 How. Pr. 358, held that the omission of the stamp required by act of July 1, 1862, rendered a summons invalid.

An original summons will be dismissed where the copy of the summons served was without any indication of a United States revenue stamp. *Watson v. Morton*, 26 How. Pr. 383.

Cole v. Bell, 48 Barb. 194, reversed a judgment for plaintiff because the summons issued by a justice of the peace, by which the action was commenced, was not stamped as required by the act of 1864.

Reddick v. White, 46 La. Ann. 1198, 15 So. 487, held, under a state stamp act, that the record on appeal must be stamped, and that the necessity of stamping could not be avoided by filing the record on appeal *in forma pauperis*.

Musselman v. Mauk, 18 Iowa, 239, held that the superior court should have dismissed an appeal from the judge of probate because the instruments and papers by which the cause was transferred to that court were not stamped as required by the act of 1864.

So far as the question involved in this subdivision depends upon the applicability of the revenue laws to the state courts, it is treated under subdivision I. b. *supra*.

d. In Confederate states.

An instrument executed in Alabama in the year 1864 was not invalid because of the omission of the stamp required by the United States revenue laws, since no provision had been made for the enforcement of those laws in the Confederate states. *McElvain v. Mudd*, 44 Ala. 48, 4 Am. Rep. 106. The court in that case held that the instrument would have been admissible, even if no stamp had afterwards been

placed upon it pursuant to § 9 of the act of 1866, providing that in all cases where a party has not affixed the stamp required by law it shall be lawful for him or any person having an interest in the instrument to affix the proper stamp thereto prior to January 1, 1867.

Susong v. Williams, 1 Helsk. 625; *Lewis v. Hearne*, 34 Tex. 382; *Van Alstyne v. Sorley*, 32 Tex. 518, and *Dailey v. Croker*, 33 Tex. 815, 7 Am. Rep. 279, are to the same effect. They hold that the court will take judicial notice of the existence of the conditions referred to during the war of the Rebellion.

Blunt v. Bates, 40 Ala. 470, held that an attorney to whom a note was delivered for collection had such an interest therein as to authorize him to affix the stamps within the foregoing provision.

e. Miscellaneous.

If a written contract is invalid for want of a stamp, and for that reason not evidence of a contract, the plaintiff can recover upon the consideration of the note or promise for goods sold or delivered, or otherwise. *Waterbury v. McMillan*, 46 Miss. 635.

The payee of a promissory note having no revenue stamp affixed thereto, if for that reason invalid, may recover of the maker in an action of general assumpsit upon the original consideration for which the note was given. *Wilson v. Carey*, 40 Vt. 179.

If an agreement cannot be read in evidence for want of a stamp, the plaintiff cannot recover the value of the work and labor to which it relates, although the defendant may have had the benefit of it. *Hughes v. Budd*, 8 Dowl. P. C. 478.

In *Stephens v. Pinney*, 8 Taunt. 327, 2 J. B. Moore, 349, the plaintiff in an action on the common counts for work and labor had established his case without its appearing that there was an agreement in writing regulating the price and terms of the work. It was held that the defendant could not defeat the action by proving the existence of an unstamped written agreement with reference to the work. The opinion says that if it had appeared as part of the plaintiff's case that there was an agreement in writing with reference to the work he must have produced it, and when produced it could not have been received in evidence because unstamped, and he must then have been nonsuited.

Plaintiff in an action for the price of goods supplied under a written contract, which refers for the term of payment therein said to have been made between the defendant and a third person, cannot recover where it appears by his own evidence that the arrangement was itself in writing, and cannot be produced in proof for want of a stamp. *Alcock v. Delay*, 4 El. & Bl. 660.

Lambert v. Whitlock, 29 Ind. 26, held that it was not defense to a suit for the purchase price of land that the grantor had caused the consideration to be stated in the deed at a less sum than the true amount for the purpose of defrauding the government. This decision rests upon the ground that the deed is not invalid for all purposes, notwithstanding the provision of the 9th section of the act of 1866, that an unstamped deed shall be invalid and of no effect, since the grantee may sell and convey a full and perfect title, under the provision that the title of a purchaser of land by deed duly stamped shall not be defeated or affected by the want of a proper stamp on any deed conveying the land by any person from, through, or under whom his grantor claims or holds title.

The want of a stamp on a note does not put

the indorsee upon inquiry. *Burson v. Huntington*, 21 Mich. 415, 4 Am. Rep. 497.

The internal revenue act in force January 4, 1871, merely made the inadvertent omission of a stamp a disqualification which prevented the use of the instrument as evidence until the delinquent had paid his tax, and did not, in the case of a negotiable promissory note rebut the presumption that an indorsee paid value for it. *Long v. Spencer*, 78 Pa. 303.

Jones v. Pearce, 21 Wis. 645, held that the omission, without intent to evade the revenue acts, or stamps from deeds exchanged between parties to a parol agreement for the exchange of lands did not render them insufficient to take the agreement out of the statute of frauds as to a part of the land not covered by the deeds, in view of the remedies provided for curing the omission.

V. Subsequent stamping.

a. What remedy available.

1. By party or collector.

The act of March 3, 1863, § 16, provided, in effect, that no instrument signed or issued before the 1st day of June, 1863, without being duly stamped, should, for that cause, be deemed invalid and of no effect; provided that no instrument, required to be stamped, signed, or issued without being stamped, should be admitted in evidence until stamped, and that the person desiring to use any such instrument might stamp the same in the presence of the court.

It was held that under this statute a note issued prior to June 1, 1863, without being stamped, might be stamped by the holder at any time, either before suit brought or afterwards; and that the provision as to appearing in the presence of the court was made out of abundant caution to guard against suspense, inconvenience, or hardship. *Day v. Baker*, 36 Mo. 125.

Cooke v. England, 27 Md. 14, 92 Am. Dec. 618, held that the mere authority to stamp in the presence of the court, under the acts prior to the act of 1865, did not exclude stamping at other places. In that case the stamping was done by the collector pursuant to the act of 1865, passed pending the action.

Wright v. McFadden, 25 Ind. 483, held that a party had a right to affix a stamp to an affidavit without leave of court, upon an objection made while act of June 30, 1864, was in force in view of § 163, providing that no instrument or paper made prior to the passage of the act without being duly stamped shall for that cause, if the stamp shall be subsequently affixed, be deemed invalid and of no effect.

Section 16 of the act of June 30, 1864, provided for stamping, in the presence of the court, instruments not originally stamped, which had been signed or issued before the act. The act of March 3, 1865, by an amendment to § 158 of the act of 1864 (the section which provided that unstamped instruments should be invalid and of no effect), provided for the affixing of the omitted stamp by the collector.

It was held by *Dorris v. Grace*, 24 Ark. 326, that the act of 1865 did not, in the case of an inadvertent omission, exclude the remedy given by the act of 1864, but merely gave an additional remedy.

Tobey v. Chipman, 13 Allen, 123, also held that the remedy given by the later act did not exclude that given by the earlier in case of an inadvertent omission. These decisions seem to rest upon the ground that the new remedy was given by an act which purported to amend § 158 of the act of 1864, and did not purport to amend or repeal § 163 of that act, which provided for affixing the stamp in the presence of the court. They seem to imply that the remedy provided by the act of 1865 was exclusive of the remedy under the act of 1864, when the omission was with intent to evade the act. *Garland v. Lane*, 46 N. H. 245, however, held that the remedy given by the act of 1865 only applied to instruments made under the act of 1864, and therefore did not affect the remedy given by that act, which, by its terms, only applied to instruments made or issued before its passage.

Patterson v. Eames, 54 Me. 203, and *Carpen-ter v. Johnson*, 1 Nev. 331, held that instruments executed before the act of 1864 might be stamped in the presence of the court. These decisions rest upon a provision of § 163 of the act of 1864, and make no reference to the act of 1865; which apparently was not in force at the time of the trial.

An instrument made in 1863, from which the stamp was originally omitted, can only be stamped since the 1st day of January, 1867, by the revenue collector of the proper district. *Mobile & G. R. Co. v. Edwards*, 46 Ala. 267.

Waterbury v. McMillan, 46 Miss. 635, held, with reference to a contract executed while the act of 1865 was in force, that in the absence of fraud in omitting the stamp originally it might be stamped at the trial, and introduced in evidence.

Beebe v. Hutton, 47 Barb. 187, expressed an opinion to the same effect, although it did not authoritatively so hold.

It is not apparent, however, with reference to instruments which, like those involved in the latter two cases, were executed after the act of 1864, and before the act of 1866, went into effect, that any stamping at all was required by the stamp acts in order to render them admissible in evidence, unless the original omission was fraudulent, and the instrument therefore invalid. As already observed, the provision of § 163 of the act of 1864, excluding unstamped instruments from evidence, only applied to instruments previously executed, and the act of 1865 did not contain any provision excluding unstamped instruments from evidence. This view of the statute has the support of *Govern v. Littlefield*, 13 Allen, 127, note; and *Rheinstrom v. Cone*, 26 Wis. 163, 7 Am. Rep. 48.

It may be that the court considered that inasmuch as the stamp duty had not been paid independently of any such requirement in the stamp acts. *Whigham v. Pickett*, 43 Ala. 140, however, apparently considered that it was necessary to stamp such instruments, although the omission was not fraudulent; and it held contrary to *Waterbury v. McMillan*, 46 Miss. 635, *supra*, and *Beebe v. Hutton*, 47 Barb. 187, *supra*, that the remedy provided by the act of 1865 was exclusive as to instruments executed after the act of 1864 went into effect.

Davy v. Morgan, 56 Barb. 218, expressed a similar opinion with reference to such instruments, although the omission was not fraudulent, but did not decide the question.

Boly v. Lake, 54 Mo. 202, held that the stamp might be affixed in court; but it does not appear when the contract in question was executed, nor whether the original omission was fraudulent.

The act of July 13, 1866, amended § 163 of the act of July 30, 1864, by striking out all after the enacting clause, and substituting a provision to the effect that "thereafter" no instrument required by law to be stamped, which has been signed or issued without being stamped, shall be recorded or admitted or used in evidence until a stamp shall have been

affixed thereto "as prescribed by law." The act also provided for affixing stamps before the collector, and for the remission of the penalty by him when the omission was inadvertent.

Corrie v. Billiu, 23 La. Ann. 250, held that the remedy provided was exclusive as to instruments to which it applied, and such instruments could not be stamped in the presence of the court. It does not appear whether the original omission was fraudulent or not.

Bernard's Succession, 24 La. Ann. 402, is to the same effect.

But in *Chaffe v. Ludeling*, 27 La. Ann. 607, the court said, in reply to an objection that the document sued on (which was dated after the act of 1866 went into effect) should not have been received in evidence because not properly stamped when issued, that it was stamped when offered in evidence, and that that was sufficient. It does not appear whether the stamping referred to was before the collector or not.

Foster v. Holley, 49 Ala. 593, held that the remedy by stamping before the collector under the act of 1866 did not preclude stamping in the presence of the court if the instrument was not void because of the original omission.

The provision of the act of June 23, 1874, for stamping before the court or clerk, was not exclusive of the remedy by stamping before the collector. *Cresson v. Phillips*, 6 W. N. C. 448.

The power of the court to allow an amendment of a defective bond or other security cannot be exercised to aid an appellant who has omitted the stamp required by the act of Congress from his appeal papers. *Hugus v. Strickler*, 19 Iowa, 413; *Botkins v. Spurgeon*, 20 Iowa, 598.

O'Hare v. Leonard, 19 Iowa, 515, held that the court could not, by virtue of its power to permit amendments on appeal, permit a notice of appeal to be stamped after the appeal was otherwise perfected.

Coppernoll v. Ketcham, 56 Barb. 111, however, held that the requirement of the act of 1865 that the stamp should be affixed by the collector did not deprive the state court of power, under the local code, to permit the stamp to be affixed to a notice of appeal.

State v. Way, 15 Iowa, 506, held that the defendant's objection to the transcript on appeal, on the ground that no stamp was affixed to the clerk's certificate as required by the revenue law, was obviated by the attorney general's affixing a stamp.

Stolte v. Herndon, 32 Tex. 302, held that the court would take judicial notice that the office of revenue collector was not in practical operation in Texas in 1865, and that therefore an instrument executed in Texas during that year might be stamped by any party to it prior to January 1, 1867, pursuant to the act of 1866.

2. Stamping copies.

A substantial copy, or such a draft of the instrument as will identify the subject of the tax, can be used to enable a party to avail himself of the remedial benefit of the act of 1874, providing for stamping instruments, or, if the originals have been lost, copies thereof, before the judge or clerk of a court of record. *Miller v. Wentworth*, 82 Pa. 280.

Where one part of the document has been lost the court will compel the party holding the other part, or his attorney, if he holds it, to produce it at the stamp office for the purpose of having it stamped, though it is not held on any trust for the party applying. *Neal v. Swind*, 2 Comp. & J. 378, 2 Tyrw. 464.

In *Bousfield v. Godfrey*, 5 Bing. 418, 2 Moore & P. 771, the defendant had surreptitiously obtained possession of an unstamped 48 L. R. A.

agreement executed by plaintiff and himself, thereby preventing plaintiff from affixing a stamp, as he had intended, within the twenty-one days after execution allowed by the statute. The court ordered defendant to turn over a copy of the agreement to plaintiff, and then ordered that if plaintiff should, upon the trial of the cause, produce the copy of the agreement duly stamped, the defendant should not be permitted at the trial to produce the original.

The court will compel the production by a defendant of an unstamped agreement in his custody to which the plaintiffs claim to be the parties in interest, although they are not parties to the instrument, in order that they may get it stamped. *Bateman v. Phillips*, 4 Taunt. 157.

In *Travis v. Collins*, 2 Comp. & J. 625, 2 Tyrw. 726, the court refused to compel a tenant to produce his part of the renting agreement which was executed in duplicate, to be stamped at the instance of a purchaser of the premises who had not applied to the vendor, or made proper effort to find him.

b. Time.

A party who appealed to the district court without affixing a revenue stamp to any of the papers or transcripts constituting the appeal was permitted, after the adverse party had moved to strike the cause from the files, to amend and have the stamps affixed by a deputy collector. *Deskin v. Graham*, 19 Iowa, 553.

A stamp may be supplied, even after verdict. *Janvrin v. Fogg*, 49 N. H. 346.

A stamp may be affixed to a notice of appeal after motion to dismiss. *Killip v. Empire Mill Co.*, 2 Nev. 34.

Holyoke Machine Co. v. Franklin Paper Co., 97 Mass. 150, held that the stamping of an agreement for submission to arbitration after the award was sufficient.

Browne v. Steck, 2 Colo. 70, held that the amendment of the act of 1866 so as to require an instrument to be presented to the collector for stamping, and remission of penalty within twelve months from August 1, 1871, instead of twelve months from August 1, 1866, as originally provided, was intended to cover the period between those dates, and that therefore the collector had authority to remit the penalty on a note presented to him in February, 1871.

Gay v. Comstock, 2 W. N. C. 532, held that the stamping of a draft on January 1, 1873, by the collector, was authorized, and rendered it admissible in evidence, notwithstanding an objection based on the act of June 6, 1872, providing that up to October 1, 1872, the holders of any instrument of writing not duly stamped might, upon application to the collector of internal revenue, have the same stamped according to the provisions of law then in force. The court held that as the instrument was a draft it was not within the repealing act.

Cresson v. Phillips, 6 W. N. C. 448, held, in effect, that the act of June 23, 1874, providing for stamping before the court or clerk, did not repeal § 2432, U. S. Rev. Stat., or prevent the stamping of an instrument before the collector after the expiration of the period accorded by the act of 1874, and the amendatory act of February 25, 1876, viz., January 1, 1877.

Whigham v. Pickett, 43 Ala. 140, after holding that the court below erred in permitting plaintiff to affix a stamp in the presence of the court, reversed the judgment, and remanded the cause to give plaintiff an opportunity to have the stamps affixed by the collector.

Burton v. Kirkby, 7 Taunt. 174, 2 Marsh. 490, held that the objection that the warrant of attorney on which a judgment was entered was not sufficiently stamped, was cured by pro-

curing it to be properly stamped after a rule nisi to set the judgment aside.

c. Application to collector.

1. Who may apply.

Myers v. Smith, 48 Barb. 614, held that under the act of 1865 the party who issued the paper was the one to appear before the collector and procure the stamping, and that the other party could not cure the omission by appearing before the collector and procuring the stamp to be affixed.

Schermerhorn v. Burgess, 55 Barb. 422, however, dissented from that view, and held that the application could be made, not only by the person executing the instrument, but by any person having an interest therein.

2. To what district.

When the application to the collector is not by the maker of the instrument, but by another party having an interest therein as payee or holder, the application should be made in the district in which the party making it resides, although the maker may reside in another district. *Schermerhorn v. Burgess*, 55 Barb. 422.

3. Power of deputy collector.

Deskin v. Graham, 19 Iowa, 553, held that the deputy collector had power to stamp unstamped instruments executed without any intent to defraud the United States of the stamp duty, under the provision of the revenue act in force in 1865, to the effect that in case of sickness or temporary disability of a collector the duties might devolve upon one of the deputies; and further held that in the absence of affirmative evidence to the contrary the disability of the collector would be presumed.

Brown v. Crandal, 23 Iowa, 112. *McAafferty v. Hale*, 24 Iowa, 355, and *Muscantine v. Sternerman*, 30 Iowa, 526, 8 Am. Rep. 685, however, held that a deputy collector, by virtue of his ordinary duties as such, had no power to remit penalties, and to stamp or to authorize the stamping of instruments when they were left unstamped from inadvertence or mistake, except when, from inability or sickness of the collector, he acted by special authority in his place; and further, that such special authority could not be presumed, and the deputy's act must be held a nullity, unless it was authenticated by the collector's seal, or there was evidence *aliunde* to show the sickness or disability of the collector.

4. Miscellaneous.

The omission of a stamp in good faith, the parties believing none is required, is an inadvertence within the act of Congress, § 158, compilation of 1867, providing that if it appears to the collector that the omission of the stamp was by inadvertence he may affix the proper stamp and remit the penalty. *Green Mountain Central Inst. v. Britain*, 44 Vt. 13.

The collector's certificate that there is satisfactory evidence that the omission was inadvertent is conclusive. *Hoppeck v. Stone*, 49 Barb. 524; *Corry Nat. Bank v. Rouse*, 3 Pittsb. 18.

When the proper revenue officer stamps an instrument, and certifies thereto, he will be presumed to have affixed the amount of stamps required by law. *Frazier v. Robinson*, 42 Miss. 121; *Green Mountain Cent. Institute v. Britain*, 44 Vt. 13.

The court will take judicial notice of the receipt or acknowledgment indorsed on a deed by the collector or deputy collector of Internal

revenue. *Lerch v. Snyder*, 112 Pa. 161, 4 Atl. 336.

An instrument will be received in evidence when the collector's receipt for the price of the stamps and the penalty is produced, although he did not actually affix and cancel the stamp as he should have done. *Ibid*.

d. What stamps required.

It has been held in England that it is sufficient if the stamps required by the act in force at the time of the subsequent stamping are affixed, although the duty is less than at the time the instrument was executed. *Deakin v. Penniell*, 2 Exch. 320; *Buckworth v. Simpson*, 1 Crompt. M. & R. 833; *Doe ex dem. Dyke v. Whittingham*, 4 Taunt. 20.

Clarke v. Roche, 47 L. J. Q. B. N. S. 147. L. R. 3 Q. B. Div. 170, 37 L. T. N. S. 633, 26 Week. Rep. 112, however, holds that before a deed can be admitted in evidence, it must be proved that it is duly stamped, not only at the time of its production, but also in accordance with the law in force when it was first executed.

e. Effect.

An instrument when stamped as prescribed by the act of 1864 in the presence of the court is valid from its date. *Dorris v. Grace*, 24 Ark. 326; *Gibson v. Hibbard*, 13 Mich. 214; *Corry Nat. Bank v. Rouse*, 3 Pittsb. 18.

The subsequent stamping, pursuant to statute, of an agreement for submission to arbitration, renders it valid as if it had been stamped when made. In the absence of fraud, and validates an award made under the agreement in the meantime. *Holyoke Mach. Co. v. Franklin Paper Co.* 97 Mass. 150.

A deed which has been stamped by the collector pursuant to act of 1865 must, as between the parties, be treated as if it had been stamped at the time of its execution. *Tripp v. Bishop*, 56 Va. 424.

The stamping of an instrument by a collector of the proper district, under the authority given him by the act of March 3, 1865, within twelve months from the time the same was executed, removes objection to its admission in evidence based on the original failure to stamp. *Knox v. Huidekoper*, 21 Wis. 528.

Stamping by the collector under the act of 1866 gives a note all the validity and competency as an instrument of evidence that it could have if it had been properly stamped as soon as it was made. Hence the note is admissible, although stamped after the date of the writ. *Aldrich v. Hagan*, 50 N. H. 60.

The stamping of an instrument by the collector pursuant to the internal revenue act relieves the court from the necessity of considering the question of the validity of the instrument because of the omission of the stamp at the time of its execution. *Logan v. Dils*, 4 W. Va. 397.

The subsequent stamping of the probate of a will under the English statute relates back, so as to support a commission of bankruptcy sued out by the executor upon a debt due him as such. *Rogers v. James*, 2 Marsh. 425.

Doud v. Wright, 22 Iowa, 336, held that the omission to affix a stamp to the appeal bond at the time of the taking of an appeal from a justice's court was not a sufficient cause for the dismissal of the appeal, where, before trial, the proper stamp was affixed with permission and under the order of the revenue collector.

Subsequently affixing a stamp to the probate of a will makes the executor's title perfect by relation as of the time of the testator's death. *Rogers v. James*, 7 Taunt. 147, 2 Marsh. 425.

The subsequent stamping of a note pursuant

to the act of 1866, in an amount sufficient to validate both it and the mortgage securing it operated to validate the record of the mortgage as soon as the fact was noted on the margin of the record. *Stewart v. Hopkins*, 30 Ohio St. 502.

Section 9 of chapter 184 of the act of 1866, which provided for stamping before the collector, and enacted that when so stamped the instrument should be deemed valid to all intents and purposes as if stamped when made or issued, and provided for making a new record when the instrument had been originally recorded, contained proviso to the effect that no right acquired in good faith before the stamping of the instrument or copy thereof and the recording thereof, as provided in the section, if such record be required by law, should be affected by the statute.

Vall v. Knapp, 49 Barb. 299, upheld the validity of a chattel mortgage, stamped before the collector pursuant to the act of 1866, as against an attachment levied after the execution and filing of the mortgage but before the stamping. The decision rests upon the ground that the mortgage was not invalid for want of the stamps, since the omission was inadvertent, and that the proviso contemplates only instruments which are required to be recorded, and that chattel mortgages were required to be filed, but not to be recorded.

Hoppe v. Stone, 49 Barb. 524, held that the stamping of a chattel mortgage pursuant to the act of 1866 validated the same against an assignee for creditors claiming under an assignment executed in the interval between the execution and stamping of the mortgage, the original omission not having been with intent to evade the revenue laws. The opinion said that the maker of the mortgage, upon whom the duty of providing the stamp properly rested, could have no moral right to deny the force of his obligation by reason of the penal effect of the revenue laws, when the mortgagee inadvertently received the mortgage unstamped without any intent to evade the act; and that the assignee had parted with no consideration, and stood in no better position than his assignor. It was not admitted, however, that a purchaser for a valuable consideration would have been in any better position.

Sawyer v. Parker, 57 Me. 39, held that the chattel mortgage insufficiently stamped and recorded was valid as against an attaching creditor who seized the goods before the mortgage was restamped by the collector and the record corrected, there being no evidence that the omission to properly stamp the mortgage was the result of an intent to evade the statute. The opinion said the mortgage was valid without the stamps, and that the last clause of the act of 1866, to the effect that no right acquired in good faith before the stamping of such instrument or copy thereof and the recording thereof as therein provided, if record be required by law, should in any manner be affected by such stamping as aforesaid, related to the stamping of the instrument by the collector, and did not render an unstamped instrument invalid when there was no attempt to evade the act of Congress.

McBride v. Doty, 23 Iowa, 122, held that under § 152 of the Internal Revenue act the record of a chattel mortgage insufficiently stamped was not constructive notice to third parties, and that stamping before the collector pursuant to the act of 1866 did not cure the defect so as to interfere with intervening rights, although the omission was inadvertent.

Wilson v. Reuter, 29 Iowa, 176, however, held that stamping before the collector rendered a mortgage valid as against intervening

purchasers having actual notice of the mortgage, where the mortgage was not invalid because of the omission of the stamp, distinguishing *McBride v. Doty*, 23 Iowa, 122, on the ground that the parties claiming adversely to the mortgage in that case had no actual knowledge of its existence.

Miller v. Morrow, 3 Coldw. 587, held that the stamping of a deed before the collector, and the registering thereof pursuant to the act of 1866, did not validate the deed as against an intervening attachment in view of § 152 of the act of 1864, making it unlawful to record any instrument not properly stamped, and of the proviso of the act of 1866 already recited.

In *Hetzell v. Gregory*, 7 Phila. 148, a judgment had been entered upon a judgment note which was insufficiently stamped, and execution had been issued thereon. The judgment and execution were afterwards set aside by the court, and the judgment debtor then confessed judgment to another creditor and caused an execution to issue thereon without the latter's knowledge. The first judgment creditor then procured the collector to stamp the note and then another judgment was entered and another execution issued. The court then rescinded the order setting aside the first judgment, and the sheriff returned that he had sold the property under the three executions. The court held that the first judgment creditor was entitled to the proceeds of the sale under his first execution. This decision was based upon the language of the act of July 13, 1866, providing that after the instrument is stamped by the collector it shall be deemed and held to be as valid to all intents and purposes as if stamped when made or issued. The court said that there were no intervening rights which required to be protected, since the entry of the second judgment and issue of the execution thereon were the acts of the judgment debtor who was at fault in failing to affix the stamp to the note in the first instance.

VI. Pleading and practice.

a. Raising objection by demurrer.

It was generally held, under the acts of 1864, 1865, and 1866, that the objection founded on the failure to stamp could not be taken by demurrer. *Campbell v. Wilcox*, 10 Wall. 421, 10 L. ed. 973; *Miller v. Henderson*, 24 Ark. 344; *Hallock v. Jaudin*, 34 Cal. 167; *Trull v. Moulton*, 12 Allen, 396; *Cabbott v. Radford*, 17 Minn. 320, Gil. 296; *Jones v. Davis*, 22 Wis. 421.

That doctrine naturally followed from the doctrine already alluded to, that an intent to evade the revenue laws was necessary to invalidate an instrument for want of a stamp.

Campbell v. Wilcox, 10 Wall. 421, 19 L. ed. 973, rests its decision on that ground, although it also holds that the averment that defendant made and delivered the note would imply that it was stamped, if that were necessary to its validity.

The decision in *Jones v. Davis*, 22 Wis. 421, rests upon the latter ground.

Berry v. Boyd, 28 Iowa, 410, held that an answer in replevin was demurrable because it showed that the chattel mortgage upon which defendant relied was not stamped. It is to be observed, however, that at the time of this decision the Iowa courts held, contrary to the weight of authority, that a fraudulent intent was not necessary to invalidate the instrument.

Dornenhower v. Stevens, 44 W. N. C. 264, holds, in effect, that a statement setting out at length notes executed since the revenue act of

1898 went into effect, but not showing that they had been stamped according to law, is demurrable. There is no written opinion, but the argument of defendant's counsel seems to have been that the notes as set out in the statement did not appear to be stamped, and therefore could not have been received in evidence.

Armendiaz v. Serna, 40 Tex. 291, holds that the objection that the omission of a stamp from an instrument executed and issued in another country rendered it invalid under the laws of that country cannot be taken by demurrer to a petition which either does not aver the foreign laws, or avers them to be such as not to render the instrument invalid.

b. Necessity and sufficiency of averments as to omission.

The objection to the admissibility of an instrument because not stamped is not one which it is necessary to show in pleading. *Field v. Woods*, 7 Ad. & El. 114, 2 Nev. & P. 117, 6 Dowl. P. C. 23, 8 Car. & P. 52.

Whitehill v. Shickle, 43 Mo. 537, held that the objection that the instrument used was not stamped must be based on the pleadings, and cannot be raised for the first time upon an objection to the evidence.

Campbell v. Wilcox, 10 Wall. 421, 19 L. ed. 973, *supra*, however, said, *arguendo*, that the objection could be set up by special plea, or urged on the trial; and it seems to have been the general practice to raise the question by an objection to the instrument when offered in evidence.

The defense that a bill of exchange was written on paper improperly stamped with an old die is admissible under the plea of nonacceptance. *Dawson v. Macdonald*, 2 Mees. & W. 26, 2 Gale, 215.

c. Who may raise or waive objection.

A party who prevents a deed from being stamped ought not to be heard to object to its admission in evidence. *Alexander v. Leith*, 39 Ga. 180.

The maker of the note inadequately stamped cannot take advantage of his own wrong or default by objecting to its being received in evidence. *Jacquin v. Warren*, 40 Ill. 459.

A party who gives an obligation without being stamped, when the law requires stamps to be placed thereon, is a wrongdoer, and can draw no protection from his omission. *Chaffee v. Ludeling*, 27 La. Ann. 607.

Neither the principal nor the sureties in a voluntary bond can allege his neglect to affix the stamp in avoidance thereof. *McGovern v. Hoesback*, 53 Pa. 176.

The maker of a note is not entitled to the reversal of a judgment thereon because of his failure to stamp the note as required by law. *Mogelin v. Westhoff*, 33 Tex. 788. It does not appear whether the objection was made for the first time on appeal or not.

The court cannot sanction an agreement between the parties that an objection for want of a proper stamp shall be waived, and if the objection comes to the knowledge of the court no decree will be made until the instrument, duly stamped, is produced to the registrar. *Cowen v. Thomas*, 3 Myl. & K. 353.

d. Time of raising objection.

The objection to an unstamped instrument must be made when it is offered, and otherwise will not be considered. *Mortee v. Edwards*, 20 La. Ann. 236; *Robinson v. Vernon*, 7 C. B. N. S. 231; *Field v. Woods*, 7 Ad. & El. 114.

The objection that the instrument is not

stamped must be raised when it is offered, and cannot be urged for the first time by a request for an instruction to the jury to disregard the instrument. *Thomson v. Wilson*, 28 Iowa, 121.

It is too late to object for the first time to the admission of an unstamped instrument when the report of a referee comes up for confirmation. *Jones's Appeal*, 62 Pa. 324.

An objection that an instrument is not stamped as required by the revenue laws cannot be raised for the first time on appeal. *Andrews v. Poe*, 30 Md. 485; *Hawkins v. Wilson*, 1 W. Va. 117.

The objection to the admission of an instrument because not sufficiently stamped must be decided by the judge at nisi prius, and cannot properly be reserved for the opinion of the appellate court. *Siordet v. Kuczynski*, 17 C. B. 251, 25 L. J. C. P. N. S. 2.

The omission of a stamp from a notice of appeal cannot be urged on the argument of the appeal, but can only arise on a motion to dismiss the appeal. *Cole v. Bell*, 48 Barb. 194.

The objection that a summons issued from a justice's court is invalid because of the omission of a revenue stamp should be made before the justice on the return day, and it is too late to raise the objection for the first time on appeal, since the plaintiff has lost his opportunity to supply the stamp, and to negative the attempt to evade the statute. *Baird v. Pridmore*, 31 How. Pr. 359.

Miller v. Larmon, 38 How. Pr. 417, held that the objection that the return of a constable to the service of a summons was not stamped as required by the act of March 24, 1867, might be raised for the first time on appeal from a judgment for plaintiff entered without the defendant's appearance. The court distinguishes the case from *Baird v. Pridmore*, 31 How. Pr. 359, upon the ground that in that case the summons served upon the defendant was unstamped.

Where judgment has been suffered by default on a note, and a writ of inquiry is executed, it cannot be objected on the execution of the writ that the note has no stamp, or an improper stamp. *Watson v. Glover*, 12 L. J. C. P. N. S. 184, 7 Jur. 68.

e. Questions of fact; presumptions generally.

The question as to presumption with reference to intent is treated under subdivision II. b.

An instrument bearing the proper stamps, when introduced in evidence, will be presumed to have been stamped by the proper party and at the proper time. *Iowa & M. R. Co. v. Perkins*, 28 Iowa, 281; *Union Agri. & Stock Assn. v. Nell*, 31 Iowa, 95.

In the absence of proof to the contrary, the court, when a certified copy of a mortgage is offered in evidence, will presume that the recorder did his duty, and required the necessary stamps to be legally affixed before registering the mortgage. *Grand v. Cox*, 24 La. Ann. 462.

The objection by defendant that the stamp appearing on the bond when introduced in evidence was placed thereon without his knowledge, consent, or authority is properly overruled where defendant merely offered to show that the bond was not stamped at the time of its execution. The court, without proof to the contrary, will presume that the stamp was properly and legally placed on the bond. *Myers v. McGraw*, 5 W. Va. 30.

The burden of showing that a deed otherwise regular has not been duly stamped lies on the party impeaching it, and if the deed purports to have been signed and delivered, "being first duly stamped," but the stamp is obliterated, and it only appears by marks on the

deed that some stamp was once impressed, the judge may decide whether or not the fact of stamping is sufficiently proved, and if satisfied of it receive the instrument in evidence. *Doe ex dem. Fryer v. Coombs*, 3 Q. B. 927.

The court should admit a deed not bearing a stamp when offered, and submit to the jury the question of fact under the evidence whether the deed was originally stamped or not as required by law. *Alexander v. Leith*, 39 Ga. 150.

Platt v. Broach, 36 How. Pr. 188, held that the question when and by whom the stamp appearing on a note when introduced in evidence was affixed, should have been submitted to the jury, it appearing that the note was not stamped at the time it was executed and left the maker's hands.

1. Stamp not part of instrument.

The revenue stamp is not part of the instrument, and the fact that what appears to be a copy of the instrument in the paper book or settled case as appeared does not show that the instrument was stamped. Is immaterial. *Hallock v. Jaudin*, 34 Cal. 187; *Trull v. Moulton*, 12 Allen, 396; *Cabbott v. Radford*, 17 Minn. 320, Gil. 296; *Owaley v. Greenwood*, 18 Minn. 429, Gil. 386; *Kiefer v. Rogers*, 19 Minn. 32, Gil. 14.

VII. Failure to cancel; defective cancellation.

It was held, under the acts passed between 1862 and 1866, inclusive, that the failure to conform to the prescribed mode did not render the instrument inadmissible. *Foster v. Holley*, 49 Ala. 593; *D'Armond v. Dubose*, 22 La. Ann. 131, 2 Am. Rep. 718.

At least if it was not fraudulent. *Desmond v. Norris*, 10 Allen, 250; *Union Agri. & Stock Assn. v. Neill*, 31 Iowa, 95.

In *Andrews v. Thomas*, 6 W. N. C. 414, however, the court of common pleas rendered a judgment for defendant *non obstante veredicto* upon the reserved point whether a note offered in evidence by plaintiff was admissible when the revenue stamp was canceled merely by the impress of a rubber stamp with the date July 6, 1869, without any initial or other device.

It was also held that the entire failure to cancel did not invalidate the instrument. *Patterson v. Gile*, 1 Colo. 200; *Adams v. Dale*, 20 Ind. 273; *Goodwine v. Wanda*, 25 Ind. 101; *Union Agri. & Stock Assn. v. Neill*, 31 Iowa, 95; *Corry Nat. Bank v. Rouse*, 3 Pittsb. 18; *Chaplin v. Horton*, 36 Vt. 684.

Schultz v. Herndon, 32 Tex. 890, held that if there be a legal stamp upon the instrument, whether canceled or not, it is sufficient to entitle a party to use it in evidence in the state courts whatever might be its condition under like circumstances in the Federal courts.

Jacobs v. Cunningham, 32 Tex. 774, also held that the failure to cancel a stamp did not render the instrument inadmissible.

The revenue stamp is sufficiently canceled when it is so defaced that it can never be legally used again. *Taylor v. Duncan*, 33 Tex. 440.

The provision of act of 1866, chap. 184, § 9, that where an instrument was executed at a time when and place where no collection district was established, a stamp may be affixed to it by any party having an interest therein at any time prior to the first of January, 1867, does not make the cancellation of the stamp necessary. *Blunt v. Bates*, 40 Ala. 470.

Rees v. Jackson, 64 Pa. 487, 3 Am. Rep. 603, held that it was a question for the jury whether the maker of a note had canceled three of the seven stamps on the note, all of which

bore his initials, it having been proved that the initials on the other four were made by him.

VIII. Foreign laws.

In considering the question as to the enforceability of the provisions of foreign statutes with reference to unstamped instruments, it would seem that a distinction should be observed between those provisions which merely affect the remedy by excluding unstamped instruments from evidence, and those which render unstamped instruments invalid. This distinction is made by *Alderson, B.*, in *Bristow v. Sequeville*, 5 Exch. 275, 3 Car. & K. 64, 19 L. J. Exch. N. S. 289, 14 Jur. 674, which held that an unstamped receipt dated in a foreign country was admissible notwithstanding that under the laws of that country it would be inadmissible until stamped upon payment of a penalty. He said: "It is very different whether the law makes a stamp necessary to the validity of an instrument, or to its admissibility in evidence. . . . If by the law of a foreign country a document is only inadmissible for want of a stamp it is a valid contract and receivable in evidence in another country."

And in *Clegg v. Levy*, 3 Campb. 186, and *Alves v. Hodgson*, 2 Esp. 528, 7 T. R. 241, it was expressly held that if a stamp is necessary under a foreign law to render an instrument valid it cannot be received without being stamped.

In *James v. Catherwood*, 3 Dowl. & R. 190, the chief justice said: "It would be productive of prodigious inconvenience, if in every case in which an instrument was executed in a foreign country we were to receive in evidence what the law of that country was, in order to ascertain whether the instrument was or was not valid." As pointed out in *Fant v. Miller*, 17 Gratt. 47, however, it did not appear in that case, and was not alleged, that the instrument was void under the law of the foreign country for want of a stamp. And *Pollock, C. B.*, in *Bristow v. De Sequeville*, 5 Exch. 275, 3 Car. & K. 64, 19 L. J. Exch. N. S. 289, 14 Jur. 674, said with reference to the statement of *Alderson, B.*, before alluded to, that the case of *James v. Catherwood*, 3 Dowl. & R. 190, was an authority in point. The distinction is also clearly made in *Fant v. Miller*, 17 Gratt. 47, *supra*, which holds that an instrument executed in another state, and not stamped as required by the laws of that state, was nevertheless admissible because that law did not make the instrument invalid, but merely inadmissible.

Satterthwaite v. Dougherty, 44 N. C. (Busbee L.) 314, 59 Am. Dec. 554, made the same distinction between provisions rendering an unstamped instrument invalid and those rendering it inadmissible, but came to a different conclusion than the preceding case, with reference to the effect of the statute of the sister state, and therefore excluded the instrument in question.

Kohn v. The Renaissance, 5 La. Ann. 25, and *Ludlow v. Van Rensselaer*, 1 Johns. 94, hold, in effect, that the courts will not take notice of, or enforce, the revenue laws of a foreign country. It is not clear in either of these cases what the effect of the omission of a stamp is under the foreign laws, but they do not seem to recognize any distinction, and the language is broad enough to cover cases involving provisions invalidating unstamped instruments. And the doctrine of *Ludlow v. Van Rensselaer*, 1 Johns. 94, was applied in *Skinner v. Tinker*, 34 Barb. 333, upon the assumption that the instrument was valid, under the foreign law, for want of a stamp.

The court in *Arnendiaz v. Serna*, 40 Tex. 201, said that it was sometimes held that the courts of one country do not ordinarily consider themselves bound to decide upon the effect of the revenue laws of another, upon the validity

of contracts made there and sought to be enforced by parties within its jurisdiction, but said it was not necessary to decide whether that doctrine applied to the present case.
G. H. P.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

J. J. HUGGINS *et al.*, *Appts.*,
v.

William F. DALEY.

(99 Fed. Rep. 606.)

1. **The boring of a well within ninety days is a condition precedent to the continuance of an oil and gas lease which, in consideration of \$1, grants all the oil and gas in certain land, with the privilege of operating therefor for the term of five years, and as much longer as oil or gas is found in paying quantities, not exceeding thirty-five years from date, with a royalty of one seventh part or share of the oil produced and saved, but with a proviso that a well shall be completed within ninety days, in default of which the lessee shall pay a forfeiture of \$50, since the only substantial consideration consists of the prospective royalties.**
2. **No judicial proceeding is necessary to avoid an oil and gas lease for failure to comply with a condition precedent by boring a well, where the lease merely gives the right to the oil and gas, with the privilege of operating therefor on the land, since the landlord has never been out of possession, and cannot re-enter upon himself.**
3. **It is matter of common knowledge, of which the courts will take notice, that oil and gas lie far below the surface of the ground and may flow unrestrained if the owner of adjoining land bores a well down to the strata which holds them, so that they may be taken from the land without any compensation.**

(February 6, 1900.)

A PPEAL by defendants from a decree of the Circuit Court of the United States for the District of West Virginia in favor of complainant in a proceeding to restrain defendants from operating under an oil lease and to cancel the lease as a cloud on complainant's title. *Reversed.*

The facts are stated in the opinion.

Before *Simonton*, Circuit Judge, and *Paul* and *Brawley*, District Judges.

Messrs. W. W. Van Winkle and B. M. Ambler, for appellants:

The decisions of the supreme court of West Virginia as to construction and effect of oil leases will be followed by the Federal courts.

Foster v. Elk Fork Oil & Gas Co. 61 U. S. App. 576, 90 Fed. Rep. 178, 32 C. C. A. 560.

The discovery and production of oil is a condition precedent to the continuance or the vesting of a demise for oil purposes.

NOTE.—As to forfeiture of oil and gas lease, see *Evans v. Consumers' Gas Trust Co.* (Ind.) 31 L. R. A. 673, and *note*; and *Steelsmith v. Gartlan* (W. Va.) 44 L. R. A. 107. 48 L. R. A.

If at any time the lessee has the option to operate or suspend, to hold on or to drill, the lease becomes binding no longer on the lessor, because of want of mutuality.

Steelsmith v. Gartlan, 45 W. Va. 27, 44 L. R. A. 107, 29 S. E. 978.

Whenever the lessor has the right to avoid an oil lease, he may get rid of it without judicial proceeding, but by an unequivocal election to treat it as void, as by the giving of a new lease.

The lessee under the new lease so given is entitled to operate and develop the property without molestation.

Guffy v. Hukill, 34 W. Va. 49, 8 L. R. A. 759, 11 S. E. 754.

Oil law favors the faithful driller, and will not assist the fraud of resurrecting the claim of an adventurer who lies by to appropriate the enterprise of another.

Johnston v. Standard Min. Co. 148 U. S. 360, 37 L. ed. 480, 13 Sup. Ct. Rep. 585; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328.

Daley alleges a legal title to leasehold, and charges that we are in possession. That is not a case for equity.

Frost v. Spilley, 121 U. S. 552, 30 L. ed. 1010, 7 Sup. Ct. Rep. 1129; 3 Pom. Eq. Jur. § 1390.

The United States courts do not entertain a bill in equity to remove a cloud where the plaintiff is out of possession.

Whitehead v. Shattuck, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; *Read v. Dingess*, 8 U. S. App. 526, 60 Fed. Rep. 21, 8 C. C. A. 389; *Rich v. Braxton*, 158 U. S. 376, 39 L. ed. 1022, 15 Sup. Ct. Rep. 1006; *Harding v. Guice*, 42 U. S. App. 411, 80 Fed. Rep. 162, 25 C. C. A. 352.

Even where a West Virginia statute confers such jurisdiction in chancery, or where local administration would permit such practice, the Federal courts cannot entertain equity jurisdiction unless it attaches under the system of Federal jurisprudence.

First Nat. Bank v. Prager, 63 U. S. App. 703, 91 Fed. Rep. 689, 34 C. C. A. 51; *Hollins v. Brierfield Coal & I. Co.* 150 U. S. 371, 37 L. ed. 113, 14 Sup. Ct. Rep. 127; *Scott v. Neely*, 140 U. S. 106, 35 L. ed. 358, 11 Sup. Ct. Rep. 712.

This court takes judicial notice of the oil business, and of the methods of oil production in West Virginia.

Brown v. Spilman, 155 U. S. 665, 39 L. ed. 304, 15 Sup. Ct. Rep. 245.

When a lease is made for oil, the landlord to get a share of what is produced, there is an implied covenant for diligent search and operation.

Kleppner v. Lemon, 176 Pa. 502, 35 Atl. 109; *Barringer & A. Mines & Mining*, pp. 30, 31, 74, 75, 111; *Guffy v. Hukill*, 34 W. Va. 49, 8 L. R. A. 759, 11 S. E. 754, 26 Am. St. Rep. 901, note.

Perhaps in no other business is prompt performance so essential to the rights of the parties, or delay by one party so likely to prove injurious to the other.

Munroe v. Armstrong, 96 Pa. 307.

A lease for the purpose of operating for oil or gas for a period of five years, and so much longer as oil or gas is found, on no other consideration than prospective oil royalty and gas rental, vests no title in the lessee except the mere right of exploration; but the title thereto, both as to the period of five years and the time thereafter, remains inchoate, and contingent on the finding of oil and gas in paying quantities.

Steelsmith v. Gartlan, 45 W. V. 27, 44 L. R. A. 107, 29 S. E. 978; *Conrad v. Morehead*, 89 N. C. 31; *Hawkins v. Pepper*, 117 N. C. 407, 23 S. E. 434; 6 *Lawson, Rights, Rem. & Pr.* 4499; *Indianapolis, P. & C. R. Co. v. Hood*, 66 Ind. 580; *Petroleum Co. v. Coal, Coke & Mfg. Co.* 89 Tenn. 381, 18 S. W. 65.

The entire consideration of the lease is to secure the oil to be produced, and a nonperformance of that purpose destroys the entire consideration.

New Orleans v. Texas & P. R. Co. 171 U. S. 312, 43 L. ed. 178, 18 Sup. Ct. Rep. 875; *Roberts v. Bettman*, 45 W. Va. 143, 30 S. E. 95; *Farmers' Loan & T. Co. v. Galesburg*, 133 U. S. 156, 33 L. ed. 573, 10 Sup. Ct. Rep. 316.

Where one party disregards, the other may rescind.

Davison v. Von Lingen, 113 U. S. 40, 28 L. ed. 885, 5 Sup. Ct. Rep. 346; *Shaeffer v. Blair*, 149 U. S. 248, 37 L. ed. 721, 13 Sup. Ct. Rep. 856; *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12.

If Hodges and Daley had the option to operate after ninety days they ought not to have held back until the property had increased in value, by reason of developments they did not elect to make, when the whole situation had changed; and this is especially true of oil properties.

Johnston v. Standard Min. Co. 148 U. S. 360, 37 L. ed. 480, 13 Sup. Ct. Rep. 585; *DeSollar v. Hanscome*, 158 U. S. 216, 39 L. ed. 956, 15 Sup. Ct. Rep. 816; *McCabe v. Matthews*, 155 U. S. 550, 39 L. ed. 256, 15 Sup. Ct. Rep. 190.

Mr. V. B. Archer, for appellee:

The unlawful extraction of petroleum oil or gas from land, they being part of the land, is an act of irreparable injury. Equity will enjoin it.

Crawford v. Ritchey, 43 W. Va. 252, 27 S. E. 220; *Steelsmith v. Gartlan*, 45 W. Va. 27, 44 L. R. A. 107, 29 S. E. 978; *Bettman v. Harness*, 42 W. Va. 433, 36 L. R. A. 566, 26 S. E. 271.

The actual production of the money is not required where the party is ready and willing to pay it, but is prevented by the creditor's declaring that he will not receive it, 48 L. R. A.

or by his making any declaration equivalent to a refusal to accept it if tendered.

25 Am. & Eng. Enc. Law, p. 904.

Where in a lease clauses of forfeiture are specified, it is not to be inferred that there are any grounds of forfeiture not declared to be such.

McKnight v. Kreutz, 51 Pa. 232; *Harris v. Ohio Oil Co.* 57 Ohio St. 118, 48 N. E. 502.

The condition in this lease should stand upon the same basis as the usual rental clause in the ordinary oil lease, where a rental clause is inserted, but where no express condition of forfeiture for nonpayment of such rental has been provided. In all these cases the courts hold the lessee bound to pay the rental.

Aderhold v. Oil Well Supply Co. 158 Pa. 401, 28 Atl. 22; *McMillan v. Philadelphia Co.* 159 Pa. 142, 28 Atl. 220.

By reason of the expressed forfeiture of \$50 for failure to drill a well within the time, the lease must be construed as though no forfeiture clause whatever were inserted.

Guffy v. Hukill, 34 W. Va. 49, 8 L. R. A. 759, 11 S. E. 754; *Schaupp v. Hukill*, 34 W. Va. 375, 12 S. E. 501; *Thomas v. Hukill*, 34 W. Va. 385, 12 S. E. 522; *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 151; *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544; *Bettman v. Harness*, 42 W. Va. 433, 36 L. R. A. 566, 26 S. E. 271; *Crawford v. Ritchey*, 43 W. Va. 252, 27 S. E. 220; *Steelsmith v. Gartlan*, 45 W. Va. 27, 44 L. R. A. 107, 29 S. E. 978; *Barnhart v. Lockwood*, 152 Pa. 82, 25 Atl. 237; *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732; *McNish v. Stone*, 152 Pa. 457, note; *Hooks v. Forst*, 165 Pa. 238, 30 Atl. 846; *Bartley v. Phillips*, 165 Pa. 325, 30 Atl. 842; *Bartley v. Phillips*, 179 Pa. 175, 36 Atl. 217; *Thompson v. Christie*, 138 Pa. 230, 11 L. R. A. 236, 20 Atl. 934; *Foster v. Elk Fork Oil & Gas Co.* 61 U. S. App. 576, 90 Fed. Rep. 178, 32 C. C. A. 560.

When lessee Hodges obtained the lease of March 12, 1897, he acquired the exclusive right to search for oil on the tract of 50 acres of land.

Harris v. Ohio Oil Co. 57 Ohio St. 118, 48 N. E. 502.

The lease did not stipulate for the operation of the well, and the court cannot make a better contract for the plaintiff than he made for himself.

Stahl v. VanFleck, 53 Ohio St. 136, 41 N. E. 35; *Petroleum Oil Co. v. Coal, Coke & Mfg. Co.* 89 Tenn. 381, 18 S. W. 65; *Cahoon v. Bayaud*, 123 N. Y. 298, 25 N. E. 376; *Eaton v. Allegany Gas Co.* 122 N. Y. 416, 25 N. E. 981.

Brawley, District Judge, delivered the opinion of the court:

This is an appeal from the circuit court of the United States for the district of West Virginia. The appellee filed a bill in equity alleging that one A. P. Hodges had obtained from F. P. Marshall a lease for oil and gas upon a certain tract of 50 acres of land situated in Ritchie county, West Virginia, which had been assigned to him, and that subsequently said Marshall had leased the identical

premises to J. J. and J. B. Huggins; and the prayer of the bill was that the said Huggins and their associates should be restrained in prosecuting the work for developing said leasehold for oil, and that a receiver be appointed to take possession of said leasehold premises and operate the same, and that a decree should be entered canceling said lease as a cloud upon the title of the appellee.

Marshall was an illiterate farmer, the owner in fee of the tract of land described; and on March 12, 1897, he entered into an agreement, under seal, of which the substantial parts are as follows: In consideration of one dollar paid by Hodges, the lessee, the lessor "does hereby grant, demise, and let unto the said lessee all the oil and gas in and under the following described tract of land, and also said tract of land for the purpose of operating thereon for oil and gas, with the right to use water therefrom, and all rights and privileges necessary or convenient for conducting said operations and the transportation of oil and gas, and waiving all rights to claim or hold any of the property or improvements placed or erected in and upon said land by the lessee as fixtures or as part of the realty."

Then follows the description of the land. The habendum clause is as follows: "To have the same unto and for the use of the lessee, his executors, administrators, and assigns, for the term of five years from the date thereof, and as much longer as oil or gas is found in paying quantities thereon, not exceeding the term of thirty-five years from the date thereof; yielding and paying to the lessor the one-seventh part or share of all the oil produced and saved on the premises."

Then follows a further description of the method of delivering the oil into tanks, and a reservation of gas for the personal use of the lessor, and a proviso which is in the following terms: "Provided, however, that a well shall be commenced upon the above-described premises within thirty, and completed within ninety, days from the date hereof; and, in case of failure to commence and complete said well as aforesaid, the lessee shall pay to the lessor a forfeiture of \$50."

This lease was not recorded until April 8, 1898. At the same time was recorded an assignment of a half interest in said lease by Hodges to Daley, dated April 2, 1897, and acknowledged on April 4, 1898, and the assignment of the remaining half interest, dated April 2, 1898, and acknowledged April 4, 1898. The lease from Marshall to J. J. and J. B. Huggins was executed November 6, 1897, and recorded January 31, 1898.

Much testimony was taken tending to show that at the time of the execution of the lease Marshall was under the impression that the lease was only for ninety days, and that he believed that the words "five years" had been stricken from the printed form of the lease, and "ninety days" written therein; and in the copy of the lease which was given to him by Hodges the words "five years"

were stricken out, and "ninety days" substituted, but it appears that the substitution was not in the handwriting of Hodges. The proviso was in the handwriting of Hodges; the remainder of the lease being printed, with the exception of some interlineations. There was also testimony to the effect that Daley was a partner of Hodges, and that Hodges had taken the lease for the benefit of the Cairo Oil Company, and impeaching the bona fides of the assignment to Daley. The conclusions reached by us do not require the determination of these questions, if, indeed, they are properly before us. It is undisputed that nothing was done by Hodges towards boring the well. It is clear from the testimony that he had no intention at any time to bore the well within the ninety days stipulated, and that he had not the means to do so if he had any such intention. In November following the execution of the lease to Hodges, the appellants leased from one Moore the land adjoining Marshall's for the purpose of operating for oil, and began to bore a well within 100 feet of Marshall's line, and about the same time they leased the land of Marshall for the purpose of operating for oil. At the time they took this lease they had knowledge that Hodges had some claim upon the land, and Marshall exhibited to them what purported to be a copy of the Hodges lease. In this copy, as above stated, the words "five years" had been stricken out, and "ninety days" substituted; and after submitting the copy to a lawyer, and being informed that the lease had no further validity, they commenced operations upon the Marshall land, and expended about \$3,600 in the boring of a well. About the time they struck pay sand, and after the well upon the Moore land was flowing oil, on April 15, 1898, Daley filed his bill for injunction. Their lease had been recorded January 31, and some time between that day and the filing of the bill, but after they had commenced operations, Daley came upon the land, and informed them that he had some claim thereto; but the Hodges lease and assignment to Daley was not recorded until April 8, ten days before the filing of the bill.

The question for decision is whether the proviso in the Hodges lease constituted a condition precedent, and whether the failure of Hodges to do anything towards the boring of the well did not prevent the vesting of any rights under that lease. By the terms of that instrument the lessor granted to the lessee all the oil and gas in and under the land described, "and also the said tract of land for the purpose of operating thereon for oil and gas." By a course of decisions it is well settled in West Virginia that a lease of this character is not a grant of property in the oil or in the land, but merely a grant of possession for the purpose of searching for and procuring oil. The title is inchoate, and for the purpose of exploration only until the oil is found. If it is not found, no estate vests in the lessee; and, where the sole compensation to the landlord is a share of what is produced, there is al-

ways an implied covenant for diligent search and operation. There is, perhaps, no other business in which prompt performance is so essential to the rights of the parties, or delays so likely to prove injurious,—no other class of contracts in which time is so much of the essence. There is no other branch of mining where greater damage is done by delay. Coal and precious metals lie either in horizontal veins or in pockets. They remain where they are until removed. Oil and gas are the most uncertain, fluctuating, volatile, and fugitive of all mining properties. They lie far below the surface, beyond the control of human will, and beyond the reach of any legal process, whence they may flow unrestrained if the owner of adjoining land bores a well down to the strata which holds them; and there is no law which can provide adequate, or indeed any, compensation for such results. This is a matter of common knowledge, and "courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction." *Greenl. Ev. § 6*. It furnished the ground upon which the plaintiff in this case asks the court, through a receiver, to bore the well which the lessee was required to bore within ninety days from the date of execution of the instrument under which he claims. The only consideration which moved the lessor to grant the lease was the prospective royalties from oil and gas, which could come only if the lessee complied with the terms of this proviso that required the boring of a well: for, while the sum of \$1 is technically a valuable, it is only a nominal, consideration. If the contention of the plaintiff is correct, the lessee, Hodges, or his assigns, could have waited the full term of five years without expending \$1 or moving a hand for the development of the leased property, meantime tying the hands of the owner of the land, forbidding him to make arrangement with any other persons for the explorations which the lessee undertook to make, and perhaps suffering irreparable injury from the drainage of his oil and gas. This is the contract which a court of equity is asked to enforce. It is a short view of the range of equitable principles. There are no precise technical words which distinguish conditions precedent or subsequent. Whether they are one or the other is a matter of construction, to be solved by ascertaining the intention of the party creating the estate. They are not determined merely by the structure of the instrument, or the arrangement of the covenants. Where mutual covenants go to the whole consideration on both sides, they are mutual conditions,—the one precedent to the other. 4 Kent, Com. 144. Where the undertaking on one side is, in terms, a condition to the stipulation on the other (that is, where the contract provides for the performance of some act or the happening of some event, and the obligations of the contract are made to depend on such performance or happening), the conditions are conditions precedent. The reason and the sense of the contemplated transaction as it must have been understood

by the parties, and is to be collected from the whole contract, determines whether this is so or not, or it may be determined from the nature of the acts to be done, and the order in which they must necessarily precede and follow each other in the progress of performance. But when the act of one is not necessary to the act of the other, though it would be convenient, useful, or beneficial, yet, as the want of it does not prevent performance, and the loss and inconvenience can be compensated in damages, performance of the one is not a condition precedent to performance by the other. The nonperformance on one side must go to the entire substance of the contract and to the whole consideration, so that it may safely be inferred as the intent and just construction of the contract that, if the act to be performed on the one side is not done, there is no consideration for the stipulation on the other side. *New Orleans v. Texas & P. R. Co.* 171 U. S. 334, 43 L. ed. 186, 18 Sup. Ct. Rep. 875. "When one act is to be done by one party before another act, which is the consideration of it, is to be done by the other, the covenants are dependent, and the other is not bound to perform until the first act has been done, because the first act is a condition precedent to performance of the other; and, in all cases where covenants are dependent, they are in the nature of conditions precedent, and must be performed in the order of time in which performance is provided for in the covenant; and, in determining whether covenants are dependent or independent, the intention of the parties and the good sense of the case will be regarded, rather than the technical sense of the words used." *Wood, Land. & T. § 312*.

In construing this agreement in the light of all the facts surrounding contracts of this nature, and of the considerations moving the grantor in its execution, we have no difficulty in determining that the boring of a well by the grantee was the whole consideration of the lease, that nonperformance went to the entire substance of the contract, that the word "provided" is an apt word of condition, that the grantee did not, and at the time he procured the lease did not intend to, comply with the condition which was a condition precedent to the vesting of any title in the leased lands. In cases of conditions precedent, the consideration is the performance of the thing stipulated to be done, not the promise.

But it is contended by the appellee that the clause providing a forfeit of \$50 for failure to bore the well within ninety days provides full compensation for failure to perform the condition. As a matter of fact, the \$50 was not paid or legally tendered; but, inasmuch as the grantor had declared a purpose not to receive the forfeit money, it will be treated as if it had been tendered. The question whether a sum of money stipulated to be paid is a penalty or liquidated damages is sometimes difficult of determination, there being no criterion of universal application. It depends upon a construction of the whole instrument, the intention of the parties, the

nature of the act to be performed, and the consequences which would naturally flow from its nonperformance. In many of the cases where oil leases have come before the courts, the doing of a certain thing, or the payment of rental in lieu thereof, is stipulated in the contract in a way that justifies the conclusion that the parties have provided exact and just compensation by way of liquidated damages for failure of performance in contracts, where parties stipulate in the alternative, and are free to choose. But where consequences likely to follow nonperformance are not measureable by any exact pecuniary standard, and the probable damage is out of all proportion to the amount agreed to be paid, this sum should be considered a penalty; and such we hold it to be in this case, where the sum of \$50 is stated to be a forfeiture. It is in the nature of a security for the performance, and cannot be held to be liquidated damages for nonperformance.

In *French v. Macale*, 2 Dru. & W. 274, Lord St. Leonard thus states the doctrine which we hold to be applicable here: "The general rule of equity is that if a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done."

And in *Dooley v. Watson*, 1 Gray, 414. Chief Justice Shaw says: "Courts of equity have long since overruled the doctrine that a bond for the payment of money, conditioned to be void on the conveyance of land, is to be treated as a mere agreement to pay money. When the penalty appears to be intended merely as a security for the performance of the agreement, the principal object of the parties will be carried out."

If a party can show that he has done everything in his power, but by unavoidable accident, by fraud, surprise, or ignorance not wilful, has been prevented from executing his covenant literally, the courts will relieve him, especially where the case admits of compensation for his nonperformance, or the parties can be put in the same situation as if the condition had been performed; but no ground for equitable relief can be found in a case where the party has not only failed to perform the conditions upon which alone he obtained the execution of the contract, but where it is also clear that he never at any time intended to perform, or had the means to do so. "There is no more intrinsic sanctity in stipulations by contract than in other solemn acts of parties, which are constantly interfered with by courts of equity upon the broad ground of public policy, or the pure principles of natural justice. Where a penalty or forfeiture is designed merely as a security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different and oppressive purpose, as it would be to allow him to substitute another for the principal obligation." Story, Eq. Jur. § 1316.

The principles announced by this court in *Foster v. Elk Fork Oil & Gas Co.* 61 U. S. App. 576, 32 C. C. A. 560, 90 Fed. Rep. 178, 48 L. R. A.

govern and sustain the conclusion reached, although the precise point here determined was not involved. In that case the demise was for ten years, and there was a covenant that a well should be completed within one year, and in case of failure the lessee was to pay 10 cents per acre per annum after the time for completing the well as specified. The lessee bored one well, which proved to be dry, and no further effort was made. The court says: "The completion of the well saves the penalty. It does not amount to a fulfilment of the covenants. The consideration therefore for this lease was the prospective rents and royalties the lessor would enjoy if the lessee, by diligent search, could find oil and gas in paying quantities. If the lease failed to bind the lessee to diligent search for oil or gas, it was without consideration, binding on neither party, and voidable at the pleasure of either."

Numerous cases were cited,—among them, those from West Virginia which this court held to lay down rules of property stating the controlling doctrine peculiar to mining leases in that state, which the Federal courts would recognize and follow. This case fully establishes the doctrine that the consideration in leases of this character "evidently and clearly contemplates active operations upon the demised premises," and when, after one failure, no further effort is made, mere inaction on the part of the lessee may well be construed an abandonment of rights under his leases. The case of *Steelsmith v. Gartlan*, 45 W. Va. 27, 44 L. R. A. 107, 29 S. E. 978, was cited to sustain these conclusions. That was a lease to Knotts and Garber for oil purposes, providing certain royalties, with a stipulation that a well should be completed within one year; and the failure to do so rendered the lease null and void, unless the lessee should pay 25 cents per acre from and after the date stipulated for the completion of the well, when such payment should operate to extend the time for five years. No well was drilled, and the lessor, considering the lease forfeited, refused to accept the rent therefor. His lessee's executor, before the expiration of five years, executed a new lease to Gartlan, February 11, 1895, which required him to drill a well within one month, with stipulations for the payment of \$50 per month for any delay in completing the well. The term was for five years, and there was a stipulation that a failure to comply with any of its stipulations should render it void. Gartlan drilled a well, but, not finding oil or gas in paying quantities, removed his derrick and tools, and left the premises. The land was leased in October, 1896, to Steelsmith, who forthwith commenced operations, and filed a bill to cancel the Gartlan lease, and Knotts and Garber filed a cross bill. The court held that there being no provision for any further operations after the first well, when completed, was nonproductive, "the contract is at an end as to both parties as soon as such first well is abandoned as unsuccessful:" quoting *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732: "A vested

title cannot ordinarily be lost by abandonment in a less time than fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. An oil lease stands on quite different ground. The title is inchoate, and for purposes of exploration only until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned."

The lessee in that case [*Steelsmith v. Garlan*] had complied with the covenant to bore a well, and the court says: "He could not . . . be compelled to put down another well, and, he not being bound, the lessor was not bound, either; for the only consideration left to her was the prospective oil royalties and gas rentals, which the lessee was in position to entirely defeat. Contracts unperformed, optional as to one of the parties, are optional as to both."

Again: "Such leases are construed most strictly against the lessee, and favorable to the lessor. . . . When a lease provides the mode, manner, and character of search to be made, implications in regard thereto are excluded thereby, as repugnant. And the demise, for the purpose of operating for oil and gas for the period of five years, is dependent on the discovery of oil and gas in the search provided for; and, if such search is unsuccessful, the demise fails therewith, as such discovery is a condition precedent to the continuance or vesting of the demise. The lessee's title, being inchoate and contingent, both as to the five years limit and time thereafter, on the finding of oil and gas in paying quantities, did not become vested by reason of his putting down a nonproductive well."

While most of the cases cited have gone upon the ground of abandonment, the governing principle in all oil leases of the character under consideration is that the discovery and production of oil is a condition precedent to the continuance or vesting of any estate in the demised premises; that such leases vest no present title in the lessee, and if, at any time, the lessee has the option to suspend operations, the lease is no longer binding on the lessor because of want of mutuality; and, where the only consideration is prospective royalty to come from exploration and development, failure to explore and develop renders the agreement a mere *nudum pactum*, and works a forfeiture of the lease, for it is of the very essence of the contract that work should be done. And, the smaller the tract of land, the more imperative is the need for prompt and efficient drilling; for oil operations cumber the land, rendering it unavailable for agricultural purposes. The landowner is entitled to his royalty as promptly as it can be had. The danger of drainage from his small holding is increased by delay, and the resulting damage, not being susceptible of pecuniary measurement, is therefore not compensable. No such lease should be so construed as to enable the lessee who has paid no consideration to hold it merely for speculative purposes, without

doing what he stipulated to do, and what was clearly in the contemplation of the lessor when he entered into the agreement. Leaving out the proviso which bound the lessee to diligent search and development, there is nothing in this lease which bound him to do anything whatever. The proof is clear that he never intended to drill the well within the time stipulated. This proviso was written by the lessee evidently for purposes of deception. He knew that the object of the lessor was to secure diligent search for oil, and he was "keeping the word of promise to the ear, and breaking it to the hope;" skillfully turning it into a mere speculative lease, binding the lessor and leaving himself free. It would be unconscionable to hold the lessor bound. "Law, as a science, would be unworthy of the name, if it did not, to some extent, provide the means of preventing the mischiefs of improvidence, rashness, blind confidence, and credulity, on one side, and of skill, avarice, cunning, and a gross violation of the principles of morals and conscience, on the other." Story, Eq. Jur. § 1316.

In *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 593, 23 L. ed. 331, the facts were, to some extent, the converse of those here; but Mr. Justice Miller comments on the fluctuating character and value of this class of property, and asserts the injustice "of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit," and referring to the distinction between real estate, whose value is fixed, says: "The class of property here considered is subject to the most rapid, frequent, and violent fluctuations in value of anything known as property, and requires prompt action in all who hold an option whether they will share its risks or stand clear of them, [and that] no delay for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably to himself whether he will abide by his bargain or rescind it, is allowed in a court of equity."

In a case like this no judicial proceeding was necessary to avoid the lease. The landlord, never having been out of possession, cannot re-enter upon himself; and it was held in *Guffy v. Hukill*, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, and in many other cases, that any unequivocally expressed election to avoid, as by giving a new lease, avoids the one preceding.

In *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713, the court says: "No lease of land for a rent for a return to the landlord out of the land which passes can be construed to be intended to enable the tenant merely to hold the lease for purposes of speculation, without doing and performing in connection therewith what the lease contemplated. Such a construction would, indeed, make all such contracts a snare for the entrapment and injury of the unwary landlord. A man buy-

ing and paying for land may do with it as he likes,—work it or let it lie idle. But a tenant to whom land passes for a specified purpose has no such discretion; he must perform what he stipulated to do.”

A recent author says: “The trend of the decisions touching questions of forfeiture arising out of oil and gas leases has been almost uniformly in favor of the lessor. Generally it is the lessee who is favored, and, after a substantial compliance by him with the terms of the contract, equity will not regard a technical breach. But with mining leases it is otherwise. This is due principally to the nature of the business of mining, and more especially oil mining,—to the temptation offered a shrewd operator to purchase at a nominal price the right to develop lands, the owner of which is ignorant of their real value, and then to hold them indefinitely, neither working them himself, nor permitting another to do so.” “But a lessee, where the instrument presents a semblance of inequity or unfairness, will find that he has a thorny road to travel before a court of equity will sanction his claims.” Bryan, *Petroleum*, 146.

We are of opinion, upon the whole case, that the exploration for and development of oil and gas was the sole consideration for this lease; that the proviso requiring the boring of a well within ninety days was a condition precedent to the vesting of any interest in the lessee, and that the forfeiture of \$50 was intended merely as a penalty to secure the drilling of the well, and, if paid, would have been merely compensation to the landowner for the right of the lessee to possession during the ninety days, and such payment would not be so far a compliance with the conditions of the lease as to vest in the lessee a title in the leased premises for the period of five years; that after the expiration of ninety days from the date of the lease, there being no provision therein for any work to be done by the lessee in the development of the property, which was the sole consideration therefor, the lessor had the option to avoid it; that the inaction of the lessee during a period of eight months, while operations were being commenced on adjoining land, calculated to drain the land of the lessor and irreparably injure him, fully justified his avoidance of the lease; and that the lease to Huggins and his associates was an unequivocal declaration of his intention to avoid it, and terminated any inchoate right which Hodges could claim thereunder.

The decree of the Circuit Court is reversed, and the case remanded, with instructions to restore the leased premises to the appellants, and that the receiver be directed to turn over to them any moneys in his hands as the result of his operations, after deducting whatever sum may have been actually and necessarily expended by him in the development of the same, and that the bill be dismissed, with costs.

48 L. R. A.

City of PONTIAC, *Piff. in Err.*,
v.
TALBOT PAVING COMPANY.

(94 Fed. Rep. 65, 36 C. C. A. 88.)

1. A general verdict for plaintiff is not conclusive in the appellate court upon the question whether or not the declaration states a cause of action.
2. A municipal corporation is not liable to an action for refusal to proceed to levy a new special assessment to pay for street improvements after the original one was set aside for irregularity, under a contract by which the contractor agreed to look only to such assessments for his compensation and to take the risk of their invalidity. In accordance with a statute which expressly provides that the claim shall not become a public charge in any event, but the duty, if it exists, must be enforced by mandamus.

On rehearing.

3. When a municipal corporation has exercised the power conferred by Ill. Rev. Stat. art. 9, chap. 24, § 1, of prescribing the method of payment for local improvements, and the work has been done, to be paid for by special assessment, the expense cannot be made a general charge against the city.

(May 19, 1899.)

ERROR to the Circuit Court of the United States for the Southern Division of the Northern District of Illinois to review a judgment in favor of plaintiff in an action brought to recover damages for defendant's refusal to order a new assessment for the expense of a street pavement under a contract performed by plaintiff. *Reversed.*

Before Woods and Jenkins, Circuit Judges, and Scaman, District Judge.

Statement by Seaman, District Judge:

Judgment is entered against the city of Pontiac, plaintiff in error and defendant below, in an action on the case, upon a general finding by the court that the defendant is guilty, and that plaintiff's damages are assessed at the sum of \$12,343; a trial by jury being waived. The alleged cause of action, as set out in the several counts of the declaration, is failure and neglect on the part of the municipal authorities to provide “for a new special tax assessment” against contiguous property, to pay amounts earned under a contract for the paving and improvement of certain streets under the following state of facts: On June 27, 1895, an ordinance was adopted by the city of Pontiac for the improvement of certain streets, whereby the expense of street intersections was to be paid by general taxation, and “the remainder of cost of said improvement should be paid for by special taxation, to be assessed, levied, and collected against real estate abutting on the lines of said

NOTE.—As to agreement that assessments shall be accepted as payment for public improvement, and that city shall not be otherwise liable, see *Barber Asphalt Paving Co. v. Harrisburg* (C. C. A. 3d C.) 20 L. R. A. 401.

streets so ordered to be improved," in accordance with the provisions of article 9 of chapter 24 of the statute of the state of Illinois entitled "An Act to Provide for the Incorporation of Cities and Villages." The general act so referred to declares, by § 49 of article 9 (1 Starr & C. Anno. Stat. (Ill.) 2d ed. pp. 777 *et seq.*), that "all persons taking any contract with the city or village, and who agree to be paid from special assessments, shall have no claim or lien upon the city or village in any event, except from the collection of the special assessment made for the work contracted for." Section 64 of the same article provides that vouchers issued for the work shall be subject to like condition, whether the holders are the original contractors or their assigns. Proceedings were taken under the ordinance, the special tax assessments were made and confirmed, and thereupon a contract was entered into between Talbot Paving Company, the plaintiff below, and the city of Pontiac, whereby that company, as the lowest bidder, undertook to "furnish all labor and material for the construction of said local improvement" for the aggregate sum of \$15,168.90, to be paid when completed and accepted,—"and when the special tax levied under said ordinance, or any special tax which shall thereafter be levied by said city, upon the property contiguous to said improvement, should be collected," and also when the general tax provided for the cost of street intersections was collected; and the contract further provides, in express terms, that "they shall make no claims against said city, in any event, except from the collections" so referred to, and that the contractors "take all risk of the invalidity of any such special tax." The work was performed by the contractor and accepted by the city, but payment was not made, except for the cost of the intersections raised by general tax, and portions of the special assessments which were paid in by certain property owners. The balance thus left unpaid was \$10,567.33, for which "local-improvement vouchers" were issued, reciting that they were to be paid out of the special assessments when collected, and that the city was exempt from other liability. The declaration states that the failure to collect the special taxes in the first instance arose out of the prosecution by lotowners of an appeal to the supreme court of the state, which resulted in a judgment "holding the said ordinance providing for said special tax assessment invalid, thereby rendering it impossible, under said ordinance, to collect said special tax from said property to pay the balance due the plaintiff." *Bradford v. Pontiac*, 165 Ill. 612, 46 N. E. 794, is cited in the briefs as the case so referred to. After this decision, the Talbot Paving Company, presented its petition to the city council for the adoption of a supplemental ordinance "for the assessment of a special tax upon the property contiguous to said improvement" to pay the balance due, but the city council failed to make provision to that end, and the action rests upon the allegation of negligence and

wilful refusal on that behalf. The defendant demurred to the declaration, stating several grounds, but the demurrer was overruled, and the defendant, being required to plead instant, filed its plea of not guilty, and trial before the court proceeded upon the merits.

Messrs. F. W. Winkler and A. C. Norton, for plaintiff in error:

The defendant in error knew what the contract contained, and was bound to know that, by the statute, the contracting powers of the city were limited, and that its liability under such contract was limited.

Fletcher v. Oshkosh, 18 Wis. 229; *Hall v. Chippewa Falls*, 47 Wis. 267, 2 N. W. 279; *Heller v. Milwaukee*, 96 Wis. 134, 70 N. W. 1111; *Bellevue v. Hohn*, 82 Ky. 1; *Central Covington v. Weighans*, 19 Ky. L. Rep. 1979, 44 S. W. 985.

A person contracting with a city for the improvement of a street in such city is bound to take notice of the provisions of the law regulating such improvements, and must also ascertain whether the common council has so conducted the letting as to render the property owners liable for the improvement.

Johnson v. Indianapolis, 16 Ind. 227; *New Albany v. Siceency*, 13 Ind. 245; *Quill v. Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788; *Montgomery County Comrs. v. Fullen*, 111 Ind. 410, 12 N. E. 298; *Porter v. Tipton*, 141 Ind. 347, 40 N. E. 802; *Second Nat. Bank v. Lansing*, 25 Mich. 207; *Goodrich v. Detroit*, 12 Mich. 279; *Saxton v. St. Joseph*, 60 Mo. 153; *Parét v. Bayonne*, 40 N. J. L. 333; *Byrne v. East Carroll*, 45 La. Ann. 392, 12 So. 521.

The contractor's only remedy is by mandamus, and in this state the statute expressly gives him that remedy.

1 Dill. Mun. Corp. § 482; *Elliott. Roads & Streets*, pp. 436, 437; 2 Beach, *Modern Law of Contracts*, § 1191; *People ex rel. Ready v. Syracuse*, 144 N. Y. 63, 38 N. E. 1006; *People ex rel. McLean v. Flogg*, 46 N. Y. 401; *Freeport Street R. Co. v. Freeport*, 151 Ill. 451, 38 N. E. 137; *Reock v. Newark*, 33 N. J. L. 129; *Greencastle v. Allen*, 43 Ind. 347; *Greenfield v. State ex rel. Moore*, 113 Ind. 597, 15 N. E. 241; *Wren v. Indianapolis*, 98 Ind. 206; *State ex rel. Hemen v. Ballard*, 16 Wash. 418, 47 Pac. 970; *Peterson v. Manistee*, 36 Mich. 8; *Hart Twp. v. Oceana County*, 44 Mich. 417, 6 N. W. 803; *State ex rel. Hiatt v. Keokuk*, 9 Iowa, 438; *Shoolbred v. Charleston*, 2 Bay. 63.

An assessment levied under an invalid ordinance is no better than one levied without any ordinance. If an assessment was levied and the improvement made when there was no ordinance, no ordinance could afterward be passed and a valid assessment levied thereunder.

Carlsruhe v. Clinton County, 140 Ill. 512, 30 N. E. 782; *East St. Louis v. Albrecht*, 150 Ill. 506, 37 N. E. 934.

On petition for rehearing.

Cities have been held not liable because of the failure or neglect of the city council.

German-American Sav. Bank v. Spokane, 17 Wash. 315, 38 L. R. A. 259, 49 Pac. 542; *Greencastle v. Allen*, 43 Ind. 347; *Johnson v. Indianapolis*, 16 Ind. 227; *Whalen v. La-Crosse*, 16 Wis. 271; *State ex rel. Hiatt v. Keokuk*, 9 Iowa, 438; *Northwestern Lumber Co. v. Aberdeen*, 20 Wash. 102, 54 Pac. 935.

Mr. W. T. Whiting for defendant in error.

Seaman, District Judge, delivered the opinion of the court:

The general finding by the court clearly determines all issues of fact. *Fourth Nat. Bank v. Belleville*, 53 U. S. App. 628, 83 Fed. Rep. 675, 27 C. C. A. 674, and cases cited. But it is not conclusive on all the questions involved, as contended on behalf of the defendant in error. Its utmost effect is to limit the inquiry on review "to the sufficiency of the complaint and of the rulings, if any be preserved, on questions of law arising during the trial." *Lehnen v. Dickson*, 143 U. S. 71, 72, 37 L. ed. 373, 13 Sup. Ct. Rep. 481. In the case of general verdict on a trial by jury, the finding establishes all the material facts which are alleged in the declaration. If, however, the declaration on which either verdict or finding must rest "fails to state a cause of action, and clearly shows that upon the case as stated the plaintiff cannot recover," the error is not cured by verdict, and is not waived by answering and proceeding to trial after the demurrer is overruled. *Teal v. Walker*, 111 U. S. 242, 246, 28 L. ed. 415, 417, 4 Sup. Ct. Rep. 420. In such case, there is no foundation for the judgment, and that inquiry is clearly presented for review on this record. Whether considered as raised by the demurrer, or upon the objections and exceptions covering all the testimony to support the declaration, or upon the facts stated and found, is not material.

The defendant in error entered upon the performance of its contract for the street improvement under the express statutory provision that payment could be made solely out of special assessments against property abutting on the improvement, and that the contractor should "have no lien or claim upon the city . . . in any event, except from the collection of the special assessments made for the work contracted for." The ordinance by which the paving in question was authorized and let expressly referred to this statute; this condition of payment was clearly stipulated both in the contract and in the vouchers, which were finally issued and accepted for the unpaid instalments in controversy; and the contract further provided that the contractor "shall take all risk of the invalidity of any such special tax, the said city not to be liable in any event by reason of the invalidity of said special tax assessment, or any of them, or of the proceedings thereon, but only for failure to collect the same, the same being collectible in law." Proceedings were taken, and the special assessments were made, but on appeal by lotowners it was held by the 48 L. R. A.

supreme court that the ordinance was invalid by reason of provisions which committed to the city engineer an unauthorized discretion relative to the improvement, and the assessments were set aside. As the necessary result of this adjudication, which involved the entire amount unpaid on the contract, the assessments were not collected and the vouchers were not paid. The city council has since refused to take action for a new special assessment to charge the deficiency against the abutting property; and it is urged, in defense of such nonaction, that its power is exhausted, and that no such assessment can be made, under the decision referred to. Whether the power subsisted in the city council to provide for a re-assessment notwithstanding the defect in the original ordinance appears to have been the main subject of controversy in the trial court; and, for the purposes of the present inquiry, it is assumed that the decision there in favor of the power is not only in accord with justice, but is sustained as well by interpretations placed upon the statute by the supreme court. On that assumption the duty of the city is manifest to proceed promptly in the exercise of its power to assess and collect the unpaid amounts, and such duty can be enforced by mandamus, if remedies at law are not adequate for the adjustment of all rights.

The statute which confers authority for making the improvement in question imperatively requires that the expense, aside from street intersections, shall be borne by the abutting property, through special assessment, and shall not become a public charge "in any event." The provision is of general application to cities and villages in the state of Illinois, and is in accord with a rule of public policy which is common in municipal charters and is upheld by judicial authority. If, however, the contractor who performs work so authorized, has the right to recover the contract price against the municipality, by way of damages, in the event of neglect or refusal on the part of the public officers to perform their duty in enforcing the special assessments, the way is clearly open to evade and nullify the legislative purpose. By their conduct,—either through negligence, ignorance, or collusion,—the city council or officers may impose upon the public the expense of the improvement, in despite of the statute which declares it a special benefit, to be paid exclusively by abutting lotowners. Indeed, if this judgment is sustainable, it so operates in the present case, as no provision appears for collecting the amount of such recovery by a supplemental special assessment against the lotowners. On the other hand, a complete remedy is clearly open to the contractor, by a proceeding in the proper forum, to ascertain the power, and thereupon enforce the ministerial duty to make the new assessment in obedience to the statute and violating none of its provisions.

The contention, however, on behalf of the defendant in error, is predicated on the duty which is imposed by law upon the municipi-

pality to make provision for the special assessment, and on the general doctrine, held in a line of authorities and well recognized in Illinois, of municipal liability for failure or neglect on the part of its officers to discharge the public duty. The question whether this doctrine applies to any case "where the expense of making a local improvement is not to be raised by a general tax, but solely upon the property benefited," to the extent of furnishing the contractor a right to recover his compensation in an action against the corporation founded on its failure to make the necessary assessment, has given rise to decisions which are not in accord in the various jurisdictions. In 1 Dill. Mun. Corp. 4th ed. § 482, numerous cases are collated in a note, and the learned author well remarks in the text: "The right to a general judgment should, in our opinion, be limited, in any event, to cases where the corporation can afterwards reimburse itself by an assessment; for why should all be taxed for the failure of the council to do its duty in a case where the contractor has a plain remedy, by mandamus, to compel the council to make the necessary assessment, and proceed in the collection thereof with the requisite diligence." But examination of the cases there noted as favoring the general recovery, and as well those cited in the brief of counsel in support of this judgment, reveals no instance of such allowance in the face of a statute expressly prohibiting the payment or collection as a public charge in any event, and the extreme view of liability held in the two leading citations (*Keilly v. Albany*, 112 N. Y. 30, 42, 19 N. E. 508, and *Commercial Nat. Bank v. Portland*, 24 Or. 188, 33 Pac. 532) would merely disregard the contract stipulations, and not affect a case so limited by statute. In *People ex rel. Ready v. Syracuse*, 144 N. Y. 63, 66, 38 N. E. 1006, the New York court of appeals appears to disapprove the doctrine of *Keilly v. Albany*, 112 N. Y. 30, 42, 19 N. E. 508, holding that no action is maintainable against the city, even in such case, for the failure to make an assessment, but the "proper remedy was to compel, by mandamus, the officers of the city having the matter in charge to proceed with their duties as required by law."

However the consensus or weight of authority shall ultimately determine the remedy of the contractor for local improvements, where the statute authorizes payment by special assessment, but is merely directory in its terms to that end, or where the collection is limited by ordinance or contract to such assessments, and the authorities fail to provide for or to carry out the assessment, we are clearly of opinion that no general doctrine of municipal liability for mere nonfeasance in the failure or neglect of council or officers to perform a duty of the municipality can be extended to override *per se* the inhibitions expressed in this statute, and that the contractor must proceed by mandamus to enforce his claim. The decisions in support of this view are well considered, and apparently without con-

flict, and the following are leading and pertinent examples: *Fletcher v. Oshkosh*, 18 Wis. 229; *Greencastle v. Allen*, 43 Ind. 347; *Goodrich v. Detroit*, 12 Mich. 279; *Reock v. Newark*, 33 N. J. L. 129; *People ex rel. Ready v. Syracuse*, 144 N. Y. 63, 38 N. E. 1006. See also Elliott, Roads & Streets, 436, and note; Beach, Modern Law of Contracts, § 1191. In *Fletcher v. Oshkosh*, 18 Wis. 229, Mr. Justice Paine, speaking for the court in reference to a case which is practically identical, says: "Now, in the face of this provision, which says that the city shall in no event be liable, we are asked to hold that if the money is not collected in a reasonable time, in the mode which is provided, the city shall be liable. . . . We know of no rule of construction, and certainly the counsel cited no case, that could justify a court in thus overriding a plain provision of law. Whoever contracts for this kind of work, or deals in these certificates, under such a charter, takes the risk of collecting his money in the manner provided, with a right to resort to the appropriate remedy to compel the officers to whom it is intrusted to discharge their duties, and he cannot come into a court and ask to hold the city liable, in the teeth of a provision which informed him at the outset that the city should, in no event, be liable."

So considered, support cannot be found for the judgment under the general authorities, and no foundation remains unless the cases cited by counsel sustain the further contention that a rule of decision prevails in the state of Illinois which establishes the primary liability of the municipality in such contingency through the failure to make the special assessment. The decisions invoked in that view are *Clayburgh v. Chicago*, 25 Ill. 535, 79 Am. Dec. 346, and *Foster v. Alton*, 173 Ill. 587, 51 N. E. 76; but in the first-mentioned case no statute was involved which forbade liability in any event on the part of the city, and in neither case was any rule of liability adopted which can be brought into the present statute, by way of construction, to sanction an inhibited recovery. In *Clayburgh v. Chicago*, 25 Ill. 535, 79 Am. Dec. 346, the question was of a different nature, and not within the statute. An action on the case was sustained in favor of a lotowner to recover of the city damages arising out of the taking of his property for public use in opening a street. The law provided for an assessment of benefits and damages to that end, the property was appropriated and the damages ascertained, but there was a refusal to enforce collection of the assessment. The terms of the statute are not stated, but, clearly, the remedy for compensation in such a case is not applicable, in any view, to a contractor, under the present statute. In *Foster v. Alton*, 173 Ill. 587, 51 N. E. 76, however, the same statute and like conditions as in the case at bar were present, except that suit was commenced by the contractor after he had petitioned for a reassessment, and before an ordinance could be adopted for that purpose; the action being based on the ground that

the city "had exhausted its power, and could not make a reassessment, as it had agreed to do, and that it was therefore liable for the balance, to be paid by general taxation or out of the general fund." The decision of the supreme court denies the right of action, and is based solely upon the ground that a reassessment could be made for the collection; and, so far as it furnishes light, the ruling is distinctly adverse to recovery here, and appears to have been misapprehended by counsel. It is cited in the argument submitted on behalf of the defendant in error as stating in the opinion of the court: "This action cannot be maintained except upon the refusal or neglect of appellant to levy a reassessment, which is not claimed." This remark appears in the recital of facts only, and as a quotation from the findings of the appellate court of a reason for not remanding the cause. It is neither approved in the opinion, nor referred to as influencing the decision; nor could the excerpt have the force of a binding decision, if it were approved.

No ground appearing to authorize the recovery against the plaintiff in error, the judgment is reversed, with direction to sustain the demurrer to the declaration.

A petition for rehearing having been filed, **Seaman**, District Judge, on October 3, 1899, handed down the following response:

The argument for rehearing rests upon a provision of the Revised Statutes of Illinois, not previously called to attention, found in § 1, art. 9, chap. 24 (1 Starr & C. Anno. Stat. (Ill.) 2d ed. [art. 9, ¶ 117] p. 736), which reads as follows:

"That the corporate authorities of cities and villages are hereby vested with power to make local improvements by special assessment or by special taxation, or both, of contiguous property, or general taxation, or otherwise, as they shall by ordinance prescribe."

In the light of this provision, it is clear that authority is conferred upon the municipality, when a local improvement is ordered, to determine, in reference to its nature, whether the expense shall be paid by special assessment, by general taxation, or by both methods; and that the remark in the opinion, as handed down, that the statute "imperatively requires that the expense, aside from street intersections, shall be borne by the abutting property," must be qualified accordingly. Improvements which are clas-

sified as "local" are of various kinds, many of them not proper subjects for special assessment; and by this statute the city council is vested with the power and the duty to determine the classification of the improvement, and establish by ordinance the appropriate method of defraying the expense. As stated in *Morgan Park v. Wisconsin*, 155 Ill. 262, 267, 40 N. E. 611, 612: "The improvement being in truth and in fact a local improvement, the decision of the municipal authorities is final, when they adopt one or another of the modes prescribed by law for the purpose of raising funds for it." The power is "devolved upon the city council alone, and not upon the courts." See also *Lightner v. Peoria*, 150 Ill. 80, 87, 37 N. E. 69; *Fagan v. Chicago*, 84 Ill. 227.

The improvement in question was of the class generally recognized as a charge upon abutting property, was so determined by the city council, and the contract under which the work was performed so provided. Section 49 of the same article declares: "All persons taking any contracts with the city or village, and who agree to be paid from special assessments, shall have no claim or lien upon the city or village in any event, except from the collections of the special assessments made for the work contracted for." 1 Starr & C. Anno. Stat. 2d ed. [art. 9, ¶ 165] p. 777.

Section 64 establishes the same rule for claimants accepting or holding vouchers. Id. p. 784.

The expressions in the opinion have reference to these provisions, which are distinctly applicable here, and inhibit recovery in this action. The power so delegated to the corporate authorities can be exercised only for the object and in the manner prescribed. When it is exercised, and the work is performed, the latter provisions are controlling. If the assessment is "annulled by the city council," or "set aside by any court," the common council is empowered by § 46 to provide for a new assessment; and, "when the original ordinance proves defective and insufficient to support an assessment," the defect may be cured by amendment or supplemental ordinance and reassessment. *East St. Louis v. Albrecht*, 150 Ill. 506, 512, 37 N. E. 934. Such is the exclusive course open to this contractor, and mandamus is the sole remedy.

Rehearing is denied.

VIRGINIA SUPREME COURT OF APPEALS.

M. L. DUNCAN, *Plff. in Err.*,

v.

City of LYNCHBURG.

(.....Va.....)

1. A city is not liable for a nuisance created by the pollution of a stream by its employees and chain gang while operating a rock quarry outside the limits of the city, which its charter gives no authority to operate, unless it is implied from certain provisions which expressly include a denial of liability for the failure to exercise, or the improper exercise of, the powers thereby conferred.
2. Implied authority to operate a rock quarry outside the limits of a city is not conferred upon the city by general provisions in its charter for the purchase, holding, sale, and conveyance of real and personal property necessary for its uses and purposes.
3. A question as to the powers conferred by a city charter may be raised by demurrer in an action against the city for an alleged nuisance, since the court will take judicial notice of the charter.

(February 8, 1900.)

ERROR to the Corporation Court of the City of Lynchburg to review a judgment in favor of defendant in an action brought to recover damages for the alleged wrongful pollution of a stream of water flowing through plaintiff's property. *Affirmed.*

The facts are stated in the opinion.

Mr. A. S. Hester, for plaintiff in error:

Every person or corporation, entering into any business, is presumed to have the right to so engage.

5 *Thomp. Corp.* § 5967.

It does not appear from any part of the pleading that the act complained of in the declaration is *ultra vires*, and, that being true, if the question of *ultra vires* can possibly be available to the defendant, it must be raised by plea, and not by demurrer.

5 *Thomp. Corp.* § 5992; 5 *Am. & Eng. Enc. Pl. & Pr.* 95, 96; 2 *Wait, Act. & Def.* p. 333; 2 *Barton, Law Pr.* p. 1274.

The charter gives the council power to purchase, hold, sell, and convey all real and personal property for its uses and purposes.

Chap. 5, § 7, subsec. 3; *Winchester v. Redmond*, 93 Va. 711, 25 S. E. 1001; *Wallace v. Richmond*, 94 Va. 204, 36 L. R. A. 554, 26 S. E. 586.

This city is authorized to extend county roads in Campbell county for 2 miles, and the city would have the right to erect every

necessary establishment or house that would be necessary for the employees of said city in carrying out the power conferred under this section.

Dill. Mun. Corp. §§ 562, 563.

A municipal corporation engaging in any business of a quasi-private nature would be liable to all persons for its *ultra vires* torts.

15 *Am. & Eng. Enc. Law*, pp. 1141-1143; 27 *Am. & Eng. Enc. Law*, p. 393; *Myer, Fed. Dig.* §§ 1501, 1564, 1561; 2 *Barton, Law Pr.* p. 1274; *Salt Lake City v. Hollister*, 118 U. S. 256, 30 L. ed. 176, 6 *Sup. Ct. Rep.* 1055; *Green's Brice, Ultra Vires*, pp. 331, 332, 364, 365.

A city cannot direct certain works to be entered into through its board of council, and, after it is completed, say, to any person who may be injured by said works or business, you must look to the agent who performed such work, and not the city.

Salt Lake City v. Hollister, 118 U. S. 256, 30 L. ed. 176, 6 *Sup. Ct. Rep.* 1055; 2 *Dill. Mun. Corp.* § 992; *Rockland Water Co. v. Adams*, 84 Me. 472, 24 *Atl.* 840; *Goddard v. Harpswell*, 84 Me. 499, 24 *Atl.* 958, 30 *Am. St. Rep.* 409, note.

If the city has the right to procure stone to pave its streets, it has the right to operate a quarry for that purpose, and, that being so, it had the right to operate the quarry as described in the declaration, and to do all acts and construct all necessary buildings essential to its operation.

Coldwater v. Tucker, 36 *Mich.* 474, 24 *Am. Rep.* 601; *Winchester v. Redmond*, 93 Va. 714, 25 S. E. 1001; 2 *Wait, Act. & Def.* p. 333; *Monument Nat. Bank v. Globe Works*, 101 *Mass.* 57, 3 *Am. Rep.* 322; *Orme v. Richmond*, 79 Va. 89; *Salt Lake City v. Hollister*, 118 U. S. 256, 30 L. ed. 176, 6 *Sup. Ct. Rep.* 1055.

Messrs. Wilson & Manson, for defendant in error:

The city can do no act and incur no liability, whether the act complained of is a tort or a contract, unless the act is within the city's powers as fixed by charter or by other statutes applicable to it. The power to do the act must be expressly granted or necessarily implied; if the power be fairly doubtful, the decision must be against the existence of the power, and the activities of the city officials, and their power to fix burdens on the taxpayers, are, as a rule, confined to its own limits, and do not extend to such acts as they may do and improvements they may see fit to make in the surrounding country.

Winchester v. Redmond, 93 Va. 713, 25 S. E. 1001; 1 *Dill. Mun. Corp.* 3d ed. § 89; *Becker v. La Crosse*, 99 *Wis.* 414, 40 *L. R. A.* 830, 75 *N. W.* 84; *Kirkham v. Russell*, 76 Va. 961; *Wallace v. Richmond*, 94 Va. 217, 36 *L. R. A.* 554, 26 S. E. 586; *Albany v. Cunliff*, 2 *N. Y.* 165; *Boylard v. New York*, 1 *Sandf.* 27; *Cavanagh v. Boston*, 139 *Mass.* 426, 52 *Am. Rep.* 716, 1 *N. E.* 834; *Goddard*

NOTE.—As to the liability of municipal corporations for pollution of streams, see also *Chapman v. Rochester* (N. Y.) 1 *L. R. A.* 296, and *note*.

As to liability for pollution of public well, see *Danaher v. Brooklyn* (N. Y.) 7 *L. R. A.* 592.

As to liability of municipality for creation of nuisance in general, see *Bates v. Westborough* (Mass.) 7 *L. R. A.* 156, and *note*; *Miles v. Worcester* (Mass.) 13 *L. R. A.* 841; *Terry v. Richmond* (Va.) 38 *L. R. A.* 834.

48 *L. R. A.*

v. *Harpswell*, 84 Me. 499, 24 Atl. 958; *Keller v. Corpus Christi*, 50 Tex. 814, 32 Am. Rep. 619; *Hoggard v. Monroe*, 51 La. Ann. 683, 44 L. R. A. 477, 25 So. 349.

The liability of the city for a wrong done in improving the public roads of Campbell county, even in the absence of the legislative provision exempting them from liability, may be well doubted.

Bates v. Rutland, 62 Vt. 178, 9 L. R. A. 363, 20 Atl. 278.

If the injuries complained of arose out of the improper exercise of the powers conferred by subsection 39, the legislative enactment in express terms relieves the city from liability.

Wallace v. Richmond, 94 Va. 204, 36 L. R. A. 554; *Jones v. Richmond*, 18 Gratt. 517, 98 Am. Dec. 695; *Richmond v. Smith*, 15 Wall. 437, 20 L. ed. 202.

Buchanan, J., delivered the opinion of the court:

This is an action on the case against the city of Lynchburg for creating and continuing a nuisance near the premises of the plaintiff, to the damage of the health and comfort of himself and family.

It is averred in the declaration that the defendant, while operating a rock quarry outside of the limits of the city, erected a privy for the use of its employees, including its chain gang, over a stream of water which runs under the front porch of the dwelling house occupied by the plaintiff, situated near by, and just below the quarry, and so polluted the stream as to render his premises unfit for habitation, and to cause serious sickness in his family.

The defendant demurred to the declaration upon the ground that the injury complained of was not caused by an act done within the scope of the power and authority of the city, but was the result of an *ultra vires* act, for which the city was not liable.

The trial court sustained the demurrer and gave judgment for the defendant. To that judgment this writ of error was awarded.

The question presented for our determination is whether the nuisance complained of was created or continued by the agents or employees of the defendant city while engaged in a work which was within its corporate powers.

In order to render a municipal corporation liable in damages for the torts of its agents and employees, it is necessary, among other things, that the injury complained of be caused by, or result from, an act done in the exercise of some power conferred upon it by its charter or other positive enactment.

"If the act complained of," says Judge Dillon, "necessarily lies wholly outside of the general or special powers of the corporation, as conferred in its charter or by statute, the corporation can in no event be liable to an action for damages, whether it directly commanded the performance of the act, or whether it be done by its officers without its express command. . . . But, if the wrongful act be not in this sense *ultra vires*, 48 L. R. A.

it may be the foundation of an action of tort against the corporation, either when it was done by its officers under its previous direct authority, or has been ratified or adopted expressly or impliedly by it, or when it was done by the officers, agents, or servants of the corporation in the execution of corporate powers or the performance of corporate duties of a ministerial nature, and was done so negligently or unskillfully as to injure others, in which case the corporation is liable for the carelessness or want of skill of its officers or immediate servants or agents in the course of their authorized employment, without express adoption or ratifying act." 2 Dill. Mun. Corp. 4th ed. § 908; *Smith v. Rochester*, 76 N. Y. 506; *Cavanagh v. Boston*, 139 Mass. 426, 52 Am. Rep. 716, 1 N. E. 834; *Horn v. Baltimore*, 30 Md. 218.

It is the settled law of this state that a municipal corporation possesses and can exercise the following powers, and none others: First, those granted in express words; second, those necessarily or fairly implied, or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. *Winchester v. Redmond*, 93 Va. 711, 714, 25 S. E. 1001; *Lynchburg & R. Street R. Co. v. Dameron*, 95 Va. 545, 548, 28 S. E. 951; 1 Dill. Mun. Corp. § 89.

By § 7, chap. 6, of the charter of the city (Acts Assem. 1895-96, p. 201), it is provided that the council shall, in addition to the general powers vested in it by the laws of the state, have power "to purchase, hold, sell, and convey all real and personal property necessary for its uses and purposes" (subsec. 3); "to erect in or near the city suitable workhouses, houses of correction or reformation and houses for the reception and maintenance of the poor and destitute" (subsec. 5); "to establish and regulate public squares and parks in or near the city," and to acquire, by purchase, condemnation, or otherwise, the land deemed necessary for such uses (subsec. 6); "to establish water works or gas works within or without said city;" to acquire land for such purposes by purchase or condemnation: and to protect from injury or pollution by proper penalties said works or anything connected therewith within or without the city, "and under this authority to prevent the pollution of the water in the river by prohibiting the throwing of filth or offensive matter therein for a distance of 6 miles above the limits of the city" (subsec. 7); "to establish or acquire by purchase and to operate within or without the corporate limits suitable works for the generation of electricity for illuminating or other purposes, and to acquire lands for such use by purchase or condemnation" (subsec. 8); "to provide in or near the city lands to be used as burial places for the dead and to improve and care for the same and the approaches thereto" (subsec. 17); and, concurrently with the board of supervisors of Campbell county, "to take care, supervision, and control for a

distance of 2 miles from the city limits, of all public roads extending from the city into Campbell county, and jointly with said supervisors to close, extend, widen, narrow, lay out, graduate, pave, macadamize, and otherwise improve and alter said roads for such distance and to keep the same in good order and repair and to condemn the necessary land for the purpose. . . . Nothing contained herein shall be construed as compelling the exercise of the powers herein given or as fixing any liability on the said city for the failure to exercise or the improper exercise of the said powers, except damages for the land condemned, which are to be ascertained and fixed in the manner provided by the general laws of the state." Subsec. 39.

Power is given to city councils, under the general law, to provide in or near the city waterworks, cemeteries, hospitals, and pest houses. Code, §§ 1038, 1719, 1721.

None of the provisions of the charter nor of the General Statutes above quoted expressly confer upon the city the right to acquire and operate a rock quarry. If such power can be necessarily or fairly implied from the powers expressly granted, it must be under subsecs. 3 and 39 of § 7, chap. 8, of the charter. The power given by subsec. 3, which authorizes the city to purchase, hold, sell, and convey all real and personal property necessary for its uses and purposes, must, I apprehend, be exercised within, and not without, the limits of the city; for the general rule is that the power of a municipal corporation is confined to its own territorial limits, and, without some special provision authorizing it, it cannot possess any control or rights in or over lands lying without those limits. *Denton v. Jackson*, 2 Johns. Ch. 320, 336; *Riley v. Rochester*, 9 N. Y. 64; *Coldwater v. Tucker*, 36 Mich. 475, 477, 24 Am. Rep. 601; 2 Dill. Mun. Corp. § 565.

"Municipal corporations," says Judge Dillon in the section cited, "being created chiefly as governmental agencies, and for the attainment of local objects merely, the general rule is that they cannot purchase and hold real estate beyond their territorial limits unless the power is conferred by the legislature. It has been expressly decided that a conveyance to a municipal corporation of lands beyond its boundaries for the purpose of a street is void, though the corporation has by its charter power 'to purchase, hold, and convey any real property for the public use of the corporation.' The author, however, is inclined to think that there are purposes for which such corporation may without special grant purchase and hold extraterritorial lands, as for a pest house, cemetery, and the like objects of a municipal character."

If it be true, as the learned author is inclined to think, that a municipal corporation without special authority may purchase and hold lands without its limits for some purposes, it must be because the lands are indispensably necessary to enable it to protect the health and well-being of its people.

It might be convenient for a municipal corporation to own and operate a rock quarry,

but it is manifestly not indispensable that it should do so, in order that it may accomplish the objects of its creation.

Again, the provisions of the charter conferring special power upon the city to acquire lands without the city for workhouses, houses of correction or reformation or the reception of the poor, public squares or parks, water works and gas works, electric plants, the burial of the dead, and highways in the county of Campbell, would seem to exclude the idea that it was the intention of the legislature, in granting the charter, to confer any other extraterritorial powers upon the city than those expressly named.

If the power to acquire and operate a rock quarry can be necessarily or fairly implied from the provisions of subsection 39 (§ 7, chap. 8, of the charter), which authorizes the city, in connection with the county of Campbell, to pave and macadamize, among other things, the highways of that county for a distance of 2 miles from the city, it would not aid the plaintiff; for it is expressly provided in that section that nothing in it shall be construed as compelling the exercise of the powers conferred by it, or as fixing any liability on the city for the failure to exercise, or the improper exercise of the powers conferred, except damages for lands condemned for public highways. The object of that provision was manifestly to protect the city from any other or further liability than the county of Campbell (its associate in establishing and maintaining the roads) would be under in exercising the powers conferred. And, as is well settled, the county being one of the political subdivisions of the state, it would not be liable in damages to the plaintiff if it or its agents or employees had caused the injury complained of. *Fry v. Albemarle County*, 86 Va. 195, 9 S. E. 1004; *Field v. Albemarle County* (Va.) 20 S. E. 954; 2 Dill. Mun. Corp. §§ 23, 903, note 1; 1 Shearm. & Redf. Neg. § 256.

The contention of the plaintiff in error that the question of whether or not the work in which the city officials were engaged when the nuisance complained of was created was within its powers could not be raised by demurrer, but only by a plea, is wholly untenable. The courts take judicial notice of the charters of municipal corporations. 1 Dill. Mun. Corp. § 83; 4 Minor, Inst. 1210, 1211; Code, § 3328; 1 Greenl. Ev. § 4, note 3. And, if the cause of action stated in the declaration is one for which the corporation is not liable, a demurrer is the proper and usual way to raise the question. *Sayre v. Northwestern Turnp. Road*, 10 Leigh, 454; *Noble v. Richmond*, 31 Gratt. 271, 31 Am. Rep. 726; *Orme v. Richmond*, 79 Va. 86; *Powell v. Wytherville*, 95 Va. 73, 27 S. E. 805; *Maia v. Eastern State Hospital Directors*, 97 Va. 507, 34 S. E. 617.

It follows from what has been said that the defendant was not liable in damages for the injury complained of, that the demurrer was properly sustained by the trial court, and that the judgment must be affirmed.

ARKANSAS SUPREME COURT.

J. W. DOSTER, Appt.,
v.
MANISTEE NATIONAL BANK.

(.....Ark.....)

1. A judgment is not a lien on lands which the judgment debtor has previously conveyed, though with intent to defraud creditors, under Sand. & H. Dig. § 4204, which provides that judgments shall be liens on lands of the judgment debtors, and § 3049, providing for the sale on execution of lands of which the judgment debtor, or any person for his use, is seised in law or equity.
2. The superior diligence of a junior judgment creditor in bringing a suit to uncover land which had been conveyed after the judgments, in fraud of creditors, will entitle him to the proceeds.

(Battle and Riddick, JJ., dissent.)

(January 13, 1900.)

A PPEAL by plaintiff from a decree of the Pulaski Chancery Court in favor of defendant in a proceeding to determine which creditor of George R. Brown had a superior right to certain lots belonging to him. *Affirmed.*

The facts are stated in the opinion.

Messrs. Cockrill & Cockrill for appellant.

Messrs. Dodge, Johnson, Carroll, & Pemberton and D. H. Cantrell, for appellee:

A lien is neither a *jus in re* nor a *jus in rem*. It conferred no right of property, but a right to sell property.

Whiting v. Beebe, 12 Ark. 577; *Roberts v. Jacks*, 31 Ark. 600, 25 Am. Rep. 584.

The appellant by his negligent nonaction has suffered the debtor to dispose of a large amount of property that should and could have been subjected to the payment of his debt. He has suffered himself to be defrauded.

We are put to the alternative, either of losing our debt, or of collecting appellee's debt for him in order to clear the way for our lien.

As to the personal property we have the superior lien, because we filed our bill and made an equitable levy on it.

Senter v. Williams, 61 Ark. 189, 32 S. W. 490.

If it were not for the statute that makes a judgment a lien on land there is no question but that our judgment would take precedence, because, as said in *Senter v. Williams*, our equity is superior.

If, then, measuring the equities themselves, ours is a superior equity, why must not the statute yield to let it in, as it did in the case of the innocent purchaser in *Stis v. Chaytor*, 55 Ark. 116, 17 S. W. 707.

The statute did not design to deprive a

party of any advantage he might obtain by the exercise of superior diligence.

Smith v. Lind, 29 Ill. 27.

Although the statutes of our state provide generally that the first judgment creditor shall have the prior lien, yet when the junior creditor earns the right to precedence by superior diligence in discovering equitable assets, it should be given to him.

Black, Judgm. § 455.

Wood, J., delivered the opinion of the court:

This suit is between judgment creditors of George R. Brown to determine which of them has the superior right to certain lots in Little Rock. Appellant obtained judgment against Brown May 16, 1893, and had scire facias issued and served to revive same February 11, 1896, and judgment of revivor was rendered May 25, 1896. Appellee obtained its first judgment against Brown June 7, 1893, and the second May 10, 1895. Execution was issued on these October 29, 1895, and same was returned *nulla bona*. On the same day—October 29, 1895—appellee filed a complaint for itself alone to uncover certain property, including the lots in controversy, alleging that same had been conveyed by Brown in fraud of creditors. On December 21, 1896, appellant filed his intervention in appellee's suit, setting up his judgment lien, alleging that he was willing to contribute to the expenses of the action, that Brown was insolvent, and that an execution against him would be of no avail, and asking to be allowed to share in the proceeds of the creditors' bill filed by appellee. Appellee's answer to the intervention of appellant alleged a specific lien on the property by reason of the complaint filed by it, and asked that the rights of appellant under his judgment be subordinated to its lien. At the time of the filing of appellant's intervention appellee agreed with him that the assistance of his attorney in the prosecution of the creditors' suit would be waived, and that in the contest between them it would be considered as though appellant had rendered all the assistance that the law would require. Appellant filed a written assumption of his share of the costs. It was understood that all controversy between appellant and appellee as to their respective rights in the proceeds, if any, of the creditors' suit against Brown and others, should be postponed until that issue was settled. No execution was issued by appellant until long after the present suit had been brought and appellant's intervention had been filed. The decree on the original complaint and answer subjected the lots in controversy to the payment of Brown's debt. Of these lots some were conveyed before and some after the rendition of the judgments. The appellant contends that, as senior judgment creditor, he is entitled to have applied to the satisfaction of his judgment the entire proceeds from any sale that

NOTE.—As to lien of judgment on land fraudulently conveyed, see *Russell v. Chicago Trust & Sav. Bank* (Ill.) 17 L. R. A. 345.
48 L. R. A.

may be had of the lots which were fraudulently conveyed prior to the rendition of the judgment of either party. He grounds his contention upon the following sections of the Digest (Sandels & H.):

"4204. A judgment in the supreme, chancery or circuit court of this state or in the district or circuit court of the United States within this state shall be a lien on the real estate owned by the defendant in the county in which the judgment was rendered from the date of its rendition."

"3049. The following described property shall be liable to be seized and sold under any execution upon any judgment, order, or decree of a court of record: . . . Sixth. All real estate whether patented or not, whereof the defendant or any person for his use, was seized in law or equity on the day of rendition of the judgment, order, or decree whereon execution issued, or at any time thereafter."

Appellant also relies upon the following decisions of this court: *Ringgold v. Waggoner*, 14 Ark. 69; *Apperson v. Ford*, 23 Ark. 746-759; *Bennett v. Hutson*, 33 Ark. 762; *Hershey v. Latham*, 46 Ark. 542; *Wormser v. Merchants' Nat Bank*, 49 Ark. 117, 4 S. W. 198; *Cohn v. Hoffman*, 50 Ark. 108 6 S. W. 511; *Stix v. Chaytor*, 55 Ark. 116-123, 17 S. W. 707; *McNeill v. Carter*, 57 Ark. 579, 22 S. W. 94.

The statute gives a lien from the day of the rendition of the judgment upon the real estate owned by the defendant, or whereof he, or any person for his use, is seized in law or equity. Where a debtor has fraudulently conveyed his real estate before any judgment is rendered against him, or has procured same to be fraudulently conveyed to another, he is not in any sense the owner of such real estate, nor is he thereafter seized in law or equity of such real estate, nor is the grantee seized for his use. The authorities generally recognize the fact that a deed to land, although fraudulently conveyed, carries the title of the grantor. The deed is good *inter partes*. *Mew v. Anthony*, 11 Ark. 411, 52 Am. Dec. 274; *Millington v. Hill*, 47 Ark. 309, 1 S. W. 547; *Bell v. Wilson*, 52 Ark. 171, 5 L. R. A. 370, 12 S. W. 328; *Bump, Fraud. Conv.* §§ 432, 433; *Wait, Fraud. Conv.* §§ 395-399; 8 Am. & Eng. Enc. Law, 1st ed. p. 771; and authorities cited by these. The fraudulent grantee gets a title that he can alienate, and by so doing confer a perfect title upon his alienee, if the alienee be an innocent purchaser for value. This is the doctrine of our own court and of nearly all the states. *Ringgold v. Waggoner*, 14 Ark. 69; *Stix v. Chaytor*, 55 Ark. 116-123, 17 S. W. 707; *Wait, Fraud. Conv.* § 386; *Bump, Fraud. Conv.* § 492, and numerous authorities cited. Of course, this would not be possible if the conveyance of the fraudulent grantor did not carry the title to the fraudulent grantee. It follows, then, logically and necessarily, that under this statute alone the judgment creditor has no lien upon lands fraudulently conveyed by the debtor prior to the rendition of his judgment. This

construction certainly conforms to the plain and unequivocal language of the act. Why should we so change and extend it as to make it apply to lands which the defendant, at the time of the rendition of the judgment, did not own, and of which neither he nor anyone for him, was seized in law or equity. To so construe it would be judicial legislation, and that, too, with unjust results; because, "when the law gives priority, equity will follow it" (*Senter v. Williams*, 61 Ark. 189, 32 S. W. 490); and in passing upon the rights of judgment creditors to lands fraudulently conveyed prior to the rendition of the judgments the effect would be to ignore that old and excellent maxim of equity, *Vigilantibus non dormientibus æquitas subvenit*, and to declare in favor of those merely prior in time, although ever so unequal in diligence. Such a doctrine would encourage fraudulent judgments. It would impose oftentimes upon the junior judgment creditor the expensive, but still thankless and bootless, task of uncovering assets, which by his diligence, he had discovered, for the benefit of another, or else the disagreeable experience of seeing the fraudulent debtor concealing and appropriating to his own use assets which justly belonged to his creditors. But, while the language of the statute itself is plainly against a construction which would lead to such inequitable consequences, appellant, to sustain his contention for a lien, would have us construe § 3472, Sandels & H. Dig., as *in pari materia*, and to hold that his judgment was a lien on Brown's estate, just as though the legal title had been all the time in Brown. The section referred to is as follows: "Every conveyance . . . of any estate or interest in lands made or contrived with the intent to hinder, delay, or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts or demands, as against creditors and purchasers prior and subsequent shall be void." If the latter statute is to be taken as *in pari materia* with the statute under consideration as between judgment creditors and their debtors, still that cannot aid appellant. Ever since the passage of 13 Eliz., after which our statute as to fraudulent conveyances was modeled, the word "void," as therein used, has generally been held to mean "voidable." *Mew, Eng. Case Law Dig.* 338, and authorities collected; *Pom. Contr.* § 282, and authorities cited; *Bump, Fraud. Conv.* § 451, and authorities cited in note 1. As we have seen *supra*, such is the view of our own court, and this is undoubtedly correct, for every fraudulent conveyance carries the legal title, subject only to defeasance by creditors and purchasers. Such conveyance is not void *per se*, even as between the debtor and creditor; much less between creditor and debtor. Even as between debtor and creditor, if the creditor condones the fraud, and takes no steps to avoid the conveyance, it stands forever as a divestiture of the title of the debtor. Nor will the mere rendition of a judgment in favor of the creditor against the debtor

avoid the latter's fraudulent conveyance. The judgment simply fixes the amount of the debtor's liability, for which is subject the property he actually owns, or of which he or someone for him, is seised and possessed. Nor do courts of law annul and set aside fraudulent conveyances. Some process, after judgment at law is rendered, is necessary in order to fix and secure a lien upon property that has been fraudulently conveyed, and to uncover it for the judgment creditor. In some jurisdictions the creditor has choice of three remedies: "First, he may sell the debtor's land upon execution issued on his judgment, and leave the purchaser to contest the validity of the defendant's title in an action of ejectment; or, secondly, he may bring an action in equity to remove the fraudulent obstruction to the enforcement of his lien by execution, and await the result of the action before selling the property; or, thirdly, he may, on the return of an execution unsatisfied, bring an action in the nature of a creditor's bill to have the conveyance adjudged fraudulent and void as to his judgment, and the lands sold by a receiver or other officer of the court, and the proceeds applied to the satisfaction of the judgment, as, in the case of equitable interests, the debtor's assets are reached and applied." So it is said by the supreme court of Minnesota in *Jackson v. Holbrook*, 36 Minn. 494, 32 N. W. 852; also in *Erickson v. Quinn*, 15 Abb. Pr. N. S. 166. Those states which hold, under statutes similar to ours, that a judgment is a lien upon property fraudulently conveyed prior to its rendition, may very properly and consistently adopt the first of the above-named remedies, to wit, to sell the debtor's land upon execution, and leave the purchaser to contest the validity of the defendant's title in an action of ejectment. But it is apparent that, if the conveyance is to be treated, upon the simple rendition of a judgment, as though it had never been made, and the property, notwithstanding such conveyance, is still the debtor's, then it is inconsistent to say, and idle and useless to hold, that the creditor may elect to adopt the above remedy, or go into chancery to remove the fraudulent obstruction to the enforcement of his lien by execution, or bring a creditors' bill to have the conveyance adjudged fraudulent and void as to his judgment; for, if the property so fraudulently conveyed is nevertheless, still owned and seised by the debtor, then an execution on the judgment at law will reach it, and there is in fact no fraudulent obstruction to the enforcement of his lien by execution, and there is no necessity for a creditors' bill to have the conveyance adjudged fraudulent and void as to his judgment, because there is nothing that obstructs the enforcement of such judgment at law. The courts which fall into such glaring incongruities in prescribing the remedies under this statute are no more discriminating, logical, and consistent when discussing the principles upon which the rights are founded giving rise to the remedies. All the authorities which hold that

a judgment creditor has a judgment lien upon land which has been fraudulently conveyed by the debtor prior to the rendition of the judgment are grounded upon the egregious fallacy that a fraudulent conveyance is not voidably merely, but absolutely void. *Slattery v. Jones*, 96 Mo. 216, 8 S. W. 554; *Jackson v. Holbrook*, 36 Minn. 494, 32 N. W. 852; *Freeman, Executions*, § 136, and authorities there cited; *Jacoby's Appeal*, 67 Pa. 434; *Bump, Fraud. Conv.* § 530.

That a lien may be fixed by the levy of an execution on lands which have been fraudulently conveyed by a debtor prior to the rendition of judgment against him, and that such lien may be made productive by a sale of the property under the writ without seeking the aid of chancery, as is held by some authorities (*Smith v. Osgood*, 46 N. H. 178; *Burnett v. Handley*, 8 Ala. 685; 1 *Freeman, Executions*, § 207), does not at all conflict with the idea that there is no statutory judgment lien on such property. We must discriminate properly between the statutory judgment lien and the lien acquired by virtue of an execution issued under a general judgment. As in the numerous cases cited by Mr. Freeman in note 1 to § 136 of his work on Executions. Mr. Herman, in his work on Executions, at page 265, says: "Where the judgment is a lien on lands, there can be no independent lien acquired by the issue of an execution. But where land is seised by virtue of a judgment which is no lien, the execution becomes a lien." As was said by the supreme court of Pennsylvania: "A lien is, indeed, a necessary and inseparable incident of seizure in execution, except where the execution is merely instrumental in enforcing a prior and superior lien by judgment. In such case it never was supposed by the legislature or the profession that a judgment and an execution on it had each a distinct and independent lien." *Davis v. Ehrman*, 29 Pa. 256. We maintain that there is no statutory judgment lien on lands which have been fraudulently conveyed before the rendition of judgment, the debtor no longer owning or being possessed or seised of such property, either in law or equity. Whether liens may be acquired by executions on judgments against such debtors, and in various other ways, it does not boot us here to discuss. We do not hesitate, however, to say that the method of attacking a fraudulent conveyance of land by levying an execution on same, and then proceeding to sell same under the writ, leaving the purchaser to contest the validity of the conveyance in an action of ejectment against the fraudulent vendee, is not to be encouraged. It is circuitous and cumbersome, and at last, leaves a cloud upon the record title, for a court of law can never cancel and set aside a fraudulent conveyance. As was held by this court in *Sale v. McLean*, 29 Ark. 612, quoting from syllabus: "Where a judgment creditor seeks to subject land which the debtor has conveyed fraudulently, the proper practice is to exhaust the process of the court

and apply to a court of equity for aid before a sale." We are not without abundant and excellent authority to support the construction for which we contend. Section 13 of 1 & 2 Vict. chap. 110, provides, in effect, that "a judgment against any person shall operate as a charge upon all lands . . . of or to which such person shall, at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever at law or in equity," etc. The statute under consideration was modeled after this. In *Beavas v. Oxford*, 6 De G. M. & G. 492, at page 514. Lord Chancellor Cranworth says: "The question which was reserved for consideration in this case relates to the priority of three judgment creditors of the late Lord Oxford. . . . and the point is whether, by virtue of the statute of Elizabeth alone, or by virtue of it combined with the statutes of the present queen [Victoria], these judgment creditors have or have not a right against the parties claiming under a voluntary settlement executed by Lord Oxford in the year 1838." After holding that a judgment creditor is not a purchaser under the statute of 27 Eliz. concerning fraudulent conveyances, and not entitled to protection as such against a prior voluntary conveyance, the lord chancellor proceeds as follows: "Now, what did the legislature mean to do by that enactment? In the first place they meant to make the judgment directly operate as a charge; but a charge on what? I apprehend that there was no principle inducing them to mean, and that the words do not represent them as having meant, to give the judgment creditor any right except against his debtor; that is, the judgment was to have the effect of a charge on that which was the property of the debtor. That, I think, is manifest from the words used. The judgment is to operate on land of which the debtor is seised," etc. Other concurring opinions were delivered by the lord justices. The case is a very instructive one, and is an early and able vindication of the exact construction for which we here contend. See also *Eyre v. M'Dowell*, 9 H. L. Cas. 619. In *Dolphin v. Aylward*, L. R. 4 H. L. 486, it is held that, "where a voluntary settlement has been made, subsequent judgment creditors of the settlor cannot acquire rights in derogation of it, which the settlor himself would not have possessed." At page 500 the lord chancellor said: "And it is quite settled that a judgment creditor can take no interest whatever, either legal or equitable, beyond what he acquires from the debtor,—such an interest in fact, as the debtor himself could give, and no other." Mr. Freeman, in the fourth edition of his work on Judgments, which is later than the second edition of his work on Executions, which he cites, says: "In some of the states a judgment is a lien against lands fraudulently conveyed for all purposes, and cannot be displaced in favor of any junior judgment or other lien, the holder of which first proceeds, either at law or in equity, to seek satisfaction out of the

property so conveyed." "But," he continues, "we think the better rule is that one who has obtained judgment, and has not, by levy or otherwise, taken any further steps to obtain satisfaction out of property fraudulently transferred, has no lien thereon. . . . On the contrary, the creditor who first proceeds in equity to reach property fraudulently transferred thereby obtains a right to priority, to which the claims of other judgment creditors, whether prior or subsequent must yield precedence." 2 Freeman, Judgm. p. 640, § 350. In *Re Estes*, 3 Fed. Rep. 134, Judge Deady, after a most satisfactory review of authorities pro and con sums up the whole matter as follows: "In my own opinion, the lien of a judgment which is limited by law to the property of or belonging to the judgment debtor at the time of the docketing does not, nor cannot without doing violence to this language, be held to extend to property previously conveyed by the debtor to another by deed valid and binding between the parties. A conveyance in fraud of creditors, although declared by the statute to be void as to them, is, nevertheless, valid as between the parties and their representatives, and passes all the estate of the grantor to the grantee; and a bona fide purchaser from such grantee takes such estate, even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title. . . . Such a conveyance is not, as has been sometimes supposed, 'utterly void,' but is only so in a qualified sense. Practically, it is only voidable, and that at the instance of creditors proceeding in the mode prescribed by law, and even then not as against a bona fide purchaser." See *Re Estes*, 6 Sawy. 459, 3 Fed. Rep. 134. Other authorities are *Rappleye v. International Bank*, 93 Ill. 396; *Boyle v. Maroney*, 73 Iowa, 70, 35 N. W. 145; *Howland v. Knox*, 59 Iowa, 46, 12 N. W. 777; *Bridgman v. McKissick*, 15 Iowa, 260; Black, Judgm. § 455; *Smith v. Lind*, 20 Ill. 27.

The learned counsel for appellant says that "appellant had a prior and paramount lien over appellee on all lands acquired by Brown before the rendition of appellee's judgments, although the title was fraudulently taken in the name of other persons," and he contends that this doctrine "is established by numerous cases in this court. beginning with *Ringgold v. Waggoner*, 14 Ark. 69, and ending with *Stitz v. Chaytor*, 55 Ark. 116, 17 S. W. 707." With due deference, we think counsel are mistaken both as to what the law is and what we have decided. Brown, as we have endeavored to show, no longer had any interest, either legal or equitable, in lands, after he, as the owner in fee, had fraudulently conveyed them. Nor did he have any equity in lands purchased by him, and the legal title taken in the name of another, in order to defraud creditors. This was, in effect, the same as though the legal title had first been taken in the name of the debtor, and thereafter he had transferred same to another, to defraud creditors. Hence all we have said ap-

plies to such conveyances. But those authorities which hold that a judgment is a lien on the land which the debtor has previously conveyed in fraud of creditors, upon the theory that such conveyance is void, and is to be treated as though it never had been made, leaving the legal title still in the debtor, are not applicable to conveyances where the legal title never has been in the debtor; for, says Mr. Freeman: "If the transfer were treated as void, the title would remain in the person of whom the purchase was made; and this would be of no advantage to the creditors. The transfer must, therefore, be treated as valid, and as transmitting the legal title to the person named in the deed. This legal title cannot be reached by the levy of an execution against the debtor, because he has never owned it. The creditors must, therefore, resort to equity, except in a few states, where statutes have been enacted to enable them to reach it at law." 1 Freeman, Executions, p. 341, § 136. See also Smith, Eq. Rem. Cred. § 157, note 31, and numerous cases cited. The only theory for holding, under the statute, that a judgment is a lien upon lands to which the debtor never held the legal title, but which were purchased by him, and the title taken in the name of another, to defraud creditors is that of resulting trusts. But this theory is erroneous, for where a conveyance is made to defraud creditors a resulting trust never arises in favor of the fraudulent debtor. He has no interest thereafter that can be asserted either in law or equity. *Heinz v. White*, 105 Ala. 670, 17 So. 185; *Proseus v. McIntyre*, 5 Barb. 425; *Vanzant v. Davies*, 6 Ohio St. 52; *Cutler v. Tuttle*, 19 N. J. Eq. 549; *Glidewell v. Spaugh*, 28 Ind. 319. Where property is conveyed without consideration, with a view of defrauding creditors, no trust will result. 1 Beach, Trusts & Trustees, § 125; 1 Beach, Modern Eq. Jur. § 217; 1 Perry, Tr. § 151; *Miller v. Davis*, 50 Mo. 572; *Baldwin v. Campfield*, 8 N. J. Eq. 891; 10 Am. & Eng. Enc. Law, p. 14. As to our own decisions, while there are expressions in some of the cases which seem to support the contention of appellant, we cannot find that the question we have here, involving the priorities of judgment creditors, has ever been passed upon. In *Ringgold v. Waggoner*, 14 Ark. 69, Ringgold filed his complaint in chancery to set aside certain alleged fraudulent conveyances from John W. Waggoner to his brother, Edmond P., and from Edmond P. to one Burr. The complaint alleged, in substance, that Ringgold had sued John W. Waggoner at law for debt; that while this suit was pending, and before judgment, John W. sold to Edmond P. the land in controversy, and that Edmond P. in turn sold to Burr, and that all these conveyances were for the purpose of defrauding Ringgold; that Burr had been notified, before getting his deed from Edmond P., that he (Ringgold) had obtained judgment against John W. Waggoner, which was a lien upon the land in question, by reason of the fraudulent conveyance from John W. to Edmond P., and that he intended

to have the land sold under his judgment as the property of John W.; that Burr in other ways had notice that the conveyance from John W. to Edmond P. was fraudulent; that, notwithstanding this notice, Burr had colluded with John W. and Edmond P. to enable John W. to defraud his creditors; that, the judgment at law in favor of Ringgold remaining unsatisfied, he had execution issued and levied upon the land as the property of John W. Waggoner, and same was sold under such execution, and he (Ringgold) became the purchaser thereof; and that one Hooper, acting under the authority of Burr, was then in possession. The prayer was for a cancellation of all the conveyances, and for possession, etc. Burr answered that he was an innocent purchaser. The court, discussing the character of the conveyance from John W. to Edmond P., said it, "as against the complainant, was void, and the judgment subsequently obtained by him became a lien upon the land as the property and estate of the fraudulent grantor; and the complainant, by his purchase of the land under execution, acquired a valid title to it as against the parties to the fraudulent conveyance." Continuing, Chief Justice Watkins said: "The only question in the case is whether the defendant, Burr, is entitled to be protected as an innocent purchaser;" and that was, indeed, true. For, the complaint being in equity to set aside fraudulent conveyances, it was not at all necessary for the decision of the case that the court should decide that complainant's judgment was a lien on the land, nor that he acquired a valid title, as against the parties to the fraudulent conveyance, by his purchase under execution. That was all true, even if the judgment was not a statutory lien. The creditor had an equitable lien. *Stix v. Chaytor*, 55 Ark. 116. 17 S. W. 707, was also a suit in chancery by a judgment creditor to set aside certain conveyances alleged to be fraudulent. So much of the case as is pertinent here relates to a purchase of land by Chaytor, he paying the purchase money, and having the lands conveyed to his wife, in order to defraud creditors. Speaking of this phase of the case, Judge Mansfield, for the court, said: "The purchase in the name of his wife can stand on no better footing, for the law regards it as, in effect, a conveyance from himself. . . . But where land is thus purchased by a husband and conveyed to his wife in fraud of his creditors, the latter would not be benefited by treating the conveyance to her as void, since the title would then remain in the grantor. And equity will therefore treat the wife in such case as a trustee for the benefit of the husband's creditors. . . . Applying this doctrine to the present case, an estate in the lands purchased of Feazel resulted to Chaytor on the execution of the deed to his wife. The estate which he thus acquired was subject to sale on execution under our statute, and the purchaser would have taken, not only the beneficial interest in the lands, but also the legal title. . . . It follows, neces-

sarily, we think, . . . that the lands in controversy, while held by Mrs. Chaytor, were subject to a lien existing by virtue of the plaintiff's judgment. . . . Such a lien could not, however, be asserted against 'bona fide purchasers or encumbrancers.'" Here again it will be seen that it was wholly unnecessary to decide that an estate in the lands resulted to Chaytor on the execution of the deed to his wife, and that such estate was subject to execution under our statute, and that the purchaser thereunder acquired the legal title, and that the lands while held by Mrs. Chaytor were subject to a lien existing by virtue of plaintiff's judgment. These were not, in fact, germane to the issue, the only question before the court being, Was the conveyance, as between the creditor and his debtor, fraudulent, and, if so, still were certain parties innocent purchasers? If the court meant by these *dicta* to hold, where a purchase of land is made by a debtor, and the conveyance is made to his wife, at his instance, in order to defraud creditors, that an estate results to the debtor upon the execution of the deed to his wife, and that a judgment rendered at law after such conveyance is a statutory lien upon such land, then we do not hesitate to declare all such *dicta* as unsound, and we will not follow them. Where a fraudulent conveyance is set aside by creditors, and the land is thereafter sold to satisfy their claims, should there be any residue after paying their debts, such residue does not go to the debtor, but to his fraudulent vendee. This shows the debtor has no estate in the land upon such conveyance. Bump, Fraud. Conv. § 450, and authorities cited. We can easily see, as Judge Mansfield says, how the wife or the fraudulent vendee is held as a trustee for the creditors. But how she could be a trustee, so as to vest any estate, legal or equitable, in the debtor, is an altogether different matter. Probably both of these learned judges after all only had in view the equity which creditors have by proper proceedings to subject land which has been fraudulently conveyed to the payment of their debts. That creditors have such an equity is unquestioned, but they do not have it by virtue of the statute, but independent of it. Says Mr. Pomeroy: "In carrying out the general principle of trusts for the purpose of working ultimate justice and reaching property where the legal title has been parted with and is beyond the scope of legal process, a constructive trust is said to arise in favor of judgment creditors with respect to the property of their debtors, which has been transferred with the intent to defraud the creditors of their rights, or of which the legal title is vested in

third persons with a like fraudulent intent, or which is of such a nature that it cannot be taken by execution upon judgments in legal actions." Continuing, in the note, he says: "The trust is in reality one in name alone. The creditor's right to reach the debtor's property is in no true sense an interest in that property; it is, at most only an equitable lien on the property." 2 Pom. Eq. Jur. § 1057. Of the other cases cited,—*McNeill v. Carter*, 57 Ark. 579, 22 S. W. 94; *Cohn v. Hoffman*, 50 Ark. 108, 6 S. W. 511, and *Wormser v. Merchants' Nat. Bank*, 49 Ark. 117, 4 S. W. 198,—not only is the question of priorities not involved, but in each of these there might be said to be some equity remaining in the judgment debtor, bringing the case within the express terms of the statute. *Hershy v. Latham*, 46 Ark. 542, and *Apperson v. Ford*, 23 Ark. 746, have no bearing that we can see, in favor of appellant's contention. After a careful analysis and comparison of our own cases and all the other authorities at our command, we are of the opinion that judgment creditors have no lien, by virtue of the statute, upon lands which have been fraudulently conveyed prior to the rendition of their judgments, and that at least the proper, if not the only, remedy for them in such cases is to go into equity to uncover such conveyances, and that the creditor who exercises superior diligence in that regard by first bringing his suit and proceeding to uncover such assets is entitled to the proceeds. This seems to us to be eminently just, for intrinsically one creditor's judgment, fairly obtained, and based on a valid claim, is as meritorious as another's. There is no merit in the mere time of rendition, for that depends often only upon the time of maturity of the debt. Besides, the one first in time is not prevented from being first also in diligence.

The chancellor held that appellee was entitled to the proceeds of the sale of the lands fraudulently conveyed prior to the rendition of the judgment of either party, but for different reasons than those we announce. In the view we have taken, it becomes unnecessary to discuss the reasons of the chancellor. The proceeds of the lands which were fraudulently conveyed after the rendition of the judgments he also gave to appellee, because of its superior diligence in first bringing its suit to uncover same. In this, we think, he was entirely correct, for the reason stated, and because in other respects the appellee showed far greater diligence.

Finding no reversible error, the decree of the Pulaski Chancery Court is affirmed.

Battle and Riddick, JJ., dissent.

COLORADO SUPREME COURT.

J. E. DAVIDSON *et al.*, *Appts.*,
v.

I. W. JENNINGS *et al.*

(.....Colo.....)

1. An appeal by the owners of the property from a decision establishing a mechanic's lien can be maintained without joining other defendants, under Mills's Anno. Stat. § 1085, which provides that appeals may be taken by any person aggrieved.
2. The allowance of an attorney's fee. In addition to costs that would otherwise be allowed by law, to successful lien claimants, in pursuance of Sess. Laws 1893, chap. 117, p. 325, § 18, which provides for such allowance only to plaintiffs, is in violation of Bill of Rights, § 6, providing that courts of justice shall be open to every person, and that right and justice shall be administered without sale, denial, or delay.
3. The mere silence of a person owning a one-fourth interest in a mine, with respect to his lack of interest in a contract for work and materials made by lessees of the mine, will not estop him from denying that his interest is subject to a lien for such work and materials, although, as an employee of the lessees, he may have given directions as to the performance of such contract, where the nature of the interests of all parties clearly appeared upon the records.
4. An estoppel to deny liability under a contract made by others cannot be proved under a pleading which merely avers the execution of a contract.

(February 5, 1900.)

APPPEAL by defendants from a judgment of the District Court for Gunnison County in favor of plaintiffs in an action brought to recover for materials and labor furnished in working a mine and to establish a lien therefor. *Reversed.*

Statement by **Goddard, J.:**

This action was originally brought in the county court of Gunnison county by the appellees against the appellants and S. B. Outcalt, J. T. Clayton, and R. D. Smith, to recover against Outcalt, Clayton, and Smith for goods, wares, and merchandise furnished and labor performed in working the Vulcan mine, situate in Gunnison county, Colorado, and to establish and enforce a lien therefor against said mine. Judgments for the several amounts claimed were recovered in the county court against Smith, Outcalt, and Clayton, and they were declared to be liens against an undivided one-fourth interest in the mine. Davidson and Himebaugh, who held the title to this interest, appealed from that portion of the judgment which subjected said interest to the liens of plaintiffs, to the district court of Gunnison county. Motion to dismiss the appeal was denied, and a trial *de novo* had. The material

NOTE.—As to estoppel by silence when there is no duty to speak, see Knoedler v. Glaenger (C. C. A. 2d C.) 20 L. R. A. 733.
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facts disclosed by the evidence introduced are, in brief, as follows: On March 18, 1895, the then owners of the Vulcan mine leased the same, with an option to purchase, to one Frank Winters, until December 1, 1895, which lease was recorded in the office of the clerk and recorder of Gunnison county. On April 11, 1895, the lease was extended until April 1, 1896. On this date Winters assigned the same to one Spinney, and later Spinney assigned a one-half interest therein to R. D. Smith. Subsequently Outcalt acquired the other half, and about the middle of November, 1895, he and Smith commenced working the mine thereunder, and continued to work until about the 1st of March, 1896. Smith and Outcalt carried on their operations under the name Vulcan Mining Company or Vulcan Mine. Clayton was employed by them as bookkeeper, in which capacity he was acting during the times the goods were furnished and labor performed for which suit was brought; and in this capacity he issued orders upon which some of the merchandise was furnished, to which he signed the name of the company, adding to such signature, "by C." Also, at times during this period Clayton was at the mine, and, in the absence of Smith and Outcalt, gave directions in regard to the work and operations thereof. On April 6, 1895, he acquired the fee-simple title to an undivided one-fourth interest, and during the time the labor was performed and the materials furnished said interest stood of record in his name. He sold and conveyed this interest to Himebaugh and Davidson on March 2, 1896. The court below, *inter alia*, found that during the time the labor was performed and materials furnished "the record did not disclose that defendants Smith and Outcalt had any interest in said property; that no agreement existed between said defendants Clayton, Outcalt, and Smith for the working and development of said property for their joint benefit, and, as a matter of fact, said property was being operated for the benefit of Smith and Outcalt alone; that none of the parties performing labor or furnishing materials, on whose account it is sought to enforce a lien in this action against said property, had actual notice, during the period said labor was being performed and said materials furnished, for whose benefit or on whose account said mine was being worked or operated,"—and found, as a conclusion of law, that Clayton, by failing to notify the lien claimants or their assignors that he was not interested in the working and development of the mine, under the circumstances, was estopped from claiming that such persons have no lien against his interest, and that, as against his interest, a lien attached for the work performed and materials furnished, and, as Himebaugh and Davidson purchased this interest within the period in which the parties claiming lien might file their lien statement, they too

such interest subject to said liens, and entered a decree establishing a lien on the undivided one-fourth interest in favor of the lien claimants, in the respective amounts found due them, together with attorney's fees and costs. To reverse this decree, Davidson and Himebaugh bring the case here on appeal.

Messrs. Brown & Nourse, Wolcott & Vaile, and W. W. Field for appellants.

Mr. Sprigg Shackelford, for appellees: There is no rule which requires the grounds of estoppel to be pleaded where there has been no opportunity to set up the plea.

Bigelow, Estoppel, 4th ed. pp. 668, 689, 5th ed. pp. 698, 699; *Wood v. Jackson ex dem. Genet*, 8 Wend. 9, 22 Am. Dec. 603; *Henderson v. Keutzer*, 56 Neb. 460, 76 N. W. 881; *Isaacs v. Clark*, 12 Vt. 692, 36 Am. Dec. 372; *Donnelly v. San Francisco Bridge Co.* 117 Cal. 417, 49 Pac. 559; *Blood v. La Serena Land & Water Co.* 113 Cal. 221, 45 Pac. 252; *Goetz v. Goldbaum* (Cal.) 37 Pac. 646; *Churchill v. Baumann*, 95 Cal. 541, 30 Pac. 770.

Goddard, J., delivered the opinion of the court:

1. Appellees assign cross error upon the overruling of their motion by the district court to dismiss the appeal to that court from the county court. The motion was based upon the ground that the appeal was taken by Davidson and Himebaugh alone, and from that part of the decree only that established the lien; the contention being that an appeal from the county to the district court can be taken only by the united action and concurrence of all the defendants to the suit in the county court. We do not think that this position is tenable. Section 1045. *Mills's Anno. Stat. inter alia*, provides: "Appeals may be taken to the district court of the same county, from all final judgments and decrees of the county court, . . . by any person aggrieved by any such final judgment or decree," etc. It will be seen that this statute provides that an appeal may be taken by any person aggrieved. Davidson and Himebaugh were affected by the judgment and decree only in so far as it established a lien against their property, and were not concerned with, or directly affected by, that portion which adjudged a personal liability against Smith, Outcalt, and Clayton. If it should be held that, as a condition to their right to have so much of the controversy as affected their rights tried *de novo* in the district court, it was essential that all the defendants in the county court should join in the appeal, or that, in case of the refusal of any to join, it was incumbent upon Davidson and Himebaugh to appeal the entire case, thereby necessitating their giving an appeal bond to answer for the personal judgment, it is manifest that they would, in the one event, have been deprived of their right to an appeal, and, in the other, they would have reaped no benefit from the submission of their case 48 L. R. A.

to the district court, even if successful in defeating the lien. The appeal, as taken, in no way disturbed the personal judgment against Smith, Outcalt, and Clayton, which determined their liability; nor was there any occasion for the district court, upon the trial of the question as to whether or not a lien existed against the property of appellants, to consider the personal liability of those parties. The court was therefore correct in so deciding, and refusing to dismiss the appeal.

2. Counsel for appellants contend that the judgment and decree are erroneous, in that the lien decreed against the property of appellants includes in addition to the principal and interest of the debt, and the usual costs, the allowance of attorney's fees to the respective lien claimants. These allowances were made in pursuance of § 18, chap. 117, p. 325, Sess. Laws 1893, which reads as follows: "In all suits for the foreclosure of liens provided for in this act in which the plaintiff shall obtain a judgment and decree of foreclosure against the property described in said lien there shall be taxed as costs, in addition to the costs already provided for in such cases, a reasonable sum as an attorney fee to be fixed by the court at the time of rendering such judgment and decree." It will be seen that this section imposes a penalty upon the defendant for exercising, in this class of cases, the common right of making a defense, which is accorded to every other litigant in the courts, by subjecting him to the payment of the plaintiff's attorney's fees if he is successful, without giving him (the defendant) a reciprocal right if he is victorious. As furnishing support for this character of legislation, we are referred to the following cases, wherein statutes allowing an attorney's fee to plaintiff in actions against railroad companies for the killing of stock have been held to be constitutional: *Peoria, D. & E. R. Co. v. Dugan*, 100 Ill. 537, 50 Am. Rep. 619; *Kansas P. R. Co. v. Mower*, 16 Kan. 573; *Perkins v. St. Louis, I. M. & S. R. Co.* 103 Mo. 52, 11 L. R. A. 426, 15 S. W. 320; *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 12 L. R. A. 436, 3 Inters. Com. Rep. 584, 48 N. W. 98. An examination of these cases discloses that the statutes there under consideration required the railroad company to fence its right of way, and provided penalties for the nonperformance of this statutory duty,—among them, an attorney's fee,—but no such reason underlies the legislation in question. The attorney's fee allowed by the foregoing provisions of our statute is not in the nature of a penalty for the violation of any statutory duty, but a punishment for the failure to pay the claim of the lienor, and cannot be sustained upon the principle announced in those cases. Its validity, therefore, depends upon whether it violates any provision of our Constitution. Section 6 of our Bill of Rights enacts: "The courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property, or character; and that right and justice should be administered

without sale, denial, or delay." In *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500, an act that exempted the city of Janesville from the payment of costs in any action brought against it to set aside any assessment or tax deed, or to prevent the collection of taxes in said city, was held to conflict with § 9, art. 1, of the Constitution of Wisconsin, which was substantially like the foregoing section of our bill of rights. Chief Justice Dixon, in discussing the construction and effect to be given to that provision, said: "It is obvious there can be no certain remedy in the laws, where the legislature may prescribe one rule for one suitor or class of suitors in the courts, and another for all others under like circumstances, or may discriminate between parties to the same suit, giving one most unjust pecuniary advantage over the other. Parties thus discriminated against would not obtain justice freely, and without being obliged to purchase it. To the extent of such discrimination, they would be obliged to buy justice and pay for it, thus making it a matter of purchase to those who could afford to pay, contrary to the letter and spirit of this provision. Certainty of remedy implies uniformity of remedy and equality of rights and privileges in all things respecting it, which can only be obtained by general laws, equally binding upon every member of the community. The language denotes that there can be but one remedy for all similar cases, which must operate upon all persons or parties alike, and be equally free and favorable to all." In *South & North Ala. R. Co. v. Morris*, 65 Ala. 193, a statute which imposed upon an unsuccessful appellant a reasonable attorney fee incurred by reason of taking an appeal from a decision rendered by a justice of the peace in a suit against railroad companies for damages to live stock, notwithstanding it gave the same right to both parties, was held to be in conflict with the 14th Amendment to the Constitution of the United States and § 14 of their Bill of Rights, which is identical with § 6 of ours. It is there said: "The clear legal effect of these provisions is to place all persons, natural and corporate, as near as practicable, upon a basis of equality in the enforcement and defense of their rights in courts of justice in this state, except so far as may be otherwise provided in the Constitution. This right, though subject to legislative regulation, cannot be impaired or destroyed under the guise or device of being regulated. Justice cannot be sold or denied by the exaction of a pecuniary consideration for its enjoyment from one, when it is given freely and open-handed to another, without money and without price. Nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right, by the imposition of arbitrary, unjust, and odious discriminations, perpetrated under color of establishing peculiar rules for a particular occupation. Unequal, partial, and discriminatory legislation, which secures this right to some favored class or classes, and denies it to others, who are thus excluded

ed from that equal protection designed to be secured by the general law of the land, is in clear and manifest opposition to the letter and spirit of the foregoing constitutional provisions." In *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss. 641, a similar statute was adjudged unconstitutional, the court saying: "The right of appeal cannot be fettered and clogged with reference to the parties litigant, or the attitude they occupy as plaintiff or defendant. All litigants, whether plaintiff or defendant, should be regarded with equal favor by the law, and before the tribunals for administering it, and should have the same right to appeal with others similarly situated. All must have the equal protection of the law and its instrumentalities. The same rule must exist for all in the same circumstances." In *Gulf, O. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, an act of the legislature of Texas which provided that any person having a valid, bona fide claim for personal services or for damages, overcharges on freight, or claims for stock killed or injured by the trains of any railway company, that did not exceed \$50, might present the same for payment by filing it with the station agent of such corporation in any county where suit might be instituted, and if, after the expiration of thirty days after such presentation, such claim had not been paid or satisfied, he might immediately institute suit thereon in the proper court, and, if he should obtain judgment for the full amount of his claim, he should be entitled to recover the amount of such claim and all costs, and in addition thereto a reasonable attorney's fee, not to exceed \$10, to be assessed or awarded by the court or jury trying the issue, was held to be unconstitutional. Mr. Justice Brewer, who delivered the opinion of the court, said: "The act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions, and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute." And, after a thorough and exhaustive review of all the cases bearing upon the subject, he held the act to be unconstitutional because it operated to deprive the railway companies of property without due process of law, and denied to them the equal

protection of the law, in that it singled them out, of all citizens and corporations, and required them to pay, in certain cases, attorney's fees to parties successfully suing them, while it gave to them no like or corresponding benefit. To the same effect are *Jolliffe v. Brown*, 14 Wash. 155, 44 Pac. 149; *Hocking Valley Coal Co. v. Rosser*, 53 Ohio St. 12, 29 L. R. A. 386, 41 N. E. 263; *State v. Fire Creek Coal & C. Co.* 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 288, and others that might be cited.

In but few of the states are statutes allowing attorney's fees in this class of cases to be found. In California such legislation has been upheld by the supreme court, but in none of the cases has its constitutionality been presented, discussed, or determined. In the following cases its constitutionality was directly challenged and passed upon. In *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, 43 N. W. 1006, a statute which allowed \$5 attorney's fees as part of plaintiff's costs in a log-lien suit was held to be illegal and unauthorized, for the reasons stated in *Wilder v. Chicago & W. M. R. Co.* 70 Mich. 382, 38 N. W. 289; *Schut v. Chicago & W. M. R. Co.* 70 Mich. 433, 38 N. W. 291; *Lafferty v. Chicago & W. M. R. Co.* 71 Mich. 35, 38 N. W. 660. In *Wilder v. Chicago & W. M. R. Co.* 70 Mich. 382, 38 N. W. 289, the court, in discussing the question, says: "This inequality and injustice cannot be sustained upon any principle known to the law. It is repugnant to our form of government, and out of harmony with the genius of our free institutions. The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist." In *Randolph v. Builders' & Painters' Supply Co.* 106 Ala. 501, 17 So. 721, the provision allowing attorney's fees was held to be in violation of § 14 of their Bill of Rights, which, as above stated, is identical with § 6 of ours, "in that it allows a fee to the plaintiff's attorney for prosecuting his suit successfully, whereas a like fee is not allowed the defendant's attorney in case the plaintiff fails in his suit, and on that account it is discriminative and class legislation." In *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280, the constitutionality of the act was upheld by a divided court, the majority opinion being delivered by Blake, Ch. J. But we think the able dissenting opinion of De Witt, J., is better supported by reason and authority. In *Ivall v. Willis*, 17 Wash. 645, 50 Pac. 467, a logger's lien act, which provided an attorney's fee for the person claiming the lien, was upheld: the court observing that such act was clearly distinguishable from the statute under consideration in *Jolliffe v. Brown*, 14 Wash. 155, 44 Pac. 149, which provided for an attorney's fee to plaintiff in case of recovery against the railway company for killing stock, and which was there declared unconstitutional because it did not provide for the payment of a like fee by plaintiff in case he should be unsuccessful, for the reason that the attorney's fee provided by the 48 L. R. A.

latter was compensation to plaintiff for expenditures necessarily made by him in the foreclosure of his lien, and allowable upon the same principle that costs are allowed. It is difficult to see how the designation of such fee as "costs" obviates the objection that it confers upon the plaintiff a right that is denied to defendant, and that it is an "attempt to grant special privileges and advantages to one class of litigants at the expense and to the detriment of another."

Appellees lay some stress upon the fact that Mr. Justice Brewer, in *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 660, 17 Sup. Ct. Rep. 255, mentions, in the course of his discussion, that statutes giving special protection to laborers and mechanics have been upheld; but the reasons he gives for distinguishing the legislation there under consideration from such statutes apply with equal force to our act, to wit, that it does not aim to protect laborers and mechanics alone, but its benefits are conferred upon every individual, whether rich or poor, who has a claim of the character described. It extends the benefit to materialmen, contractors, and others who do not come within the reason that justifies such legislation for the protection of laborers or mechanics. While it is true that statutes extending the right to a lien to these other classes have been upheld, yet the principle upon which they have been sustained affords no support for extending to them the benefits of the provision under consideration. We are unable to perceive any reason why, in an action to enforce their claims for merchandise or material furnished in the erection of a house or for the development of a mining claim, they should be afforded any other or greater rights than are given other merchants who furnish provisions or supplies to persons for family consumption, or that their debtors should not have the same right to contest the justice of their claims upon the same terms and conditions as are afforded to other debtors by the general law of the land. It is no answer to say that the debtor may avoid the imposition of this additional cost by paying his honest debts, because the very purpose of the litigation he invokes is to determine whether he owes the debt or not. And it is immaterial whether he successfully defeats the larger part of the claim. He may nevertheless be mulcted in a sum which will deprive him of any benefit from the defense which he has legitimately established. It is also equally immaterial whether he interposes a vexatious defense, or makes an honest though unsuccessful one, or allows judgment to be taken against him by default: he is subjected to the same penalty. We think this character of legislation is prohibited by § 6 of our Bill of Rights, and that both upon principle and authority § 18 of the lien law is unconstitutional, and that the court below erred in allowing the attorney's fees complained of. This, however, if the only error, would not necessitate a reversal of the entire judgment, since the lien and judgment are affected only to the extent of the illegal excess.

3. The principal and controlling question presented by appellants' assignments of error is whether, under the pleadings and facts of this case, the court below erred in holding that a lien attached against Clayton's interest by reason of his connection with, and apparent interest in, the operations of the mine. A mechanic's or miner's lien is the creature of the statute, and attaches only by virtue of work being done or materials furnished under a contract express or implied, with the owner of the property upon which the lien is claimed; and the burden of proving such contract rests upon the party asserting it, and he must ascertain for himself that the party with whom he deals holds such a relation to the work being done, and the property upon which the same is done, as will entitle him to claim a lien for the work or material which he furnishes. *Rico Reduction & Min. Co. v. Musgrave*, 14 Colo. 79, 23 Pac. 458; *Tritch v. Norton*, 10 Colo. 337, 15 Pac. 680; *Henry & C. Co. v. Fisherick*, 37 Neb. 207, 55 N. W. 643; *Brown v. Cowan*, 110 Pa. 588, 1 Atl. 520. In this case there is an entire absence of evidence tending to show that the mine was being worked under any contract or arrangement by virtue of which Clayton was in any way made liable for the labor performed or merchandise furnished, or that there existed any contract which directly or indirectly obligated him to pay for the same, or that the lien claimants or their assignors performed the work or delivered the merchandise sued for, relying upon his personal credit. But, on the other hand, it is clearly established that the property was being operated by Smith and Outcalt under a lease in which Clayton had no interest, and the labor was performed and the merchandise furnished exclusively for their use and benefit. This lease and its several assignments were of record in Gunnison county prior to and during the time the indebtedness herein sued for accrued, and were notice to all parties concerned that the same had been transferred, and then stood of record in the name of Smith and Spinney; and the lien claimants or their assignors, had they taken the precaution to inquire, could have readily ascertained that Spinney's interest had passed to Outcalt, and that, at the time of the transactions mentioned in the complaint. Smith and Outcalt, in the contemplation of the mechanic's lien statute, were the only "owners" of the property whose interest therein could be subjected to lien for their claims. Under these circumstances, it is clear that no lien accrued against Clayton's interest in the mine, in their favor, by virtue of any contract relation that they directly or indirectly held to him. This was evidently the conclusion reached by the court below, since it predicated the liability of Clayton, and the right to a lien against his interest in the property, solely upon the ground that he was cognizant of the work being done, and to some extent took part in its direction; and, having in some instances given orders for merchandise in the name of the company under which it was being operated, and failing

to notify the parties dealing with the company of his true relation thereto, he is now estopped from claiming that such persons have no lien against his interest. We do not think that, under the circumstances of this case, such conclusion is justified. As we have seen, it was the duty of these lien claimants to ascertain with whom they were dealing, and for whose use and benefit they were performing labor and furnishing material. And, certainly, in the then condition of the record, Clayton had a right to presume that they had knowledge of the true state of the title, and of the facts that they could have ascertained by such inquiry as was suggested by the record. "Where the party's rights in property sufficiently appear of record, mere silence upon his part is no violation of duty." 7 Am. & Eng. Enc. Law, 1st ed. p. 13, note, *Silence*, and authorities there cited. But, aside from this, the question of estoppel was neither raised by the pleadings nor supported by the evidence. That the facts constituting an estoppel *in pais* must be specially pleaded is well settled. *De Votie v. McGerr*, 15 Colo. 467, 24 Pac. 923; *Gaynor v. Clements*, 16 Colo. 204, 26 Pac. 324; *Prewitt v. Lambert*, 19 Colo. 7, 34 Pac. 684. The complaint avers that Smith, Outcalt, and Clayton made and entered into an agreement with the parties performing labor upon the Vulcan mine, and that the goods, wares, and merchandise were supplied to defendants to be used for the working, preservation, and development of said Vulcan mine; thus predicated their right to relief as against Clayton upon direct agreements between him and the persons for whose labor and material the liens are claimed. The answer of these appellants denied these allegations, and any and all indebtedness on the part of Clayton. The parties went to trial upon these issues. The testimony wholly failing to show a contract of employment by Clayton, appellees undertook to show such a participation in the business as would raise an implied contract on his part. Not only was this testimony inadmissible under the issues formed by the pleadings, but it was, we think, clearly insufficient to raise any implied assumption. It, at most, disclosed acts on his part within the scope of his employment, and wholly failed to show that in any instance the parties performed the labor or furnished the materials relying upon his liability as a party in interest, or upon his personal credit, or that they were induced so to do by his acts or apparent connection with the business. To entitle a party to invoke the doctrine of estoppel, he must actually have been misled and induced to act to his prejudice by reason of another's conduct; he having on his part, exercised due diligence to ascertain the truth. In *Moore v. Bowman*, 47 N. H. 494, the doctrine is thus concisely stated: "To have this effect, however, the defendant must actually have been misled by the plaintiff's conduct, and induced thereby to change his position. If he is not so misled, . . . and with a reasonable use of means within his reach he might have ascer-

tained the fact, he could not set up an estoppel. The truth is, the party setting up an estoppel is himself bound to the exercise of good faith and due diligence to ascertain the truth." *Douglass v. Craig*, 13 S. C. 371; 2 *Herman, Estoppel*, § 969. If it can be held that a lien can be created against the interest of an owner of property in this state, in the absence of any contract on his part, by reason of his conduct, it is manifest that the facts disclosed by this record are insufficient to work such a result. We are therefore of the opinion that, in the circum-

stances of this case, no lien was created against Clayton's interest in the mine, and the court below erred in adjudging a lien against such interest.

For the foregoing reasons, the decree of the court below is reversed, and the cause remanded, with directions to enter judgment in favor of appellants.

Gabbert, J., not participating.

Rehearing denied.

GEORGIA SUPREME COURT.

T. H. McMILLAN, Plff. in Err.,
v.

R. B. HARRIS et al., Exrs., etc., of Sarah M. Parsons, Deceased.

(.....Ga.....)

"1. One who bids at a public sale, not because of any desire to purchase, but merely for the purpose, either in his own interest or that of another, to run up the price, is not a "puffer," if, in case his bid is the last and highest, he can be compelled by the person conducting the sale to take and pay for the property; and this is so though, under an arrangement with another or others to whom the proceeds of the sale, or a considerable portion thereof, will ultimately go, he will not be compelled to keep and pay for the property.

2. Accordingly, it is neither contrary to law nor public policy for persons who will be entitled to the proceeds of land sold by an executor under a decree of court to engage a third person to run the property up to a specified price, with the understanding that, if it is knocked down to him, they will take it off his hands.

(February 28, 1900.)

ERROR to the Superior Court for Chatham County to review a judgment compelling the successful bidder at a judicial sale to take the property allotted to him. *Affirmed*.

The facts are stated in the opinion.

Messrs. Denmark, Adams, & Freeman, for plaintiff in error:

Under the Code the court had full power to relieve Mr. McMillan, and it was its duty to do so if the sale, made under the process of its court, "was infected with fraud, irregularity, or error, to the injury of either party."

Ga. Code, §§ 4856, 5427; *Johnson v. Dooly*, 72 Ga. 297; *Parker v. Glenn*, 72 Ga. 638; *Fears v. State*, 102 Ga. 284, 29 S. E. 463.

The fact that the bidding complained of

*Headnotes by COBB, J.

NOTE.—For effect of preventing or checking bids upon the validity of sales at auction, see *Herdon v. Gibson* (S. C.) 20 L. R. A. 543, and note.

48 L. R. A.

was done in good faith and for a purpose regarded by Mr. Owens and the gentlemen representing the other half interest as lawful and proper, in advancement of the interests of their clients, cannot be material or important.

Harrison v. McHenry, 9 Ga. 164, 52 Am. Dec. 435.

Mr. McMillan had a right to this property at the lowest real bid without any inflation by anything like puffing.

Pennock's Appeal, 14 Pa. 446, 53 Am. Dec. 561; *Staines v. Shore*, 16 Pa. 200, 55 Am. Dec. 492; *Peck v. List*, 23 W. Va. 403, 48 Am. Rep. 398; *Springer v. Kleinsorge*, 83 Mo. 162.

An owner cannot employ a by-bidder, "for the purpose of preventing a sacrifice of the property," or its sale below a certain price.

Bennett's Benjamin, Sales, 6th ed. p. 454, 7th ed. p. 447; *Veazie v. Williams*, 3 Story, 611, Fed. Cas. No. 16,907; *Story, Sales*, 4th ed. §§ 482 *et seq.*; *Tiedeman, Sales*, § 165; *Hartwell v. Gurney*, 16 R. I. 78, 13 Atl. 113.

Puffing at a judicial sale vitiates the sale as completely as if the sale were not judicial.

Rorer, Judicial Sales, p. 44, § 77; *Tiedeman, Sales*, § 165.

Mr. Owens's conduct amounted to "puffing" under the definitions.

Locke v. Willingham, 99 Ga. 297, 25 S. E. 693; *James v. Kelley*, 107 Ga. 446, 33 S. E. 425; *Coleman v. Maclean*, 101 Ga. 304, 28 S. E. 861; *Beazell v. Christie*, 1 Cowp. 395; *Veazie v. Williams*, 8 How. 154, 12 L. ed. 1027; *Crowder v. Austin*, 3 Bing. 368; *Robinson v. Wall*, 2 Phill. Ch. 373; *Wheeler v. Collier*, *Moody & M.* 123; *Green v. Baverstock*, 14 C. B. N. S. 204; *Rex v. Marsh*, 3 Younge & J. 331; *Mortimer v. Bell*, L. R. 1 Ch. 10, 5 Am. L. Reg. N. S. 310; *Peck v. List*, 23 W. Va. 403, 48 Am. Rep. 398; *Hinde v. Pendleton*, Wythe (Va.) 146; *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq. 159; *Donaldson v. M'Roy*, 1 Browne (Pa.) 346; *Woods v. Hall*, 10 N. C. (1 Dev. Eq.) 411; *Flannery v. Jones*, 180 Pa. 338, 36 Atl. 857; *Bowman v. McClenahan*, 20 App. Div. 346, 46 N. Y. Supp. 946; *Miller v. Baynard*, 2 Houst. (Del.) 559, 83 Am. Dec. 168; *Baham v. Bach*, 13 La. 287, 33 Am. Dec. 561; *Towle*

v. *Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Bateman*, Auctions, pp. 131-134, 246; *Bispham*, Eq. 6th ed. § 209; 1 Warvelle, Vendors, pp. 254-256; 2 Pom. Eq. Jur. § 934.

Mr. R. R. Richards, for defendants in error:

The law authorized Mr. Owens to bid.

The parties to an action may purchase.

Freeman v. Cooper, 14 Ga. 238; *White v. Crew*, 16 Ga. 416; *Kilgo v. Castleberry*, 38 Ga. 513, 95 Am. Dec. 406; *Humphrey v. McGill*, 59 Ga. 649; *Pinkston v. Harrell*, 106 Ga. 102, 31 S. E. 808; Rorer, Judicial Sales, 2d ed. §§ 170, 782; *Pugh v. Highley*, 152 Ind. 252, 44 L. R. A. 392, 53 N. E. 171; 2 Sugden, Vendors, 8th Am. ed. 689.

So may a cotenant in partition sale.

Freeman, Cotenancy & Partition, § 165; *Pencab Min. Co. v. Mason*, 145 U. S. 349 36 L. ed. 732, 12 Sup. Ct. Rep. 887; *Baird v. Baird*, 21 N. C. (1 Dev. & B. Eq.) 524, 31 Am. Dec. 399.

So may an heir at law or a devisee at administrator's or executor's sale, and that, too, at his own sale, if the executor or administrator is one of the heirs or devisees.

Anderson v. Butler, 31 S. E. 183, 5 L. R. A. 166, 9 S. E. 797; *Pennock's Appeal*, 14 Pa. 446, 53 Am. Dec. 562; *Rigg v. Schweitzer*, 170 Pa. 549, 33 Atl. 116; *James v. Kelley*, 107 Ga. 446, 33 S. E. 425; Rorer, Judicial Sales, 2d ed. § 426.

The policy of the law forbids, as conducive to fraud and inimical to fair dealing the purchase by masters, trustees, executors, administrators, guardians, and all others, at their own sales, as also all agents, public or private, who are concerned in selling whether such purchase be direct or indirect. Rorer, Judicial Sales, § 413.

In sales directed by a court of chancery, the whole business is transacted by a public officer, under the guidance and superintendence of the court itself.

Blossom v. Milwaukee & C. R. Co. 3 Wall. 207, 18 L. ed. 46; *Pencab Min. Co. v. Mason*, 145 U. S. 361, 36 L. ed. 736, 12 Sup. Ct. Rep. 887; *Pinkston v. Harrell*, 106 Ga. 102, 31 S. E. 808.

Under our system any party may bid who does not come within the reason and spirit of the law which prohibits a vendor to become the purchaser at a judicial sale.

It is difficult to see how a public sale between competing bidders could ever be sustained if one may insist that he was taken by surprise and prejudiced because he had not been informed of the amount to which bidders would run the property.

Barking v. Peters, 134 Ill. 606, 25 N. E. 770.

Two or more parties interested in the result of a judicial sale may lawfully combine to purchase on joint account, for the honest purpose of preventing a sacrifice of the property, or for any other purpose, lawful in its nature, not designed to stifle competition or chill the sale.

White v. Crew, 16 Ga. 416; *Buckner v. Chambliss*, 30 Ga. 653; *Pennsylvania Transp. Co.'s Appeal*, 101 Pa. 576; *Hopkins v. Ensign*, 122 N. Y. 144, 9 L. R. A. 731, 25 48 L. R. A.

N. E. 306; *Thames v. Miller*, 2 Woods, 564. Fed. Cas. No. 13,860; *James v. Fulcrod*, 5 Tex. 512, 55 Am. Dec. 744; *Gulick v. Webb*, 41 Neb. 706, 60 N. W. 13; *Jenkins v. Hogg*, 2 Treadway, Const. 821; *Phippen v. Stickney*, 3 Met. 387; *Kearney v. Taylor*, 15 How. 494, 14 L. ed. 787; *Wicker v. Hoppock*, 6 Wall. 94, 18 L. ed. 752; *Reagan v. Bishop*, 25 S. C. 585.

It could hardly be considered a fraud for a competent bidder to bid what property was worth, to keep it from being sacrificed to a bidder who was trying to get it at less than it was worth.

Richards v. Holmes, 18 How. 148, 15 L. ed. 306; *Smith v. Black*, 115 U. S. 398, 29 L. ed. 398, 6 Sup. Ct. Rep. 50; *Pencab Min. Co. v. Mason*, 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 887; *James v. Kelley*, 107 Ga. 446, 33 S. E. 425; *Pennock's Appeal*, 14 Pa. 446, 53 Am. Dec. 562; *Rigg v. Schweitzer*, 170 Pa. 549, 33 Atl. 116; *Anderson v. Butler*, 31 S. C. 183, 5 L. R. A. 166, 9 S. E. 797; 3 Am. & Eng. Enc. Law, 2d ed. p. 505.

There is a solid distinction to be made between the bid of an irresponsible puffer, secured, by the power that controls the sale, from liability for his bid, and the bid of a responsible party to the record at a judicial sale, with which he can be and should be made to comply for the benefit of others interested in the proceeds of sale as well as he.

Allen v. Gillette, 127 U. S. 595, 32 L. ed. 274, 8 Sup. Ct. Rep. 1331; *Smith v. Arnold*, 5 Mason, 414, Fed. Cas. No. 13,004.

A sale by an administrator will not be set aside by discharging the purchaser because one interested in the estate employs a puffer, without the knowledge of the administrator or auctioneer.

East v. Wood, 62 Ala. 313; *Locke v. Wilingham*, 99 Ga. 297, 25 S. E. 693.

Messrs. A. C. Wright and George W. Owens also for defendants in error.

Cobb, J., delivered the opinion of the court:

Stoyell C. Parsons and Elizabeth Catharine Maas, by her father, as next friend and guardian, brought suit in the superior court of Chatham county against the executors of the last will and testament of Sarah M. Parsons and others, alleging in their petition that they were joint owners of certain described realty in the city of Savannah, and praying that a certain deed alleged to be a cloud upon the title of petitioners might be delivered up to be canceled, and that the executors take charge of the realty, and dispose of the same for the benefit of petitioners. When the case came on for a hearing, a decree was entered, providing that the trust deed referred to be set aside and canceled, and that the executors "take charge of and dispose of the property set out in said petition in accordance with the terms of compromise as agreed on," and to this end advertise the property in a designated way for sale at public outcry before the door of the courthouse of Chatham county during the legal hours of sale to the

highest bidder, and report the sale to the court for confirmation. The sale was had in the manner prescribed in the decree, and on the day fixed in the advertisement the property was sold in several parcels, and knocked down to different purchasers. The executors reported the sale to the court, when it appeared that one of the parcels had been knocked down to T. H. McMillan, the plaintiff in error, for the sum of \$14,000. In answer to the rule nisi calling upon him to show cause why the sale should not be confirmed, McMillan set up that the price at which the property was knocked down to him was the result of "puffing" or "by-bidding" at the sale, done at the instance of parties owning an interest in the property, and in fraud of his rights as purchaser; that the property was run up by the owners thereof without his knowledge by bids that were not real or genuine, but made for the purpose of puffing the property, and that such conduct rendered the sale illegal, and released him from his obligation to pay for the property. After hearing the evidence, the judge held that sufficient cause had not been shown to authorize him to refuse to confirm the sale, and an order was passed confirming the sale, and directing McMillan to pay the amount of his bid into the hands of the executors. To this ruling McMillan excepted, assigning as error that the decision of the judge was contrary to law and the evidence, that the evidence required a finding that the sale was puffed, and was therefore illegal. It appears from the evidence that the petitioners in the original proceeding, Miss Maas and Dr. Parsons, were, under the will of Sarah M. Parsons, entitled each to a one-half interest in the property involved in the present case. Mr. Owens was an attorney at law representing Miss Maas. Mr. Seabrook was an attorney at law representing Dr. Parsons. Mr. Owens was at the sale, and made several bids on the property; one of these bids being immediately before the bid of McMillan, at which the property was knocked down to him. Mr. Owens was not bidding in his own interest. He was bidding for his client by authority given him to bid such an amount as, in his discretion, would be necessary to prevent the property from being sold at a sacrifice. It also appears that Mr. Owens and Mr. Seabrook, representing their respective clients, had agreed that the property should not be sold for less than \$13,000, and that, in pursuance of this agreement, Mr. Owens became a bidder at the sale; and it is to be inferred from the testimony that, if the property had been knocked down to him, the purchasers would have been neither himself nor Mr. Seabrook, but their respective clients. It also appears that out of the proceeds of the sale different items of costs and expenses connected with the litigation were to be paid by the executors; the amount of such items which were due and unpaid at the date of the hearing of the petition brought to confirm the sale being more than \$250. The auctioneer who conducted the sale was one of the executors,

and it appeared that neither in his capacity as auctioneer nor as executor did he have any connection whatever with the arrangement made between Mr. Owens and Mr. Seabrook, and there was no reason whatever why he could not, if the property had been knocked down to Mr. Owens, have treated him as the purchaser, and invoked the aid of the court to that end. It appeared distinctly from the testimony that, if there was any puffing or by-bidding, neither the auctioneer nor the executors had any connection with the same, and that it was done without their consent, knowledge, or authority.

The controlling question to be determined is whether the conduct of Mr. Owens in entering into the arrangement with Mr. Seabrook to bid on the property in behalf of their respective clients so as to prevent its sacrifice, and bidding at the sale for that purpose without the expectation of becoming a purchaser himself, was of such a character as to authorize the court to declare that McMillan was misled, and that for that reason the sale was void, and should be set aside. To properly determine this it is necessary to investigate the law of sales at auction, and determine who is a puffer at an auction, and what conduct would amount to puffing so as to invalidate the sale. There is no decision of this court bearing directly upon this question. The presence at auction sales of persons who bid for the purpose of inflating the value of the property in behalf of those interested in the sale is a matter at the present time of very common occurrence, and has been from the time that auction sales were first known. This practice has brought about many controversies which resulted in numerous cases, and the effect of such conduct has been discussed by many judges and text writers. A person of the character referred to is usually denominated a "puffer," but he is sometimes referred to as a "by-bidder," "capper," "decoy duck," "white bonnet," or "sham bidder." The first time that this question seems to have come before the English courts, so far as the reported cases are concerned, was in the case of *Walker v. Nightingale*, 4 Bro. P. C. 193, which was decided in 1726. It was held by the house of lords in that case that a puffer could not recover compensation for his services, since they were contrary to good faith. The next case in point of time was *Bevoell v. Christie*, 1 Cowp. 395, which was decided by the court of King's bench in 1776. This was a decision by Lord Mansfield, and, as it was rendered prior to our adopting statute, it is controlling authority in this state. *Thornton v. Lane*, 11 Ga. 500. For this reason it is necessary to examine that case with some care. An action was brought against an auctioneer, for selling a horse at the highest price bid for him, contrary to the owner's express direction not to allow him to go under a larger sum named, and it was held that such an action would not lie, but that it would have been otherwise if the owner had directed the auctioneer to put the horse up at a particular price, and not lower.

The opinion of Lord Mansfield in the case was as follows: "The matter in question is in itself of small value, but in respect of the principles by which it must be governed it is a question of great importance. Since the trial I have mooted the point with many who are not lawyers, upon the morality and rectitude of the transaction. The question is whether a bidding by the owner of goods at a sale under these conditions, namely, 'that the highest bidder shall be the purchaser, and if a dispute arise, to be decided by a majority of the persons present,' is a bidding within the meaning of such conditions of sale. There is no express undertaking on the part of the defendant, nor is it, as has been ingeniously said, a direction that there should be no bidding under £15, which might be fair; but the direction given to the defendant is 'not to let the horse go under £15,' which implies there might be a bidding under that sum. The question, then, is whether the owner can privately employ another person to bid for him. The basis of all dealings ought to be good faith; so, more especially in these transactions, where the public are brought together upon a confidence that the articles set up to sale will be disposed of to the highest real bidder. That could never be the case if the owner might privately and secretly enhance the price by a person employed for that purpose; yet tricks and practices of this kind daily increase, and grow so frequent that good men give in to the ways of the bad and dishonest in their own defense. But such a practice was never openly avowed. An owner of goods set up to sale at an auction never yet bid in the room for himself. If such a practice were allowed, no one would bid. It is a fraud upon the sale and upon the public. The disallowing it is no hardship upon the owner; for, if he is unwilling his goods should go at an under-price, he may order them to be set up at his own price and not lower. Such a direction would be fair. Or he might do as was done by Lord Ashburnham, who sold a large estate by auction. He had it inserted in the conditions of sale that he himself might bid once in the course of the sale, and he bid at once £15,000 or £20,000. Such a condition is fair, because the public are then apprised and know upon what terms they bid. In Holland it is the practice to bid downwards. The question, then, is, is such a bidding fair? If not, it is no argument to say it is a frequent custom. Gaming, stockjobbing, and swindling are frequent. But the law forbids them all. Suppose there was an agreement to abate so much, which is the case where goods are sold by one person in the trade to another, they abate sometimes 10 to 15 per cent. Such an agreement between the owner and a bidder at sale by auction would be a gross fraud. What is the nature of a sale by auction? It is that the goods shall go to the highest real bidder. But there would be an end of that if the owner might privately bid upon his own goods. There is no contract with the auctioneer. He is only an agent between the buyer and seller. He may fair-

ly bid for a third person who employs him, but not for the owner. In this case there is another fraud put upon the public. For by the catalogue the goods are described to be 'the goods of a gentleman deceased, and sold by order of the executor.' Upon this representation many people would attend to bid on a supposition that the goods were necessarily to be sold at all events, whether valuable or not valuable; whereas they might have their suspicions if they were the property of persons living. Horses, or any other species of property, belonging to persons that are dead, are not so likely to be faulty as those which are parted with by persons in their lifetime. We all remember the sale of a gentleman's wines, where vast quantities had been sent in belonging to other persons, and all sold at a very high price, under an idea they were his. The consequence was, most of the buyers were taken in. Therefore, upon full consideration, I am of opinion that a bidding by the owner in the manner contended for, and agreeable to the directions given in this case, would have been a fraud upon the sale; and, consequently, that this action against the defendant as auctioneer cannot be maintained."

In *Howard v. Castle*, 6 T. R. 642, the decision of Lord Mansfield in *Bezeucl v. Christie* was followed by Lord Kenyon. In *Wheeler v. Collier*, *Moody & M.* 123, a sale at which there were two puffers was held to be void, and Lord Tenterden stated that the inclination of his mind was that the employment of only one puffer would avoid a sale. In *Crowder v. Austin*, 3 Bing. 368, it appeared that the vendor of a horse stationed his servant to join in the bidding at a public auction, and the servant bid up to £23 after a bona fide bidder had bid £12. It was held that the sale could not be enforced against a subsequent bidder. In *Green v. Barrerstock*, 14 C. B. N. S. 204, it was held that upon a sale of goods by auction, where the highest bidder is to be the purchaser, the secret employment of a puffer on behalf of the vendor is a fraudulent act and vitiates the sale. In that case Byles, J., said: "The sale is vitiated by the fraud, and void, unless the vendee, with knowledge of the fact, has acted upon it so as to deprive himself of the right to complain. This has been the law of England, and, indeed, of the whole of Europe, for a very long time indeed. It was a law of universal application even before the Christian era." The decisions of the common-law courts of England have been almost without exception in line with the decision of Lord Mansfield in *Bezeucl v. Christie*. The principle at the foundation of this decision was, that for one to offer his property at public outcry to the highest bidder, and then secretly arrange with another to bid on the property in his behalf, with the distinct understanding that he was not to incur any liability on his bid,—was a fraud upon the right of those who attended the sale in good faith expecting to come into competition with others like themselves—who really desired to purchase the property on the best terms possible. The reason for

the rule was the palpable fraud upon bona fide bidders. Strange as it may seem, the English court of chancery did not follow the rule laid down by Lord Mansfield, but, on the contrary, in a number of decisions this rule was criticised, and the fraud incident to puffing at auctions was not only tolerated, but approved of, by that court. In *Conolly v. Parsons*, which will be found reported in a note in 3 Ves. Jr. 625,—a decision rendered in 1797,—Lord Chancellor Loughborough found great fault with the conclusion reached by Lord Mansfield, and also with the reasoning which led him to that conclusion. According to the rule in that case, unlimited puffing was allowable. While the decision last referred to was not followed by the court of chancery in all of its bearings, that court held on different occasions that the mere fact that one puffer was employed to prevent a sacrifice of the property would not be such a fraud as would vitiate the sale when it was otherwise free from infirmity. In *Mortimer v. Bell* [L. R. 1 Ch. 10] 5 Am. L. Reg. N. S. 310, it was held by Lord Chancellor Cranworth that the rule said to exist in equity, allowing one puffer to be employed, without notice, to prevent a sale at an undervalue, is abstractly less sound than the rule at law, which declares such employment to be fraudulent; and rests only on the authority of decisions in lower branches of the court. See also, in this connection, *Flint v. Woodin*, 9 Hare, 618; *Robinson v. Wall*, 2 Phill. Ch. 372; *Smith v. Clarke*, 12 Ves. Jr. 477. The conflict between the rule laid down by the common law and the chancery courts of England was finally settled by an act of Parliament which provided that, "whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law."

In the case of *Peck v. List*, 23 W. Va. 338, 43 Am. Rep. 398, which is one of the leading American cases on the subject, the English decisions above referred to, as well as many others by the English common law and chancery courts, are collected and commented on in the opinion of Mr. Justice Green. We have referred to such of those decisions as we deem necessary to the present discussion. The decision of Lord Mansfield must be treated as binding authority in this state, as there are none of our own decisions in conflict with the rule he there lays down. Attention was called in the argument to the fact that the record in the case of *Locke v. Willingham*, 99 Ga. 297, 25 S. E. 693, disclosed that certain charges of the trial judge bearing upon the subject under consideration in the present case were under review, and that the effect of the ruling in that case, which was merely a head-note, that no error of law was committed, was to approve of the charges made by the trial judge. We have examined the record in that case, and we find that the charges of the judge under review were not only not in conflict with the rule laid down by Lord Mansfield, but seem to have been in accord

therewith. The following decisions and authorities will show the rulings of some of the American courts on this subject: 2 Pom. Eq. Jur. § 934, pp. 1336, 1337; 3 Am. & Eng. Enc. Law, 2d ed. pp. 304, 305; Benjamin, Sales, 7th ed. §§ 470 et seq.; 1 Warvelle, Vendors, p. 254; 1 Story, Eq. Jur. § 293; Bispham, Eq. § 209; Tiedeman, Sales, § 163; Rorer, Judicial Sales, p. 44; Bateman, Auctions, p. 131; 1 Wait, Act. & Def. p. 482; Story, Sales, § 482; *Veazie v. Williams*, 8 How. 134, 12 L. ed. 1018; *Flannery v. Jones*, 180 Pa. 338, 36 Atl. 856; *Bowman v. McClenahan*, 20 App. Div. 346, 46 N. Y. Supp. 945; *Pennock's Appeal*, 14 Pa. 446, 53 Am. Dec. 561; *Hartuell v. Gurney*, 16 R. I. 78, 13 R. I. 113; *Reynolds v. Dechaums*, 24 Tex. 174, 76 Am. Dec. 101; *Davis v. Putney*, 3 Head, 607, 75 Am. Dec. 789; *Miller v. Baynard*, 2 Houst. (Del.) 559, 83 Am. Dec. 168; *Jenkins v. Hogg*, 2 Treadway, Const. 821; *East v. Wood*, 62 Ala. 313; *Woods v. Hall*, 16 N. C. (1 Dev. Eq.) 411; *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq. 159; *Hind v. Pendleton*, Wythe (Va.) [145] 354; *Curtis v. Aspinwall*, 114 Mass. 187, 19 Am. Rep. 332; *Springer v. Kleinsorge*, 83 Mo. 152; *Toule v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Staines v. Shore*, 16 Pa. 200, 55 Am. Dec. 492.

An examination of the authorities above cited, as well as of many others which might be cited, will show that the conclusions reached by the American courts on this question are far from being uniform. Some have followed the rule laid down by Lord Mansfield, others the rule announced by Lord Loughborough; and still others are not in exact accord with either, but are modifications of one or the other. It is not possible to reconcile the American decisions on this subject, and it would not be profitable to undertake to do this, even if it were possible. We may lay it down as a rule without exception that the employment of a puffer at an auction sale is such a fraud as will vitiate the sale. Such being the rule, the question now to be determined is, Who is a puffer? Mr. Justice Green, in *Peck v. List*, cited above, thus defines a puffer: "A puffer, in the strictest meaning of the word, is a person who, without having any intention to purchase, is employed by the vendor at an auction to raise the price by fictitious bids, thereby increasing competition among the bidders, while he himself is secured from risk by a secret understanding with the vendor that he shall not be bound by his bids." This definition will be found to have been approved by several of the text writers and many of the judges in the authorities and decisions above cited. It is directly in line with the ruling made by Lord Mansfield in *Buxwell v. Christie*. In order to constitute one who bids at a sale a puffer, it is not only necessary that he shall be employed by the owner of the property which is being sold, or by some person having an interest therein, but it must appear that the person employing the puffer was so interested in the auction or act of selling that there could be made with him a binding agreement by

which the person bidding incurs not the slightest risk of being called on to comply with the terms of any bid that he may make. If he be employed by the owner of the property, and the owner has complete control of the auction and the auctioneer, as was the case in *Beawell v. Christie*, then no one would question that he was a puffer, within the meaning of the law, and his employment would amount to a fraud upon the real bidder. If he be employed by a person interested in the property, although not the sole owner, and such person has complete control over the auction, so that he could entirely relieve him from all responsibility for the bid he would make, then a person employed under such circumstances would be a puffer, within the principle of the ruling made in *Beawell v. Christie*. The rule is thus stated by Mr. Justice Green in *Peck v. List*, before referred to: "But it is obviously unimportant whether the by-bidder is employed by the owner of the land or by some one else having a pecuniary interest in the auction about to be made, and who stands in such a relation to it that he can make good his assurance to the by-bidder that he shall not be held responsible for his bid if it happen to be the highest bid made. The real essence of the fraud is not that the owner is bidding for the property, but it consists in the fact that a by-bidder pretending to be a bona fide bidder deceives honest bidders, raises the price of the property by fictitious bids increasing competition, while he himself has good reason to believe and does believe that he is secure from any risk of being held personally liable for his bids. It is immaterial from whom he derives this assurance of immunity, provided the party giving the assurance expressly or impliedly has the power, either legally or practically, to make good the assurance." "It makes no difference that such puffer or by-bidder was employed to prevent a sacrifice of the property, and was directed to bid it up, to a fixed price only; nor does it make any difference that the property only sold at a reasonable price." In many of the cases it is said that a person employed by the owner to secretly bid upon the property would be a puffer; in still others it is said that a person so employed by the vendor would be a puffer; in still others it is stated that a person so employed by the seller would be a puffer; and in still others it is declared that a person employed by those who are pecuniarily interested in the property would be a puffer. In dealing with this subject the terms "owner," "vendor," "seller," and "person pecuniarily interested in the property or its proceeds" are to be given the same meaning, and they all refer to one who, without regard to what may be his peculiar interest in the property, must have absolute control of the auction sale, and is at liberty of his own volition to discharge any bidder from liability on account of his bid. If the person conducting the sale can, notwithstanding the agreement of one who has a larger interest in the proceeds of the sale, hold the bidder responsible for the amount of his bid, then

a person employed by the person having such larger interest in the proceeds would not be a puffer within the meaning of the law. Bidding by such a person would not be fraudulent, and therefore the sale would not be affected by the employment of such a person. An auctioneer is the agent of the person who directs him to make the sale. The sale is, therefore, controlled by one who directs the auctioneer. When an auction sale is declared by the auctioneer to be without reserve, this is, in effect, a statement that the person who directs the auctioneer to make the sale, no matter what his interest in the property may be, has empowered the auctioneer to sell the property to the highest bidder, and that the person directing the auctioneer will not himself bid upon the property, or employ others to do so in his behalf. Where the auctioneer puts up property without any statement as to the conditions of sale, the bidders have a right to presume that the sale is to be without reserve. The owner, vendor, seller, or person interested in the sale, whatever we may call him, that is, the person who has directed the auctioneer to sell the property, and who will be compelled to make good to the bidder the acceptance of a bid by the auctioneer, is not allowed to secretly bid at the sale. He may bid, however, if public notice be given of the fact, so that other bidders may know that they are coming into competition with the person who has control of the sale. The mere fact that a person is pecuniarily interested in property which is being sold at auction does not preclude him from becoming a bidder, and this is true of judicial sales as well as private sales. No matter what interest a person may have in the proceeds of the sale or in the property which is going to be sold at public outcry, either at private auction or judicial sale, his right to become a bidder at the sale is well recognized by numerous decisions of this court, as well as of other courts in this country, provided the sale is not under his control. See, in this connection, *Freeman v. Cooper*, 14 Ga. 238; *White v. Crew*, 16 Ga. 416; *Buckner v. Chambliss*, 30 Ga. 652; *Kilgo v. Castileberry*, 38 Ga. 512, 95 Am. Dec. 406; *Kearney v. Taylor*, 15 How. 494, 14 L. ed. 787; *Richards v. Holmes*, 18 How. 143, 15 L. ed. 304; *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 387; *Blossom v. Milwaukee & C. R. Co.* 3 Wall. 196, 18 L. ed. 43; *Smith v. Black*, 115 U. S. 308, 29 L. ed. 398, 6 Sup. Ct. Rep. 50; *Allen v. Gillette*, 127 U. S. 589, 32 L. ed. 271, 8 Sup. Ct. Rep. 1331; *Baird v. Baird*, 21 N. C. (1 Dev. & B. Eq.) 524, 31 Am. Dec. 399; *Gulick v. Webb*, 41 Neb. 706, 60 N. W. 13; *Phippen v. Stickney*, 3 Met. 384; *Pennsylvania Transp. Co's Appeal*, 101 Pa. 576; *Thames v. Miller*, 2 Woods, 564, Fed. Cas. No. 13,860; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328. Such being the right of one who is interested in the property sold or in the proceeds of the sale, who is himself not conducting the sale, and who has not such control over the sale as that he can make a binding agreement with a bidder that he will not

be held responsible for his bid, it cannot be a fraud for such person to employ one to bid at a sale in his behalf, even though the fact that the bidder is bidding in behalf of one interested in the property is not disclosed to the other bidders. The law charges everyone who attends an auction sale, no matter what its character, whether resulting from a private agreement or from a judgment of a court, that anyone interested in the proceeds of the sale or in the property, and who has no absolute control over the sale, may become a competitor with any other person at the sale, and bid for the property, and such a person is under no obligation to disclose to others his intention to bid; and therefore the employment by such a person of another to bid in his behalf, without disclosing that he is representing the person so interested, could not, in any sense, be a fraud upon other bidders. It is true that the law prohibits certain persons from acting as agents of such a person. A sheriff cannot become a bidder at his own sale as agent for another (*Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *Coleman v. Maclean*, 101 Ga. 303, 28 Ga. 861); though it has been held that a sheriff acting as auctioneer at an administrator's sale may make one bid for a person interested in the property to be sold, if he discloses the fact that he is bidding for another, and if his authority is limited to making one bid, and he have no discretion to do otherwise (*James v. Kelley*, 107 Ga. 446, 33 S. E. 425.)

The matter may thus be summed up: If a person who has such control of an auction sale that he, of his own volition, can release a bidder from all responsibility for his bid, employs another, upon an understanding of that character, to bid at the sale, without disclosing for whom he is bidding, for the purpose of preventing the property from selling at a sacrifice, or for the purpose of making the same bring more than its actual value, the bidding by one or more persons under such employment is such a fraud upon the real bidders that the sale will be declared void at their instance. The only lawful way in which such a person can prevent a sacrifice of the property sold is to fix a minimum price, of which public notice shall be given, or make public the fact that he, either by himself or by others, will be a bidder at the sale. On the other hand, the mere fact that the person is interested in the property to be sold, or in the proceeds of the sale, will not preclude him from either bidding himself or from procuring another to bid, either openly or secretly, in his behalf, without regard to what the agreement may be with such bidder, if the one employing such bidder has not himself such control of the sale that he could absolutely release the bidder from all responsibility growing out of his having participated in the sale in that capacity. Applying the principles above announced to the facts of the present case, Mr. Owens was in no sense a puffer, and the 48 L. R. A.

sale was not, for any reason set up by the plaintiff in error, invalid.

Judgment affirmed.

All the Justices concur.

STATE of Georgia, *Plff. in Err.*,
v.
CENTRAL OF GEORGIA RAILWAY COM-
PANY *et al.*

(.....Ga.....)

- *1. The competition, the defeating or lessening of which par. 4, § 2, art. 4, of the Constitution (Civ. Code, § 5800), so far as applicable to railroad companies, was designed to prevent, was competition between lines of railroad, viewed with reference to their general business in and through the territory traversed by them, and not competition which might incidentally exist at mere points or particular places. A combination of railroad lines, whatever the form adopted for bringing it about, is not violative of this paragraph of the Constitution, even though it might lessen or defeat competition at some point or points, if, as a general result of the combination, the public at large, as distinguished from the people of special or particular communities, was in consequence benefited.
2. Whether or not the combination of any two given lines of railroad would be contrary to this paragraph of the Constitution is a question which cannot be settled under any rule of universal application, but one which must be determined in each case upon its own peculiar facts and circumstances.
3. The present record discloses that there was ample evidence to uphold an adjudication that the consolidation of the two lines of railroad involved did not defeat, and was not intended to defeat, competition, in the sense in which that word is used in the above-mentioned paragraph of the Constitution, and also that such consolidation neither encouraged nor tended to encourage monopoly.

(January 31, 1900.)

ERROR to the Superior Court for Putnam County to review a judgment in favor of defendants in a proceeding to set aside a contract looking toward the consolidation of certain railroad companies. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. M. Terrell, Attorney General, J. S. Turner, S. T. Wingfield, and W. H. Burwell, for plaintiff in error:

The right to forfeit charters carries with it the right to enjoin *ultra vires* acts, or to set the same aside.

2 Cook, Corp. § 635; *Louisville & N. R. Co. v. Uom.* 97 Ky. 675, 31 S. W. 476; *Louisville & N. R. Co. v. Kentucky*, 161 U. S.

*Headnotes by LEWIS, J.

NOTE.—For restrictions on consolidation of parallel or competing railroads, see *State ex rel. Nolan v. Montana R. Co.* (Mont.) 45 L. R. A. 271, and note.

677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; 3 Pom. Eq. Jur. § 1003; *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 524; 10 Enc. Pl. & Pr. 897.

Section 5800 of the Code, ¶ 4, § 2, art. 4, of the Constitution makes the common law, so far as relates to the purchase of one corporation by another corporation, a part of the Constitution.

See Small's Debates of the Convention of 1877. As to what is the common law, see *Central R. Co. v. Collins*, 40 Ga. 583.

The purchase of the Eatonton branch by the Middle Georgia & Atlantic was contrary to law, null, and void. While under the charter the Eatonton branch might buy or sell, no such authority belonged to Middle Georgia & Atlantic.

Last Linc & R. River R. Co. v. Rushing, 49 Tex. 313, 6 S. W. 834; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950.

The Middle Georgia & Atlantic Railway Company could not legally buy stock in another road.

Central R. Co. v. Collins, 40 Ga. 583; *Hozelhurst v. Savannah, G. & N. A. R. Co.* 43 Ga. 13.

The general assembly could not confer upon the Middle Georgia & Atlantic Railway Company authority to buy stock.

Ga. Code, §§ 5800, 5780; *Hamilton v. Savannah, F. & W. R. Co.* 49 Fed. Rep. 424; *Langdon v. Branch*, 37 Fed. Rep. 449, 2 L. R. A. 120; *Central R. Co. v. Collins*, 40 Ga. 583; *Ellington v. Beaver Dam Lumber Co.* 93 Ga. 53, 19 S. E. 21.

The two roads were competing roads, and for that reason the sale was void.

The right to construct, or aid in the construction of, branch roads does not carry with it the right to purchase roads already constructed.

Campbell v. Marietta & C. R. Co. 23 Ohio St. 168; *Gulf, C. & S. F. R. Co. v. Morris*, 67 Tex. 692, 4 S. W. 156.

These roads are competing lines.

Central R. Co. v. Collins, 40 Ga. 583; *Langdon v. Branch*, 37 Fed. Rep. 448, 2 L. R. A. 120; *Hamilton v. Savannah, F. & W. R. Co.* 49 Fed. Rep. 424; *Clarke v. Central R. & Bkg. Co.* 50 Fed. Rep. 338, 15 L. R. A. 683; *Gulf, C. & S. F. R. Co. v. State*, 72 Tex. 404, 1 L. R. A. 849, 2 Inters. Com. Rep. 335, 10 S. W. 81; *State ex rel. Leese v. Atchison & N. R. Co.* 24 Neb. 143, 38 N. W. 43; *East Linc & R. River R. Co. v. State*, 75 Tex. 434, 12 S. W. 690; *Texas & P. R. Co. v. Southern P. R. Co.* 41 La. Ann. 970, 6 So. 888; *State v. Vanderbilt*, 37 Ohio St. 590; *Louisville & N. R. Co. v. Com.* 97 Ky. 675, 31 S. W. 476; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Pennsylvania R. Co. v. Com.* (Pa.) 4 Cent. Rep. 495, 7 Atl. 368; *East St. Louis Connecting R. Co. v. Jarvis*, 92 Fed. Rep. 735, 34 C. C. A. 639.

The fact that rates have not been changed does not affect the question.

Pearsall v. Great Northern R. Co. 161 U. S. 48 L. R. A.

S. 648, 40 L. ed. 839, 16 Sup. Ct. Rep. 705; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L. R. A. 159, 30 N. E. 279; *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 465, 43 N. W. 1102; *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 102, 24 Atl. 964.

Equity may interfere by injunction, and may appoint a receiver.

Columbian Athletic Club v. State ex rel. McMahon, 143 Ind. 98, 28 L. R. A. 727, 40 N. E. 914; *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 102, 24 Atl. 964.

Messrs. Lawton & Cunningham, Thomas G. Lawson, J. R. Lamar, and H. A. Jenkins for defendants in error.

Lewis, J., delivered the opinion of the court:

This suit was brought in Putnam superior court, by and in the name of the state of Georgia, against the Central of Georgia Railway Company, the Middle Georgia & Atlantic Railway Company, and the Eatonton Branch Railroad. It was founded upon an executive order which was issued in the early part of the year 1899 upon a petition filed by certain citizens of Putnam county with the governor; the main purpose of the petition being to procure an executive order directing the attorney general to institute suit in the name of the state to set aside a certain contract of sale, under which the two last-named roads were purchased by the Central of Georgia Railway Company on the 31st of December, 1896, upon the ground that this contract of sale was in violation of article 4, § 2, par. 4, of the Constitution of this state. In the petition it was substantially alleged that these two companies (the Middle Georgia and the Central) were competing lines, and the effect of this purchase by the Central was to destroy competition, and to create a monopoly in the business formerly enjoyed by both corporations. It was especially charged that there was great competition between the two companies at Milledgeville and at Machen; and several points were designated in the petition, along the Middle Georgia & Atlantic Railway, where it was alleged that the result of the contract of purchase by the Central was to defeat competition at such places, and created in most of them a monopoly in the Central. The Central, through its counsel, filed an answer to the petition, specifically denying its allegation that the purchase of the Middle Georgia was designed, or had any tendency whatever, to defeat or lessen competition or to produce monopoly, within the meaning of the Constitution; alleging that the two roads were never rivals or competitors, in the sense contemplated by the Constitution, and that the effect of the contract of purchase was really of vast benefit to the public interests, the same having resulted in the reduction of passenger and freight rates, in the better equipment of the road, and in superior accommodations to its patrons and the public generally. This case came on to be heard before his honor, Judge Hart, at chambers, on September 11, 1899.

upon the prayer of the petition that the holding and operation of the Eatonton Branch and the Middle Georgia by the Central directly or indirectly be enjoined, and that until the final hearing of the case a restraining order be granted, prohibiting the further operation of these two railroads by the Central, and that a receiver be appointed to take charge of the two roads and all the corporate property belonging to them, and to hold, operate, and manage the same under the direction of the court, in order that competition may be preserved and the public interests protected until the two roads are operated by their respective corporations as separate properties. On the 18th of September, after hearing argument of counsel, the judge below, having held up his decision until that date, passed an order refusing the injunction and receiver as prayed for, to which plaintiff in error excepted, and assigns the same as error in its bill of exceptions.

In 1889 what was known as the Eatonton & Machen Railroad Company was incorporated by an act of the legislature, with authority to build and operate a line of railway from Eatonton to Machen, and to extend the same in either direction to Savannah and Atlanta. See Acts 1889, p. 227. At the same session of the legislature (see page 231) the name of the corporation was changed to the Middle Georgia & Atlantic Railway Company. During the year 1890 this line had been completed between the towns of Eatonton and Machen, and had been graded north of Machen nearly to Covington. In 1893 the road had been completed to Covington, and was being operated from Eatonton to that point. In 1893 there were in Eatonton two separate and independent lines of railway, namely, the Middle Georgia and the Central; the latter, through its receiver, operating the Eatonton Branch under a lease made many years previous. It appears from the record that the line from Eatonton to Milledgeville, known as the Eatonton Branch Railroad, was completed about the year 1852, and this branch has never been under any separate or independent operation; but upon its completion the Central Railroad & Banking Company of Georgia leased the same, and it went into the hands of the receiver of the Central, by whom it was operated until October, 1893, when, under an order of the United States circuit court, this branch railroad was allowed to withdraw, and did withdraw, its line from the control of the receiver, upon the showing made to the court by the receiver that this branch was not earning its operating expenses and annual rental. Upon assuming control of its road, the Eatonton Branch Railroad immediately entered into contract with the Middle Georgia & Atlantic, by which the latter corporation was to operate its line temporarily; the net proceeds to be divided between the two corporations on a mileage basis. The Middle Georgia & Atlantic then began to run its trains from Milledgeville to Covington. On the 1st day of June, 1896, the Middle Georgia

& Atlantic purchased by deed of conveyance the railroad and corporate franchises of the Eatonton Branch, and then became the owner of the line from Milledgeville to Covington, until it sold out its road and franchises to the Central of Georgia on December 31, 1896. The affairs of the Central Railroad & Banking Company became liquidated under the receivership, and a reorganization perfected, by which all the property and franchises of that corporation passed into the custody and control of the new corporation, the Central of Georgia Railway Company. It owned and operated a line of railway from the city of Atlanta to the city of Savannah, via Macon, and from Gordon, in Wilkinson county, to Milledgeville, in the county of Baldwin, besides other lines.

1, 2. The suit in this case, and the relief therein sought, is based upon the following provision in the state Constitution, embodied in § 5800 of the Civil Code: "The general assembly of this state shall have no power to authorize any corporation to buy shares or stock in any other corporation in this state or elsewhere, or to make any contract, or agreement whatever, with any such corporation, which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly; and all such contracts and agreements shall be illegal and void." The case necessarily involves the vital question as to what is a proper construction to be placed upon this language in the Constitution. Did the convention, in framing that instrument, intend to enact any new law or declare any new principle in connection with contracts touching the defeat or lessening of competition, or the production or encouragement of monopoly? If so, what is that new principle? Can it be gathered from the words employed as to what sort of competition or monopoly is meant? We are left absolutely in the dark, so far as provisions in the Constitution are concerned, as no language whatever is used therein to throw any light on, or give explanation touching, the matter. We are not, however, in absolute darkness as to the general principles of law that have been in existence from time almost immemorial touching contracts of this nature; that is, principles relating to the protection of the people against contracts preventing competition or creating monopolies. The common law has always abhorred a monopoly, and has encouraged competition in all legitimate businesses of the people, whether followed by individuals or corporations. The purpose of such law is patent. One great object it has in view is to prevent such combination in trade, traffic, or other business as to concentrate it under one management, and so place it under such control of one person, company, or corporation, as to enable them unreasonably to oppress their patrons by exacting payment of extortionate and exorbitant prices. Such contracts are usually designated as those in restraint of trade, and are referred to in § 3068 of the Civil Code as "contracts in general in restraint of trade."

But it does not follow that the law ever intended to defeat all combinations that might be made in the business affairs of life, or to declare null and void all contracts that might in some particulars have a tendency to lessen competition or to restrain trade. It requires no argument to show that such a rigid construction, instead of being demanded by public policy, would in many instances work with great injury to the public, and seriously affect the prosperity of a country. Competition may be so unreasonable as not only to result in disaster to the competitors, but also in injury to the public. For instance, three competitors may be engaged in the same line of business, in the fair conduct of which the public in a given community or section of the country is vitally interested. Public patronage may not be sufficient to sustain them all. Each one is engaged in an earnest contest for the mastery of the situation. One may be more powerful than the others, and, on account of financial ability, may reduce charges for accommodations, conveniences, or necessities furnished the public lower than the actual expense of operating the business, and in this way succeed in an extermination of the other two competitors; and this for the direct purpose of securing a monopoly, and raising prices to an exorbitant and oppressive amount. Now, suppose the two weaker institutions should make such an arrangement or combination as to place the business of both under one management, and under the control of such an owner as would have the ability to compete with the remaining enemy in the field; would any court of law or equity declare such a contract void, though made for the purpose of destroying competition between the parties thereto? Numerous other illustrations might be given of unreasonable competition that might prove injurious to the public interests. By virtue of § 2176 of the Civil Code, such unreasonable competition, in the case of railroads, is provided against by requiring a new road constructed under the provisions of the act to be at least 10 miles from the one already constructed. When an effort, therefore, is made by a state to set aside contracts of this character on account of public policy, the vital test is whether or not such a contract is injurious to the public interests. In the text-books and decisions touching the common law on this subject we can find no well-settled definition of "restraint of trade," and it would perhaps be impracticable to give any certain definition of the term which would be of universal application to every case that might arise involving the question of the validity of such contracts. The difficulty grows out of the fact of failure in the law-making power, to specify what acts and agreements shall constitute restraint of trade, monopoly, trusts, etc. Spelling, in his work on Trusts and Monopolies, enters into a discussion on this subject, and on page 224 he uses the following language: "The fatality of any legislation which does not circumstantially define what shall constitute restraint of trade, but

leaves it to the courts to determine the question by reference to the common law, is this: There is no settled or accepted legal definition of restraint of trade at common law. The rule of public policy which must be violated by an agreement in restraint of trade is a variable and indefinable quantity. As an English judge once said: 'It is an unbridled horse, which, when you have once mounted it, you know not whither it will go, or where it will land you.' The Federal judges especially have assumed such liberal discretion in the interpretation of the rule as to indicate that there is in fact no rule, but that each decision should turn upon the exigencies, environment, and circumstances of the parties and the subject-matter. In other words, there is no pole star to guide the judicial mind, but each judge evokes from his own breast a proper decree upon the facts as presented in each case." See also the subject discussed in Clark on Contracts, p. 446.

In the case of *Leslie v. Lorillard* (decided by the New York court of appeals Oct. 16, 1888) 110 N. Y. 519, 1 L. R. A. 456, 18 N. E. 363, Gray, J., in discussing this question, on page 533, 110 N. Y. 461, 1 L. R. A., and page 366, 18 N. E., says: "When, therefore, the provisions of agreements in restraint of competition tend beyond measures for self-protection, and threaten the public good in a distinctly appreciable manner, they should not be sustained. The apprehension of danger to the public interests, however, should rest on evident grounds; and courts should refrain from the exercise of their equitable powers in interfering with and restraining the conduct of the affairs of individuals or of corporations, unless their conduct, in some tangible form, threatens the welfare of the public." The decision in that case was to the effect that a certain agreement of a steamship corporation to buy out a competing line, which line, for a consideration, agreed to discontinue running vessels between certain ports, was not void as in restraint of trade. The reason for that ruling was evidently based upon the idea that the facts and circumstances of that particular case did not show that the public interests were injuriously affected. In the case of *Nester v. Continental Brewing Co.* 24 L. R. A. 247, it was held: "The true test of the illegality of a combination to restrict business is its effect upon the public interests." 161 Pa. 473, 29 Atl. 102. In *Spelling on Trusts & Monopolies*, p. 158, it is declared: "But, since the public interest is the controlling consideration in this class of cases, the rule against restrictive contracts by public servants does not extend beyond or in conflict with public welfare. Therefore a court will not declare a contract between common carriers illegal merely because it gives monopoly, where it does not appear that the public is injured, or that either party to the agreement has exercised any function exclusive of public rights." And again on p. 75, § 52, he says that "courts are not governed by any hard and fast rule in deter-

mining whether a particular contract is in restraint of trade, and amenable to the rule of public policy rendering such contracts invalid; the test being whether the restriction is reasonable and necessary to the party's protection, the public interest being constantly kept in view." On page 76 the author advances the idea that it is not strange that decisions upon apparently similar facts are variable, and that it is almost impossible to deduce general abstract rules from them: that the courts have an almost unlimited range of discretion in deciding upon the facts of each case as presented, whether the restriction be reasonable and necessary, or inimical to the public interest, because calculated to stifle competition and lead to extortion and oppression. In *Fowle v. Park*, 131 U. S. 97, 33 L. ed. 67, 9 Sup. Ct. Rep. 652, Chief Justice Fuller, in discussing the question as to when the restraint of trade or the lessening of competition becomes invalid, in his opinion, says: "Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other requires, the contract may be sustained. The question is whether, under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is or is not unreasonable." See also *Ec Greene*, 52 Fed. Rep. 118, where the reasonableness of such a contract is made to depend on whether it is more injurious to the public than is required to afford a fair protection to the party in whose favor it is secured. The court recognizes there that no precise boundary can be laid down as to when and under what circumstances the restraint would be reasonable, and when it would be excessive. See also *Ellerman v. Chicago Junction R. & Union Stockyards Co.* 49 N. J. Eq. 217, 23 Atl. 267-300. The same doctrine touching the effect such contracts have upon the public has been more than once recognized by this court. It will be noted that the words cited above from § 3668 of the Civil Code refer to contracts in general restraint of trade. It does not undertake to declare contracts in partial restraint of trade void. In *Holmes v. Martin*, 10 Ga. 503, it was decided: "A contract in general restraint of trade is void; but if in partial restraint of trade, only, it may be supported, provided the restraint be reasonable, and the contract founded on a consideration." Lumpkin, J., in delivering the opinion in that case, on page 505, says: "The reason assigned for this difference is, that all general restraints tend to promote monopolies, and to discourage industry and enterprise and just competition, whereas the same reason does not apply to special restraints. On the contrary, it may even be beneficial to the public that a particular place should not be overstocked with persons engaged in the same business." In the case of *Western U. Teleg. Co. v. American U. Teleg. Co.* 65 Ga. 160, 38 Am. Rep. 781, a contract between a railroad and telegraph company, vesting in the latter the exclusive right to use or occupy the right of way of the former for the erection and oper-

ation of its telegraph business, was held to be void. It will be seen that, although that decision was made since the Constitution of 1877, it was not based upon the provision in that Constitution against such contracts, but upon the common law, it being ruled that they were in general restraint of trade, tending to create monopolies, and were thus against public policy. This question was discussed in the case of *Rakestraw v. Lanier*, 104 Ga. 188, 30 S. E. 735, by Justice Little. The contract in that case involved a restraint upon one of the parties from following his occupation at a given place. Justice Little, in his opinion, on page 194, 104 Ga., and page 738, 30 S. E., says: "It is, however, satisfactorily established that, as a matter of law, such a contract is to be upheld, if the restraint imposed is not unreasonable, is founded on a valuable consideration, and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public." Further, on page 195, 104 Ga., and page 738, 30 S. E., he says: "In determining, however, whether such a contract is reasonable, the court will consider the nature and extent of the trade or business, the situation of the parties, and all the other circumstances." Authorities could be multiplied, sustaining the position that at common law the test as to whether agreements relating to a restraint of trade, or, what is the same thing, to lessening competition and encouraging monopoly, is whether or not the public interests have been injuriously affected. But we think the above citations are quite sufficient to establish the doctrine.

The above doctrines of the common law have been repeatedly applied by the courts of this country to transactions between railroad companies. The first time the question was before this court as to whether one railroad could purchase the controlling interest in a competing line, and thus destroy the competition that formerly existed between them when they were operated as independent lines, was in the case of *Central R. Co. v. Collins*, 40 Ga. 582. The Central Railroad & Banking Company, chartered to build a railroad from Savannah to Macon, and the Southwestern Railroad Company, which was chartered to build a railroad from Macon to the Chattahoochee river, were about to purchase from the city of Savannah 12,383 shares of stock in the Atlantic & Gulf Railroad Company, which was chartered to build a road from Savannah to Bainbridge. It was alleged that the purpose of these two companies was to use the stock thus purchased to affect the management of the Atlantic & Gulf Railroad. An action was brought to enjoin the purchase of this stock, and payment therefor, and that the two railroad companies be forever prohibited from voting the stock, and from controlling the Atlantic & Gulf road, to the detriment of the interests of complainants and the people of Georgia. There seems to have been no doubt in the case that these two roads were competing lines, each terminating at

the seaboard, and penetrating at their extremities and by their connections the distant southwest, competing for the traffic and travel in that region of the country. On page 583 (Syl., point 6) it was decided: "It is a part of the public policy of the state, as indicated by the charter of several railroads from the seaboard to the interior, to secure a reasonable competition between said roads for public patronage, and it is contrary to that policy for one of said roads to attempt to secure a controlling interest in another; and any contract made with that view will be set aside by a court of equity, as illegal, beyond the objects of the charter, and contrary to the public policy of the state." The decision was evidently based upon the common-law doctrine that contracts or agreements producing monopoly or lessening or defeating competition were void. It will be noted that that decision was rendered prior to the Constitution of 1877. It will be observed that Robert Toombs was of counsel for the complainants in that case, and, as such counsel, contended for the doctrine of the common law as therein enunciated. As a member of the constitutional convention of 1877, he is reputed to have drawn up this section of the Constitution now under consideration. In construing this section of the Constitution with reference to defeating or lessening competition and encouraging monopoly, the question naturally arises as to what was the nature of the competition and monopoly, the question naturally arises as to self uses no explanatory language, and there is really nothing in the language employed to give these words any different meaning than what was almost universally recognized by judiciaries and legislatures for ages. In construing a Constitution, a safe rule is to give its words such significance as they have at common law, especially if there is nothing in the instrument to indicate an intention by its framer that the language in question should have a different construction. We think, therefore, that the purpose of the Constitution was to declare no new principle. What is therein declared with reference to corporations is equally applicable to individuals. It will be noted that the provision is addressed to the general assembly of the state, and declares that body shall have "no power to authorize any corporation in this state or elsewhere," etc. There was a reason for applying the principle to corporations and not individuals; for the legislature could not authorize an individual to do an act against public policy, whereas the powers which corporations exercise are governed by the stipulations in their charters, and franchises conferred upon them by the law-making power. At common law a corporation could not make such contracts as contemplated by the Constitution, without special grant of power. The object of the Constitution was to restrict the legislature in this particular, and our judgment is that in this provision of our Constitution it was simply declaratory of the common-law principle recognized in the *Collins Case*; the purpose being to make that principle, so far 48 L. R. A.

as corporations were concerned, the organic law of the state, and thus put it beyond the power of the legislature to grant any rights or privileges to corporations inconsistent with its terms. Another proper rule to be observed and duly considered in the interpretation of a Constitution is to determine what construction the legislative department of a state thereafter placed upon such provisions, in enacting laws in relation thereto. The legislature of the state has, in several railroad acts passed since the adoption of the Constitution, authorized the purchase, sale, lease, or consolidation of connecting railroads, but has added provisos that such contracts shall not be made with competing lines. See Acts 1880-81, p. 165, § 15, where the proviso to this purchasing power is added, that "no railroad shall purchase a competing line of railroad, or enter into any contract with a competing line of railroad calculated to defeat or lessen competition in this state." See also Acts 1892, p. 49, § 13, where similar power is given, with a like proviso, which prevents the railroads from making such contracts with a competing line of railroad, calculated to defeat or lessen competition. These provisions of law are embodied in §§ 2173 and 2179 of the Civil Code. In 6 Am. & Eng. Enc. Law, 2d ed. p. 931, it is held: "A constitutional provision is to be construed with reference to the principles of the common law;" and the common law will be upheld in the absence of an apparent contrary intention. It is also stated that "a contemporaneous legislative exposition of a constitutional provision is entitled to great deference." See numerous authorities cited in the text.

It will thus be seen that the policy of this state is the same that exists in some other states of this Union where there are constitutional and statutory provisions prohibiting the consolidation of competing lines. In the case of *Cumberland Valley R. Co. v. Gettysburg & H. R. Co.* (decided by the supreme court of Pennsylvania in 1896) 177 Pa. 519, 35 Atl. 952, it was decided, in effect, that railroad companies whose roads approach their point of connection almost at right angles are not competing lines. This question as to what constitutes competing lines of railway, within the meaning of the law, was discussed in the case of *State ex rel. Nolan v. Montana R. Co.* 21 Mont. 221, 45 L. R. A. 271, 53 Pac. 623, where it was ruled that two roads were competing lines when their relation to one another was such as to enable them to cut rates to principal or terminal points. Hunt, J., in delivering the opinion of the court, on page 234, 21 Mont., page 279, 45 L. R. A., and page 627, 53 Pac., declares: "The true rule is that whether two railroads are parallel or competing is a question of fact,—of physical fact. . . . Exact parallelism, however, is not what is included in the meaning of the words of the Constitution forbidding consolidation of parallel railroads. A reasonable construction must obtain. . . . We should say that by parallel railroads are meant railroads running in one general di-

rection, traversing the same section of the country, and running within a few miles of one another throughout their respective routes. They may or may not be competing. That depends upon their termini and their commands of traffic." Again, on page 236, 21 Mont., page 280, 45 L. R. A., and page 628, 53 Pac., he says: "Whether lines of road are competitive or not depends upon the business of the companies, the conduct of the roads by their authorities, their channels of traffic, and generally—nearly always—upon whether the roads extend for transportation from and to the same points along their routes." There is nothing in the record in this case to indicate that the Central and Middle Georgia roads are competing lines, in the light of above authorities. The Central purchased a branch road from Gordon to Milledgeville. There it connects with the Middle Georgia. For nearly fifty years has the Eatonton Branch been chartered, and yet at no time has it been operated as an independent road. On the contrary, it was leased and operated by the Central as a continuation of this branch line from Gordon to Milledgeville, and on to Eatonton. In the *Collins Case*, 40 Ga. 633, the relation of this Eatonton Branch to the Central was considered and discussed by this court. It was there held that the Southwestern, Waynesboro, and Eatonton roads were feeders to the Central: their interests were in harmony; and both the public and the stockholders of each road were interested in their acting in concert. If, then, it was treated not as a competitor at that time, we cannot see upon what theory or method of reasoning it can be contended that a further extension of this branch, not in the direction of the Central's line, nor within its territory, but to a point within the territory of a competing line, namely, the Georgia Railroad, would make the line a competitor of the Central. It was also decided in the *Collins Case* that a line termed then the Waynesboro Line, which connected with the Central at Millen, and ran to Augusta, was not a competing line of the Central, but a feeder, yet it was doubtless true that when the Central purchased that line it necessarily lessened competition at Millen. But, on the other hand, it increased competition at Augusta after its absorption by the Central, by giving another direct line from that point to the seaboard. There is nothing, however, in this case, from the location of these two roads, the Central and Middle Georgia, and the direction which each ran from their connecting point at Milledgeville, being almost at right angles, to indicate that they were competing lines, in any legal sense of that word.

It is insisted, however, that Milledgeville was a competitive point for these roads and the Georgia road, and the purchase by the Central of the Middle Georgia had the effect of lessening this competition. But it by no means follows that, because the number of competitors in a given business is diminished, competition is thereby lessened, to the injury of the public. The facts in the record really show that prior to this contract

of purchase the Georgia Railroad and the Middle Georgia acted in concert and harmony, by some sort of arrangement or understanding they had with reference to the transportation of through freight, and that the competition then was really between these two roads, on the one hand, and the Central, on the other. It would seem, therefore, that the effect of the purchase was simply to transfer the competition to the Middle Georgia and Central, on the one part, and the Georgia Railroad, on the other. It is further contended that at Machen the Middle Georgia crossed the Central,—that road having purchased and operating the road from Macon to Athens, which passes through Machen,—and the effect of the purchase was to diminish competition at Machen. On the other hand, there is overwhelming testimony in the record to show a very marked increase of competition created by this consolidation of the two roads in question in Covington, and that this competition was increased at the various stations along the line of the road between Machen and Covington; and the testimony seems conclusive that the general interests of the public along the line of this branch road from Milledgeville to Covington were benefited by its consolidation with the Central. Besides, it seems that the sale of its road by the Middle Georgia was an absolute necessity. It was then in a run-down condition. Its roadbed was in such a fix as to render transportation over the same absolutely dangerous to life and property. Citizens interested in its traffic, it seems, petitioned the railroad commissioners to have the road put in good order, and proceedings in court were actually instituted for this purpose. It appears that over a quarter of a million of dollars were lost by the owners of this road, and its president swore on this trial that they could not run it safely to life and property, owing to its physical condition, and that the sale of it to somebody became absolutely necessary. It appears that an effort was made to sell it to the Georgia Railroad, which declined to become the purchaser. Then the Central was approached, became the purchaser, and at once commenced the operation of the road. Its condition was thereafter greatly improved, to the general satisfaction of its patrons throughout the entire length of the line. We quote the following from the learned opinion of Judge Hart, embodied in his decision in this case: "They [meaning the Middle Georgia] were then charging four cents per mile as their passenger tariff, and the maximum freight charges the railroad commission would allow. Immediately after the purchase by the Central, passenger tariff was reduced to three cents per mile, and the freight tariff, where changed, was reduced from 2 to 50 per cent. The roadbed was put in good and safe condition. Its equipment is full and complete, and the service is generally satisfactory to its patrons. No one complains that the road is not now giving a better, safer, and cheaper service than when the Middle Georgia was operated as an independ-

ent line. Scores of affidavits were read on the hearing, and, with remarkable unanimity, affiants asked that there might be no breaking up of the present system by the appointment of a receiver. The court is of the opinion that the purchase has been beneficial to every business, every shipper, every person living on its line, except perhaps to the merchants of Shady Dale, who had their freights delivered to them free of charge from the depot of the Central, or individuals at Milledgeville who had free passes given them as an inducement to route their freight over a particular line. It was competition, no doubt, at these two points which induced these concessions; but the people as a whole have been benefited both in convenience and safety in travel, as well as in saving of freight and passenger tariff. It is susceptible of proof that in reduced freight charges the people of Eatonton and Putnam county save annually over \$20,000. A lumber dealer in Covington swears that he saves annually \$1,800 on the single item of lumber handled by his firm." We have read this voluminous record of evidence entirely through, and can say, from the facts developed on the trial, that the above conclusion of Judge Hart touching the beneficial effects of this purchase by the Central to the public at large along the line of this branch road was fully authorized.

In determining whether this contract defeated or lessened competition within the meaning of the Constitution, we must look at its effects in the light of all the facts and circumstances of the case along the entire line of the road in question. The evidence in this case tends to establish the fact that the traffic at Machen and Shady Dale, where it is claimed competition was lessened, does not exceed 2.6 per cent of the traffic on the whole line; and yet the people of that community reap the same advantage in the reduction of freight and passenger tariff as the people along the road from one end of the line to the other. It is the policy of this state, both in its Constitution and its statutes, to prevent a railroad from purchasing a competing or rival line whenever the effect of such a purchase would be to defeat or lessen competition; but, in considering whether or not a transaction has had this effect, we must look at the results in their entirety, and the effect upon the general public interested in the traffic of the road along its line. If that general effect be to increase competition to a far greater extent than it has been diminished at particular points, it cannot, with reason, be said that competition has been defeated or lessened. In point of fact, it has actually been increased. But it is insisted in this case that if competition be lessened anywhere,—it matters not what may be the general effects upon the public, and it matters not whether any loss has accrued to anyone from an increase of charges for transportation of freight or passengers,—the Constitution has been violated, and the contract is therefore void. It is true that the doing of an illegal act cannot be justified upon the plea that

no harm has resulted, but it is perfectly legitimate to look at the purposes for which a law is enacted, in determining its true intent and meaning. The object of the law against defeating or lessening competition was to prevent it being placed in the power of one, whether individual or corporation, to so control rates of trade and traffic as to increase them to an unreasonable amount. If a transaction, therefore, instead of having such a result, has an opposite effect, it furnishes, to say the least of it, a strong argument that the law has not been violated; and the argument becomes more overwhelming when there is nothing in the environment and business of the parties to place them in the position of rivals or real competitors. As Judge Hart has correctly said in his opinion: "It is the declared policy of this state to prohibit railroads from purchasing competitive or rival lines, but it is also its declared policy to encourage the great trunk lines to buy, build, and operate branch or feeding lines. Both policies are equally wise. The former is to prohibit contracts in restraint of trade. The latter is to build up our great, undeveloped interior. Railroads should be prohibited from doing the first, and should be encouraged to do the last." There is nothing in the Constitution indicating any hostility whatever to the extension of lines of railway by the construction or purchase of branch roads or the purchase of connecting lines. On the contrary, under § 5799 of the Civil Code, it is provided that, in the event the charter of any corporation should be altered or amended, such corporation should hold its charter subject to the provisions of this Constitution. The object of that was to subject such corporations to the taxing power of the state, although exempted therefrom under their original charters. But so jealous was the convention in protecting the rights of the railroads to construct, operate, or control branch roads, that it was provided that section should not extend to any amendment for the purpose of allowing any existing road to take stock in, or aid in the building of, any branch road. It would seem manifest, therefore, that the following provision in the Constitution with reference to preventing the general assembly from giving power to any corporation to make a contract to defeat or lessen competition, or to buy shares of stock in any other corporation, had no reference whatever to the purchase, ownership, and control of branch roads; and they therefore could not have been regarded as competing lines to the main roads with which they might make connection. As the result of this policy, great trunk lines have been extended in this country half across the continent. Doubtless, in the purchase of connecting lines and branch railroads, competition was lessened at given points. But the general effect of these consolidations and connections has really been to increase competition; has added greatly to the public convenience, and furnished greater and more commodious facilities for traveling; has operated to reduce the cost of transportation; has brought remote

parts of the country in close proximity, as it were, to each other; has developed resources that would otherwise have remained dormant, by opening up the markets of the world to the products of the land; and has generally contributed to work to the welfare and prosperity of the people. Even if we are incorrect in our position that the provision in the Constitution with reference to defeating competition or encouraging monopoly is only an embodiment of the common law upon the subject, and if it contains a new principle unknown to the common law, then the clause in question is evidently not self-acting, for no light is thrown upon the new meaning intended to be given the words used. It would follow, therefore, that appropriate legislation would be necessary to carry into effect such a new principle, whatever it might be. Under the provisions of § 3803 of the Civil Code, it is provided that the general assembly shall enforce the provisions of this article by appropriate legislation. In this case, then, the courts would be constrained to decide that the appropriate legislation contemplated is embodied in the general railroad acts, to which we have above referred, where the purchase, sale, lease, or consolidation of connecting railroads is allowed, providing the contracts were not made between competing lines. So at last the judiciary would be driven to the necessity, whenever the contest was made, in determining whether or not such contracts

were legal, of deciding the question as to whether they were between competing lines, and not simply lines that had competing points where competition was lessened to a degree insignificant when compared to its increase at various other points, and the benefits to the public generally along the line of transportation. When the state appeals to the courts in such matters, she occupies the position of a representative of the public, whose rights if they have been infringed upon by a violation of the Constitution or the laws, will be zealously protected by the courts. For the same reasons courts should deny her prayer, if it appeared on trial that granting the relief sought would be productive of greater injury to the public than the wrongs of which complaint is made.

3. There was ample evidence in this case to authorize the conclusion of the judge below that the consolidation of the two lines of railroad involved did not defeat, and was not intended to defeat or lessen, competition, or to encourage monopoly, in the sense in which those words were used in the Constitution; that these roads were not competing lines; and that the public interests were in no wise injured by their consolidation. The judgment of the court, therefore, refusing an injunction and the appointment of a receiver, is affirmed.

Judgment affirmed.

All the Justices concur.

ILLINOIS SUPREME COURT.

FIDELITY & CASUALTY COMPANY of
New York, *Appt.*,

v.

Hannah M. SITTING.

(181 Ill. 111.)

1. The burden of proof that death by accident was within an exception in an accident insurance policy is upon the insurer after proof of accidental death.

2. The attempt of a traveling salesman to get upon a train which is already in motion is not, as matter of law, a voluntary exposure to unnecessary danger, within the meaning of an exception in an insurance policy.

3. A voluntary exposure to unnecessary danger within the meaning of an insurance policy does not mean simply a voluntary performance of the act which results in injury, but also that it is performed with a consciousness of the danger, or that the danger is so apparent that a man of ordinary intelligence would, under the circumstances, necessarily know it.

(October 13, 1899.)

APPPEAL by defendant from a judgment of the Appellate Court, First District,

NOTE.—For voluntary exposure to unnecessary danger within the meaning of insurance policy, see *Fidelity & C. Co. v. Chambers* (Va.) 40 L. R. A. 432, and *note*.
48 L. R. A.

affirming a judgment of the Superior Court for Cook County in favor of plaintiff in an action brought to recover the amount alleged to be due on an accident insurance policy. *Affirmed.*

The facts are stated in the opinion.

Messrs. John A. Post and John B. Brady, for appellant:

When the verdict of a jury is against the weight of the evidence this court and the supreme court, when it has passed upon the facts, have again and again set aside verdicts.

Bishop v. Busse, 69 Ill. 403; *Illinois C. R. Co. v. Chambers*, 71 Ill. 519; *Booth v. Hines*, 54 Ill. 363; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338; *Chicago & A. R. Co. v. Willard*, 31 Ill. App. 436; *Chicago v. Lavelle*, 83 Ill. 482; *Chicago, R. I. & P. R. Co. v. Herring*, 57 Ill. 59.

If a proof of a fact is so preponderating that a verdict against it would be set aside by the court as contrary to the evidence, then it is the duty of the court to direct the verdict.

Tefft v. Ashbaugh, 13 Ill. 602; *Abend v. Terre Haute & I. R. Co.* 111 Ill. 202, 53 Am. Rep. 616; *Doane v. Lockwood*, 115 Ill. 490, 4 N. E. 500; *Pennsylvania Co. v. Backes*, 133 Ill. 255, 24 N. E. 563; *Ward v. Chicago*, 15 Ill. App. 98.

The test now most frequently employed in

exercising the right to direct a verdict is whether a different verdict would not be set aside as contrary to the evidence. If such is the case, a verdict should be directed.

Phillips v. Dickerson, 85 Ill. 11, 28 Am. Rep. 407; *Simmons v. Chicago & T. R. Co.* 110 Ill. 340; *Lake Shore & M. S. R. Co. v. O'Conner*, 115 Ill. 254, 3 N. E. 501; *Bartelott v. International Bank*, 119 Ill. 259, 9 N. E. 898; *People v. People's Ins. Exchange*, 126 Ill. 466, 2 L. R. A. 340, 18 N. E. 774; *Chicago & N. W. R. Co. v. Snyder*, 128 Ill. 655, 21 N. E. 520; *Dechert v. Indiana, B. & W. R. Co.* 17 Ill. App. 74; *Wood v. Illinois C. R. Co.* 23 Ill. App. 370; *Knight v. Gaultney*, 23 Ill. App. 376; *Miller v. Ohio & M. R. Co.* 24 Ill. App. 326; *Hosmer v. Teller*, 27 Ill. App. 488; *Chicago & A. R. Co. v. Adler*, 28 Ill. App. 102, Aff'd in 129 Ill. 335, 21 N. E. 846; *Roden v. Chicago & G. T. R. Co.* 30 Ill. App. 354; *Edwards v. Hushing*, 31 Ill. App. 223; *Spannagle v. Chicago & A. R. Co.* 31 Ill. App. 460; *Huschle v. Morris*, 31 Ill. App. 545; *Duggan v. Peoria, D. & E. R. Co.* 42 Ill. App. 536.

When the policy distinctly stated that the appellant company did not insure nor intend to cover a "voluntary exposure to unnecessary danger," the appellant did not intend to cover and pay for injuries that deceased might receive while rushing into the face of danger and attempting to mount an express train, a train that was built especially to get up quick speed and to make rapid stops.

Smith v. Preferred Mut. Acci. Assn. 104 Mich. 634, 62 N. W. 990; *Williams v. United States Mut. Acci. Assn.* 133 N. Y. 366, 31 N. E. 222.

If the danger was obvious, the exposure thereto voluntary and unnecessary, and the death of the assured ensued in consequence, the case may fairly be held to be within the exemption in the policy.

Tuttle v. Travellers' Ins. Co. 134 Mass. 175, 45 Am. Rep. 316; *Morel v. Mississippi Valley L. Ins. Co.* 4 Bush, 535; *Sawtelle v. Railway Pass. Assur. Co.* 15 Blatchf. 216, Fed. Cas. No. 12,392; *Travelers' Ins. Co. v. Jones*, 30 Ga. 541, 7 S. E. 83; *Bean v. Employers' Liability Assur. Corp.* 50 Mo. App. 459.

Messrs. Thornton & Chancellor, for appellee:

"Voluntary exposure to unnecessary danger" has been defined by our courts to be a willing or wilful assumption of the risk, knowing the risk; it means,—a wilful, conscious assumption of the risk of danger; i. e., it was done voluntarily, with full knowledge of the danger through which the deceased lost his life.

Accident insurance is issued and accepted for the purpose of indemnity against accident and death caused by accidental means, and the language of such policy should be construed with that purpose in view.

Healey v. Mutual Acci. Assn. 133 Ill. 556, 9 L. R. A. 371, 25 N. E. 52; *Rockford Ins. Co. v. Nelson*, 65 Ill. 420; *Cleveland, C. C. & St. L. R. Co. v. Monks*, 52 Ill. App. 627; *Terre Haute & I. R. Co. v. Eggmann*, 58 Ill. App. 21; *Lake Erie & W. R. Co. v. Morain*, 48 L. R. A.

140 Ill. 117, 29 N. E. 869; *Elgin, J. & E. R. Co. v. Raymond*, 148 Ill. 241, 35 N. E. 729.

Two theories were advanced in this case. One by the plaintiff that Herman Sittig met his death by coming in contact with the ticket office, and the other by the defense that he attempted to get upon a moving train of cars, and, in his attempt lost his footing and fell under the train, and was thereby killed.

There was evidence in the case on both of these theories, and it was for the jury to say, from all the evidence in the case, which of these theories was the correct one.

Matson v. Taylor, 35 Ill. App. 549; *McMahon v. Sankey*, 35 Ill. App. 41; *Brandt v. McEntee*, 53 Ill. App. 467; *Garretson v. Becker*, 52 Ill. App. 255; *Selover v. Osgood*, 52 Ill. App. 260; *Mobile & O. R. Co. v. Harmes*, 52 Ill. App. 649; *Wallace v. Buckingham*, 54 Ill. App. 38; *Scharf v. People*, 34 Ill. App. 400.

Carter, J., delivered the opinion of the court:

The appellate court has affirmed a judgment recovered by appellee in the superior court of Cook county against appellant on a policy of accident insurance. The insured, Herman C. Sittig, was accidentally killed while attempting to board a suburban train of the Illinois Central Railroad Company. The appellate court, in stating the case, said: "The evidence tends to show that he reached the neighborhood of the steps of the station platform just after the train had started; that he threw his valise on the platform of the car, seized the railing, and attempted to climb on, but either lost his hold and fell after being carried some distance, or else was knocked off and killed by coming in contact with a small building used as a ticket office, which stood very near the track, and distant about 140 or 150 feet from the station platform." The evidence shows that this is a fair statement of the accident. The insured was a traveling salesman, and so described in the policy, which stated that "this insurance covers injuries received in travel by regular passenger or mail trains." The policy also contained this clause: This insurance does not cover . . . voluntary exposure to unnecessary danger; and the contention of the appellant is that the insured met his death by exposing himself voluntarily to unnecessary danger, and that for that reason the judgment cannot be sustained. So far as the assignment of error embraces the question of fact involved in the decision of the appellate court, such decision is, by virtue of the statute, final, and we shall not, therefore, follow appellant's counsel in their argument upon the facts. But at the close of the evidence the defendant asked the court to instruct the jury to find a verdict for the defendant, and took an exception to the court's refusal to give the instruction, and thus the legal sufficiency of the evidence to sustain the judgment is presented to us for decision.

There was sufficient evidence to sustain

the conclusion that after the insured had secured a secure footing upon the steps of the car, and was holding to the hand rail, and about to draw himself upon the platform of the car, he was struck with such force upon the side and back of his head by the ticket-office building, as the train passed it, as to break his neck and knock him under the train. He was a traveling salesman, but what was the particular emergency or necessity for his effort to board this particular train after it had started does not appear from the evidence. Nor does it appear that he knew of the ticket-office building, or its close proximity to the track or to the moving cars. The trainmen testified that the train, after starting, had moved from 100 to 125 feet, and was going at a speed of from 8 to 10 miles an hour, when the insured attempted to get aboard, but other witnesses testified to a less degree of speed. There was testimony, also, that someone called to the insured, as he was about to make the attempt to board the train, not to do so, but whether or not this warning was heard by the insured does not appear. The death by accident insured against by the policy having been proved, it devolved on the defendant to prove a violation by the insured of the condition, or, rather, that by his act he brought himself within the exception in the policy relied on to avoid payment. This exception, as applicable to this case, was, in substance, that, although accidental, death caused by voluntary exposure to unnecessary danger was not insured against. To relieve the company from liability, it was necessary to establish two facts: First, that the exposure to danger was voluntary on his part; and, second, that it was unnecessary.

The term "voluntary exposure" does not mean simply that the act of attempting to get aboard of the moving train was voluntary, or was consciously and intentionally performed, but also that the insured was conscious of the danger to which he was then exposing himself, and voluntarily assumed it, or that the danger was so apparent that a man of ordinary intelligence would, under the circumstances, necessarily have known it. One may voluntarily do an act exposing himself to great danger, which danger he does not apprehend and which is not obvious. In such a case it could not be said that he voluntarily exposed himself to danger. If he does not know of the danger, how can it be said that he voluntarily assumes it or exposes himself to it? Mere failure to observe ordinary care would not, as in an action for negligence, defeat a recovery on the contract. This view of the law is not controverted by appellant. Indeed, the trial court, at appellant's request, instructed the jury that the words "voluntary exposure," as used in the policy, implied conscious, intentional exposure,—something which he was willing to take the risk of; that it meant a willing or wilful assumption of the risk knowing the risk,—a wilful, conscious assumption of the risk of danger. As before said, there was no evidence whatever that he knew of the proximity of the ticket-office building, or had any

reason to believe that he was exposing himself to the danger of coming in contact with any such object before he could get within the car. His experience, strength, and activity may have been such, so far as the evidence shows, that there was less danger to him in mounting a car going at the speed mentioned by the witnesses than there would be to many persons in mounting a car at the moment of starting, and it would be an unreasonable rule to adopt to hold, as a legal proposition, that a traveler who steps upon the platform or steps of a moving car of a railway train voluntarily exposes himself to unnecessary danger, though it may be conceded he is guilty of negligence in so doing. There are doubtless few trainmen whose duty it is to alight at station platforms who do not board the train after it has started. In doing so it certainly could not be said, as a matter of law, that they thus incur obvious danger. At what rate of speed, then, must the train be moving before it can be said that an attempt to get aboard would be obviously dangerous? All reasonable minds would agree that it would be obviously dangerous to attempt to climb upon a passing railway train going at full speed, or at a high rate of speed, and in a proper case, doubtless, the jury would be so instructed; but it does not follow that it would be proper to so instruct the jury in a case where the train had not, after starting, proceeded beyond 100 or 125 feet, and had acquired only such speed as shown by the evidence in this case. The question in such a case is one of fact, and not of law, and in the case at bar the question of fact has been conclusively settled against the appellant. It would be to usurp the province of the jury and of the courts below, and to do what by statute we are forbidden to do, should we reverse this judgment on this contention of appellant.

Many cases have been cited, but in most of them the provisions of the policy were different, or the facts found were materially different, from those in the case at bar. Thus, in *Tuttle v. Travellers' Ins. Co.* 134 Mass. 175, 45 Am. Rep. 310, in addition to a provision similar to the one here under consideration, the policy required the insured to use all due diligence for his personal safety and protection. But we need not review the cases which were decided upon questions of fact or upon dissimilar provisions of the insurance contract. Here we are asked to declare, as a matter of law, against the conclusive finding of facts to the contrary, that the insured voluntarily exposed himself to unnecessary danger; this, too, notwithstanding there is no evidence, direct or circumstantial, to which we have been referred, whether such exposure was necessary or not. For one to leap into a turbulent stream, rush into a burning building, or do any other hazardous thing to save human life, would be a voluntary exposure to danger but not to unnecessary danger. So, too, many emergencies in the lives of men occur where the most urgent necessity requires their presence at some particular

place at some particular time, and where to miss a train would involve serious consequences. In such a case a voluntary exposure to danger might not be unnecessary. The presence of a physician or surgeon at some critical period in the illness or injury of a human being might be necessary to save life, and it might be necessary for him to expose himself to danger to reach his patient, or in some other respect to perform his professional duty. The necessity implied in the provision of the policy does not mean only that which is unavoidable or inevitable, but also any object or purpose which men of moral responsibility and pru-

dence would regard as of such serious importance in the performance of duty as to demand or justify the incurring of risk or danger to accomplish it. Whether the jury, and finally the appellate court, decided the question of fact correctly, we cannot inquire, but it is clear that the trial court did not err in refusing to give to the jury the instruction to find for the defendant.

It is also urged that the trial court erred in refusing certain other instructions, but we are of the opinion no error was committed in that regard.

The judgment must be affirmed.

INDIANA SUPREME COURT.

Eliza GIBSON, Appt.,
v.

Harold C. MEGREW *et al.*, Assignees of
Masonic Mutual Benefit Society.

(.....Ind.....)

A member of a mutual benefit society cannot be compelled to pay an assessment, where his contract does not provide that he shall pay assessments or make any provision as to nonpayment, except that his certificate shall be forfeited therefor.

(March 6, 1900.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Marion County in favor of defendants in a proceeding brought to compel the levying of an assessment to pay a claim under a certificate in the Masonic Mutual Benefit Society. *Affirmed.*

The facts are stated in the opinion.

Messrs. Carson & Moore, for appellant:

The liability of a member of the Masonic Mutual Benefit Society of Indiana is to pay the amounts named in his certificate of membership on levy of proper assessments therefor, and such payment is not voluntary with the member.

The demurrer admits the incorporation as alleged.

There is absolutely nothing in the plan, purpose, or contract of the society, now an insolvent, to differentiate it from any other mutual insurance company.

The character of an association is to be determined from its essential structure, and not from the use of disjointed words.

Bankers' & M. Mut. Ben. Asso. v. Stapp, 77 Tex. 517, 14 S. W. 168; *McCorkle v. Texas Benev. Asso.* 71 Tex. 152, 8 S. W. 516.

The contracts made by "beneficial" societies are given the same effect as ordinary insurance contracts.

Holland v. Taylor, 111 Ind. 121, 12 N. E. 116; *Presbyterian Mut. Assur. Fund v. Allen*, 106 Ind. 593, 7 N. E. 317.

NOTE.—As to liability of member of benefit society to action for assessments, see *Ellerbe v. Barney* (Mo.) 23 L. R. A. 435, and *note*; and *Lehman v. Clark* (Ill.) 43 L. R. A. 649. 48 L. R. A.

If, in point of fact, the society is an insurance company, pure and simple, its charter must be the appropriate body of insurance law.

There has never been any question in this state relative to the liability of a member of a fire insurance company organized under the act of 1852 to payment of an assessment properly levied.

Howard v. Whitman, 29 Ind. 557; *Boland v. Whitman*, 33 Ind. 64; *Embee v. Shideler*, 36 Ind. 423; *Clark v. Manufacturers' Mut. F. Ins. Co.* 130 Ind. 332, 30 N. E. 212.

The entire plan of the society was based upon the idea of the payment by surviving members of post-mortem assessments to meet losses.

The common-law obligation of a member of a mutual insurance society, independent of the form of his obligation or the precise character of the expressed promise, is to respond to an assessment for losses.

The solvency of the assessment company depends upon the legal right of such company to collect assessments from its members.

In the case of the old line company, the point of view whence the law looks at the contract of insurance is that of the policy holder, it bringing into being the necessary conditions to secure a performance of the contract. A like attitude in the case of the assessment company will require a holding that assessments properly levied are enforceable legal demands.

The legal liability of the member to respond to assessments appears from a consideration of the trilateral relationship obtaining in the assessment company. Each member is not only an assured, but is an insurer of the other members. He also has relation to the corporation as an entity, and is bound to contribute to the expenses of its existence.

Lion Mut. Marine Ins. Asso. v. Tucker, L. R. 12 Q. B. Div. 187; *Re Albion Assur. Soc.* L. R. 12 Ch. Div. 239; *Carlton v. Southern Mut. Ins. Co.* 72 Ga. 371; *Dettra v. Simon*, 5 Pa. Dist. R. 342; *Dettra v. Kestner*, 147 Pa. 566, 23 Atl. 889.

Where a person becomes a member of an

assessment insurance company, his obligation as an insurer is to contribute to the extent necessary for the payment of the losses accruing to the other members, unless the statute under which the incorporation is had, or the mutual agreements of the members, restricts or limits such liability.

Rundle v. Kennan, 79 Wis. 492, 48 N. W. 516; *Macklem v. Bacon*, 57 Mich. 334, 24 N. W. 91.

The constitution and by-laws of the society, the application for membership therein, and the certificate of membership issued by the society, together, constitute an express agreement on the part of the member to pay assessments.

Ellerbe v. Barney, 119 Mo. 632, 23 L. R. A. 435, 25 S. W. 384; *McDonald v. Ross-Lewin*, 29 Hun, 87; *Fulton v. Stevens*, 99 Wis. 307, 74 N. W. 803.

When an assessment insurance society goes into voluntary insolvency it is the function of the court having jurisdiction of the trust to cause an assessment upon the members to be levied sufficient to meet losses, and, for this purpose, the court succeeds to the powers of the directors.

Vanatta v. New Jersey Mut. L. Ins. Co. 31 N. J. Eq. 15; *Com. v. Massachusetts Mut. F. Ins. Co.* 112 Mass. 116; *Dettra v. Kestner*, 147 Pa. 566, 23 Atl. 889; *Capital City Mut. F. Ins. Co. v. Boggs*, 5 Pa. Super. Ct. 394; *McDonald v. Ross-Lewin*, 29 Hun, 87; *Wood v. Standard Mut. Live Stock Ins. Co.* 154 Pa. 157, 26 Atl. 103; *Howard v. Whitman*, 29 Ind. 557.

Where a corporation makes an assignment for the benefit of its creditors, under a voluntary assignment law, the assets of the corporation are in *custodia legis*, the same as if a receiver were the officer.

Lewis v. Glenn, 84 Va. 947, 6 S. E. 866; *Glenn v. Williams*, 60 Md. 935; 5 Thomp. Corp. §§ 6469, 6470; 3 Thomp. Corp. §§ 3537, 3550, 3551, 3553; *Bocppler v. Menoun*, 17 Mo. App. 447.

Messrs. Chambers, Pickens, & Moores, for appellees:

This contract contains no express promise to pay assessments. Such payment is voluntary.

Nonpayment terminates membership.

Rood v. Railway Pass. & Freight Conductors' Mut. Ben. Assn. 31 Fed. Rep. 64; *Lehman v. Clark*, 174 Ill. 288, 43 L. R. A. 648, 51 N. E. 222.

Liability is only against one who continues to assert his membership.

After insolvency proceedings it is too late to assess.

Re Protection L. Ins. Co. 9 Biss. 188, 20 Fed. Cas. No. 11,444.

Jordan, J., delivered the opinion of the court:

Appellant, Eliza Gibson, petitioned the Marion circuit court in behalf of herself and others, to order appellees, as the assignees or trustees of the Masonic Mutual Benefit Society, of the state of Indiana, to levy and collect assessments from all persons who had been members thereof within the past 48 L. R. A.

six years. The demand of the petitioner was that such an assessment, under the order of the court wherein such trust was pending, be made by the appellees as would create a sum sufficient to pay all death losses remaining unpaid, together with accrued interest thereon, and all costs of collecting such assessments, etc. A demurrer was sustained to the petition, and judgment was rendered against appellant for costs. The only error assigned is predicated upon this ruling and judgment.

The petition discloses substantially the following facts: Appellant is the beneficiary under a certificate or policy of insurance numbered 12,009, in class 4, issued by the said Masonic Mutual Benefit Society on the life of her husband, James H. Gibson, bearing date of July 15, 1887, whereby the said society agreed, in consideration of the representations made in the application for membership, and the sum of \$6 in hand paid, and the further sum of \$1.80, to be paid to the secretary of the society by James H. Gibson, upon due notice to him of the death of a member, to pay to appellant, upon the death of her said husband, after satisfactory evidence of his death had been furnished, the sum of 70 cents for every member of the first class, 75 cents for every member of the second class, 95 cents for every member of the third class, and the sum of \$1.60 for every member of the fourth class belonging to the society at the time of the death of said James H. Gibson; provided that the aggregate amount of benefits payable under such policy or certificate should not exceed the sum of \$2,500. It is alleged that said James H. Gibson, while a member of said company, performed all and singular the agreements and promises made by him in his application for insurance, and has complied with all of the terms and conditions contained in his said certificate, and has complied with all the provisions of the society's constitution and by-laws. It further appears that said Gibson, while a member of the society, and in good standing therein, died, on June 24, 1897, previous to the assignment of the society, as hereinafter mentioned. Upon his death it is averred that appellant became entitled, upon the conditions contained in said certificate of insurance, to receive the benefits therein named to the full amount of \$2,500; which claim was, on the — day of September, 1897, approved by said society's board of directors, and a partial payment to the amount of \$100 was made to appellant, leaving the remainder of her said claim still due and unpaid. On January —, 1898, the society, being insolvent, made an assignment, under the assignment laws of this state, to appellees, for the benefit of all its creditors. It further appears that the Masonic Mutual Benefit Society of Indiana was organized at the city of Indianapolis, Marion county, Indiana, on August 5, 1869, and the articles of association under which it was organized were recorded in the recorder's office of Marion county, Indiana. The object of the association, as declared in these articles, was

to give financial aid and benefit to the widows, orphans, and dependents of deceased members. The names and residences of the incorporating members, together with a description of the seal, are all given or stated in said articles. In addition to the articles of association, the constitution and by-laws, etc., adopted by the society, are also set out, and made a part of the petition. This appeal may be said to present two questions: First. Is there, under the terms and provisions entering into the contract or policy of insurance issued by the society to a member, such an absolute undertaking upon his part to pay the stipulated assessments or premiums as will render him personally liable to the company for such payment, and which the latter can enforce by an action? Second. In the event that such liability exists, did the right to make an assessment and enforce it, as demanded by appellant, pass to appellees in and by virtue of the assignment made by said society?

The obligation imposed upon a holder of a certificate of insurance in this society must be determined by an interpretation of its own terms and provisions, regard being had, however, to the law under which the society was created, and to the terms and provisions of its constitution and by-laws which may have any bearing thereon. The petition refers the incorporation of the society in question to an act of the legislature of this state approved December 20, 1865, which act authorizes the organization of mutual life insurance companies. This statute appears to be supplemental to one approved June 17, 1852, which provided for the organization of mutual fire insurance companies. The supplemental act authorized the creation of mutual life and accident companies under the same conditions and subject to the same duties and liabilities, so far as applicable, as were provided by the fire insurance statute, to which it was supplemental. *Vide*, Burns's Rev. Stat. 1894, §§ 4876-4895, incl.; Rev. Stat. 1881, §§ 3745-3763; Horner's Rev. Stat. §§ 3745-3763. Appellant's counsel insist that this society was incorporated under the authority of § 4895, *supra*. The terms and provisions of its articles of association, and the method employed for its incorporation, and the provisions of its constitution and by-laws clearly demonstrate, we think, that counsel, in their insistence, are mistaken. That its organization was not, neither was it intended to be, founded upon these statutes, we think is evident. The very terms and provisions of its articles of association, and the recording thereof, respond to the requirements of the statute concerning voluntary associations: and there can be no doubt, we think, but what it was intended to be organized in compliance with the provisions of that statute. Davis's Revision 1876, p. 923; Burns's Rev. Stat. 1894, § 4583. Section 4583 of this statute authorizes the adoption of rules and regulations by associations organized thereunder for the government of their officers and members, but, aside from this, there is nothing in the statute to enlighten us in the 48 L. R. A.

decision of the question involved in this appeal.

Each applicant for membership was required to subscribe to a written application, wherein, among other things, he agreed to abide by the constitution and by-laws of the association and any amendments thereafter made, and further agreed therein to accept and abide by whatever rules, regulations, and modifications which might be adopted or made by the board of directors regulating or governing assessments or the payment of mortuary claims in accordance with the provisions of the constitution and by-laws of the society. It was further agreed and stipulated in the application that any certificate issued thereon should be upon the following express conditions and agreements: "First. That this contract shall be void if the party to whom it is issued shall die in consequence of a duel. . . . Second. If the insured shall die by his own hand or act. . . . Third. No agent of the society is authorized to make, alter, or discharge contracts or waive forfeitures. Fourth. By his acceptance of the certificate to be issued hereon, said member expressly consents that any and all physicians shall testify fully as witnesses touching any matter confided to them. . . . Whenever a certificate held by a member who has paid all assessments in full shall become a claim by death, after having been in force three full years, the society shall not contest its payment on account of the incorrectness of any statement in the application. . . . Fifth. Should the board of directors reject any claim, no suit thereunder shall be sustained in any court unless the same be commenced within one year after such rejection. . . . Sixth. The said member, by his acceptance of said certificate, agrees that, in case of his death, any unpaid balance due from him to the reserve fund, or from the assessments or otherwise, as provided by the constitution of the society, shall be deducted from any payment made thereunder; but nothing herein contained shall be held to constitute a waiver of the forfeiture for nonpayment of assessments, as provided in said constitution or by-laws." The certificate or policy of insurance issued by the society to an applicant upon the acceptance of his application in part is as follows: "This certificate of membership witnesseth that the Masonic Mutual Benefit Society of Indiana, in consideration of the representations made to it in the application for membership, which, by reference, is made a part hereof, and the sum of six dollars to it in hand paid, and the further sum of — dollars to be paid to the secretary of the society by the said —, upon due notice to him of the death of a member of the society, as provided in the by-laws of the society, such payment to be made on or before the last day of the month in which such notice is issued or sent to him, the society does promise and agree with the said — (insured), his heirs, executors, administrators, and assigns, well and truly to pay to — beneficiary, or, in case of the previous death of the person or

persons to whom this certificate is made payable, within ninety days after satisfactory evidence of the death of the said — (insured) has been presented to and approved by the board of directors of said society, the sum of seventy cents for every member of the first class, the sum of seventy-five cents for every member of the second class, the sum of ninety-five cents for every member of the third class, and the sum of one dollar and sixty cents for every member of the fourth class belonging to the society at the time of the death of the said — (insured); provided, the aggregate amount of benefits payable under this certificate shall not exceed the sum of \$2,500. This certificate is issued and contract made upon the following express conditions and agreements: First. If the said — (insured) shall be expelled from any Masonic lodge or other Masonic body, such expulsion shall work expulsion from this society; or in case he shall, without the consent of the president and secretary of the society previously obtained in writing, engage in any military or naval service whatever in time of war or rebellion, or in case he shall die by his own hand, or by the hands of justice, or in violation of the laws of any country where he may reside, or by or from the effects of intemperate habits, or from delirium tremens induced by intemperate habits, then, or in either case, this certificate shall be null and void. Second. No agent of this society shall have power to waive or alter any conditions or terms expressed in this certificate of membership, or to give any receipt for money that shall bind the society, except as herein provided. Third. By his acceptance of this certificate, the said — (insured) expressly consents that any and all physicians shall testify fully as witnesses touching any matter confided to them by him at any time material to the rights of the parties under this certificate, and that upon the discovery of any untruth or deception in his application for membership by him made the society may cancel and annul this certificate. In witness whereof," etc.

Section 1 of article 6 of the constitution adopted by the society divided the members thereof into seven classes, according to age. Sections 2 and 3 of the same article provide as follows: "Sec. 2. When an assessment has been made by the board of directors, it shall be the duty of the secretary to send, or cause to be sent, by mail, to the last known postoffice address of each member, a notice containing the amount and date of payment of such assessment; and the notice so sent shall be deemed and taken to be a lawful and sufficient demand for the payment of such assessment. The secretary may authorize the local agent in the city or town where the member resides to act for him in serving such notice, either personally or by mail, which notice so sent or served by such local agent shall be deemed and taken to be a lawful and sufficient notice for the payment of the assessment so called for and required." "Sec. 3. A member failing to pay his assessment by the last day of the month

in which such notice is sent shall forfeit his certificate of membership, and all benefits thereunder; but a member, after so forfeiting his membership for nonpayment of assessments, may be reinstated by the board of directors within thirty days after such forfeiture by paying all arrearages, and furnishing a certificate of good health from a medical examiner of the association, subject to the approval of the medical director." Section 1 of article 8 provides: "Upon the death of a member of the society each member shall be assessed, and shall pay to the secretary of the society a sum according to the class of which he is a member and the amount of the certificate held by him, as follows." Here follows a schedule of assessments to be made upon different amounts of insurance and ages of the insured, the amounts ranging from \$500 to \$2,500, and the ages from twenty-one years to seventy-five years. This section contains the following proviso: "Provided, that the board of directors shall determine the number of assessments to be collected during any one month; and provided, further, that upon the death of a member his certificate shall be charged with, and there shall be deducted therefrom, an amount equal to one assessment for each death occurring in the society prior to the death of such member on which payment has been made by such member." Section 13 of the by-laws reads as follows: "Sec. 13. When an assessment has been made by the board of directors, it shall be the duty of the secretary to send or cause to be sent, by mail, to the postoffice address of each member, a notice containing the amount and date of payment of such assessment. The notice so sent shall be deemed and taken to be a lawful and sufficient demand for the payment of each assessment. The secretary may authorize the local agent in a city or town where the member resides, or any special agent of the society, to act for him in serving notices of assessments, either personally or by mail, which notice so sent or served shall be deemed and taken to be a lawful and sufficient notice for the payment of the assessment so called for and required. Any member failing to pay his assessment by the last day of the month in which such notice is issued shall forfeit his certificate of membership, and all benefits thereunder; but a member, after so forfeiting his membership for nonpayment of assessments, may be reinstated by the board of directors within thirty days after such forfeiture by paying all arrearages and furnishing a certificate of good health from a medical examiner of the association, subject to the approval of the medical director." The certificate of insurance issued by the society to a member recites that it is in consideration of the representations made in the application for membership and the sum of \$6 cash in hand paid, and the further sum of — dollars, to be paid to the secretary of the society by the assured upon due notice to him of the death of a member, as provided in the by-laws of the society, such payment to be made on or before the last day of the

month in which the notice is issued or sent. The certificate does not, by its own terms, declare what will be the result of the nonpayment by the insured in the event he fails to pay all subsequent assessments to be made upon the death of a member. It was stipulated, however, in the application, which by reference is made a part of the certificate of insurance, that the latter should be issued upon certain enumerated conditions, among which it was provided that, in case of the applicant's death, any unpaid balance due from him to the reserve fund or from assessments or otherwise, as provided by the constitution of the society, should be deducted from any payment made thereunder. It was declared, however, that nothing therein contained should be held to constitute a waiver of the forfeiture for nonpayment of assessments, as provided in the constitution or by-laws.

The law is well settled that when a person enters into an association he must acquaint himself with its constitution and by-laws, as these are considered important factors in testing his rights, duties, and liabilities. *Supreme Lodge K. of P. v. Knight*, 117 Ind. 489, 3 L. R. A. 409, 20 N. E. 479; *Supreme Council, O. of C. F. v. Forsinger*, 125 Ind. 52, 9 L. R. A. 501, 25 N. E. 129; 3 Am. & Eng. Enc. Law, 2d ed. p. 108. In the application for membership in the case in question the applicant expressly agrees to abide by the constitution and by-laws of the society as they then exist or as they may be changed by subsequent amendments. Consequently, there can be no question but what the constitution and by-laws enter into and form elements of the contract of insurance issued by the society to a member, and therefore the contract of insurance is to be considered along with the society's constitution and by-laws, so far as the latter are pertinent to the question involved. The object in construing a written contract is to ascertain, as far as possible, the intent of the contracting parties. So, in this case, the principal question involved must be solved by an interpretation, under the settled rules of the law, of the intent of the contract as it existed between the society and the insured members in respect to the liability of the latter for the payment of mortuary assessments. Section 2 of article 6 of the constitution, as we have seen, provides for notifying a member of a death assessment when made. Section 3 provides in terms, in effect, that the failure to pay the assessment within the time therein stated shall result in the forfeiture of the defaulting member's certificate, and of all benefits thereunder, except the right of reinstatement is reserved, subject to the conditions provided. Section 13 of the by-laws combines the provisions embraced in the above-mentioned sections of the constitution. These provisions of the constitution and by-laws, as previously stated, must be considered as elements which enter into and form a part of the contract of insurance. They are virtually all of the provisions of the constitution and by-laws which can be said to have any

bearing upon what the society and its insured members, under the contract, contemplated in regard to the enforcement of the payment of subsequent assessments which were to be levied upon the death of a member. We discover nothing, either in the application, certificate issued thereon, or the constitution or by-laws, which can be construed or interpreted as an absolute promise upon the part of the assured to pay these assessments, or which can be said to create the relation of creditor and debtor between a member and the society in respect to such assessments. The parties to the contract of insurance were apparently content to provide only in regard to future assessments that, after notice thereof, the failure to pay any such assessment within the stipulated time should *ipso facto* terminate the contract of insurance, and result as a forfeiture of all rights, money paid, and benefits thereunder, except the reserved right to reinstatement. That this should be the inevitable result of a nonpayment of an assessment was no doubt deemed to be the most efficient means of coercing or inducing the payment upon the part of the members of the assessments levied. That this result must follow the nonpayment of assessments, under the plain provisions of the constitution and by-laws, is certainly not a debatable proposition. The question of forfeiture, under the circumstances, was not a matter merely within the option of the society, but necessarily followed from the force and effect of the constitution and by-laws. These were as binding and controlling upon the officers of the association as they were upon its members.

We have seen that the act concerning voluntary associations under which the society in question was organized is silent in regard to the payment of assessments or withdrawal of members of such association, and hence this statute can cast no light upon the interpretation of the contract, as it apparently has left the whole matter to be controlled by the constitution and by-laws of the association. It cannot, in reason, be asserted that there is anything in the provisions of the society's constitution or by-laws, or the application or certificate in question, which can be construed into an agreement upon the part of the assured that, after the forfeiture of all of his rights and benefits has taken place, he would continue as a member of the society for the payment alone of assessments, and that the latter might be enforced against him by suit after all of his rights and benefits under the contract had been terminated and destroyed. The assessments provided for were made to pay the losses occasioned by the death of a member, and, when collected through the agency of the society, the money did not belong to it, but went into a fund to pay the beneficiaries of the deceased member or members. While it is true that the society in controversy was a mutual benefit society, the object of which was to give financial aid and benefit to the widows, orphans, and dependents of a deceased member, still that fact

does not tender it any the less a life insurance association, operating under the assessment plan it adopted. Courts have, as a general rule, treated such societies as life insurance companies, applying to them and the policies which they issue the principles pertinent to the contracts of life insurance. 2 May, Ins. 3d ed. § 550a. The contract of an ordinary life insurance company under its contract of insurance wherein the assured is required to pay, at the time stated, the premium as provided, and wherein it is also provided that a forfeiture of the contract shall result in the event of the nonpayment of such premium, is considered, in a legal sense, to be a unilateral contract. The premium or assessment to be paid, in order to continue the risk, under such circumstances, is held not to constitute an indebtedness against the insured in favor of the company. The payment of such premium or assessment is considered as a condition precedent, upon the performance of which the company, under its contract, continues to carry the risk as originally assumed. As a general rule, under such contracts, in the absence of anything to the contrary, the insured has the right to elect whether he will continue to pay his premiums or assessments as they become due, or forfeit the contract. He must make his election after notice of the assessment within the time fixed for the payment, or suffer the loss of membership, and thereby terminate his rights and the liability of the company or society under the contract of insurance, save and except, as heretofore stated, the right of reinstatement, when the same is expressly reserved, as in the case at bar, or except any other right which may have been expressly reserved from the effect of the forfeiture. 2 May, Ins. 3d ed. § 341a; *Rood v. Railway Pass. & Freight Conductors' Mut. Ben. Asso.* 31 Fed. Rep. 62; *Worthington v. Charter Oak L. Ins. Co.* 41 Conn. 372, 19 Am. Rep. 495; *Goodwin v. Massachusetts Mut. L. Ins. Co.* 73 N. Y. 480.

As a general proposition, this same doctrine applies to mutual benefit societies. The main feature of the plan adopted by such insurance societies is that death losses are to be paid by voluntary contributions upon the part of its surviving members. Accordingly, the society, on the death of a member in good standing, levies an assessment upon the surviving members in good standing. Such assessment, which is in the nature of the premium exacted in ordinary life companies, when paid by the member within the time provided, serves to continue his policy in full force and effect until it may be forfeited by the nonpayment of some subsequent assessment. That the levy of such assessments, as a general rule, do not serve to make the insured member a debtor to the society, so as to authorize the latter to enforce the payment thereof by suit, is well settled by the authorities. *Lehman v. Clark*, 174 Ill. 279, 43 L. R. A. 648, 51 N. E. 222; *Clark v. Schromyer* (Ind. App.) 55 N. E. 785; *Re Protection L. Ins. Co.* 9 Biss. 188, Fed. Cas. No. 11,444; 2 Ba. 48 L. R. A.

con. Ben. Soc. § 357; *Niblack, Mut. Ben. Soc.* § 276; *State ex rel. Atty. Gen. v. Merchants' Exch. Mut. Bencv. Soc.* 72 Mo. 146; *Com. v. Wetherbee*, 105 Mass. 149; *Rood v. Railway Pass. & Freight Conductors' Mut. Ben. Asso.* 31 Fed. Rep. 62. The rule applicable to the question is well and aptly stated by Bacon in his work on Benefit Societies, *supra*. In § 357 the author says: "In a contract of life insurance there is generally no absolute undertaking of the insured to pay the premiums or assessments, and consequently no personal liability therefor. The payment of the premiums or assessments is only a condition precedent of the liability of the company. The insured does not promise to pay the premiums, and the company only promises to pay if it has received the agreed consideration. Therefore the insured may pay or not, as he pleases. He has the perfect right to do either, and need give no excuse for his choice. If he does not pay, the contract is ended. It follows, therefore, that the premium or assessment is only a debt when there is an absolute promise to pay embodied in the contract." Whether or not such absolute promise to pay is embodied in the contract is a question of construction. We have examined *Ellerbe v. Barney*, 119 Mo. 632, 23 L. R. A. 435, 25 S. W. 384; *New Era Life Asso. v. Rossiter*, 132 Pa. 314, 19 Atl. 140; *Dettra v. Keatner*, 147 Pa. 566, 23 Atl. 889; *Rundle v. Kennan*, 79 Wis. 492, 48 N. W. 516; *Fulton v. Stevens*, 99 Wis. 307, 74 N. W. 803; *McDonald v. Ross-Lewin*, 29 Hun, 87; and other cases,—which it is claimed support appellant's contention; but these, with the exception of *Ellerbe v. Barney*, are, under the facts, distinguishable from the case at bar, and do not sustain appellant's view. The distinguishing feature, in the main, in the above cases, is that the contracts therein involved contain a promise upon the part of the assured to pay the assessments. No such element can be said to enter into the contract under consideration. It is true that the holding in *Ellerbe v. Barney*, 119 Mo. 632, 23 L. R. A. 435, 25 S. W. 384, fairly supports the insistence of appellant. The action in that case was instituted by the receiver of the Masonic Mutual Benefit Society of Missouri, which association had been operated as a life insurance company under the assessment plan. The controversy was as to whether the insurance policies issued by it to its members contained a promise on the part of the latter to pay the assessments. The majority of the court held that the policy or contract of insurance issued by the society must be so construed, and that the assessments were collectible by suit. Chief Justice Black and Justices Brace and Burgess dissented. The dissenting opinion, prepared by the chief justice, is, in our judgment, more convincing in its reasoning, and is better fortified by authorities, than is the majority opinion. It may perhaps be said that an irreconcilable conflict exists between the holding in *Lehman v. Clark*, 174 Ill. 279, 43 L. R. A. 648, 51 N. E. 222, and *Ellerbe v. Barney*, 119 Mo. 632,

23 L. R. A. 435, 25 S. W. 384. The court in the latter case, however, seems, in our opinion, to have made the mistake of considering that the death assessments levied by the society were in the nature or character of society dues, and therefore a member could not escape the payment thereof by terminating his membership. That the assessments, under the provisions of the contract in this case, cannot be so viewed or considered, is a proposition too plain to be controverted. In *Lehman v. Clark*, 174 Ill. 279, 43 L. R. A. 648, 51 N. E. 222, the receiver of the Masonic Benevolent Association of Central Illinois sued to recover of its members assessments in order to pay death losses which had accrued while the association was a going concern. The society in that case, and also the facts and questions involved, may be said to be substantially identical with the particular association and questions involved in this appeal. It was held in a well-considered opinion in that case that an insurance contract in a benevolent association, wherein a provision is made for a forfeiture of all payments and benefits by reason of the nonpayment of assessments within the time stated therein, is unilateral in its obligation, and that the right or remedy of the association upon the default of a member in paying his assessments is to declare a forfeiture, and that its right to sue and recover the assessment could not be maintained by it nor by its receiver. This decision was followed by our own appellate court in *Clark v. Schromyer* (Ind. App.) 55 N. E. 785. To reiterate what we have previously stated, it is evident, we think, that

when the policy or contract of insurance involved in this case is considered along with the society's articles of association, its constitution and by-laws, and the application for membership, there is nothing which can, in reason, be interpreted as an agreement or obligation upon the part of its insured members to pay the mortuary assessments, such as would thereby constitute them debtors of the society, and hence authorize it to enforce the payment of the assessments by suit. If the contracts involved herein could be said to be doubtful in respect to the interpretation of the question presented thereunder, and thereby be open to the application of the doctrine of practical construction, it is possible that the acts of the society's governing officers in the administration of its affairs for a period of almost thirty years might disclose that it, through its officers, had placed a construction upon the question in issue in this case wholly incompatible with the construction or interpretation for which appellant now contends. As the society, under the contracts in dispute, was not authorized to sue, and thereby recover of its members unpaid assessments, certainly it cannot be claimed that the appellees, who are but its assignees, are invested with any greater rights than it was in respect to enforcing by suit the payment of the assessments in controversy. It follows, therefore, and we so conclude, that appellant, under her petition, is not entitled to any relief, and the demurrer thereto was properly sustained.

The judgment is affirmed.

MISSOURI SUPREME COURT (Division 1).

William H. SMITH, *Respt.*,
v.

ST. LOUIS & SAN FRANCISCO RAILWAY
COMPANY *et al.*, *Appts.*

(151 Mo. 397.)

1. An action against receivers of a railroad company appointed by a Federal court, for injuries caused by the company's

negligence before their appointment, cannot be maintained in a state court without permission of the court which appointed them.

2. A railroad company is not bound to use the same degree of care in employing a wiper or fire puller to work in a roundhouse that is necessary in employing an engineer or hostler.
3. A railroad company is not liable to an employee for injuries caused by the incompetence of a coemployee, because of

NOTE.—The duty of a master with respect to the employment of his servants.

I. General principles.

- a. Nature and extent of the master's duty stated.
- b. Duty considered as creating an exception to the doctrine of common employment.
- c. Standard of care obligatory upon the master in regard to the selection of his servants.
- d. What constitutes an incompetent servant.
- e. Plaintiff's recovery dependent upon proof of master's actual or constructive knowledge of co-servant's unfitness.
- f. Duty to inquire into the fitness of a servant at the time he is hired.

I.—continued.

- g. Duty of the master to keep himself informed as to the fitness of a servant already in his employment.

II. Probative value of various facts as tending to show culpability on the master's part.

- a. Incompetence of servant.
- b. Race and color of delinquent servant.
- c. Appearance and manner of the servant while testifying.
- d. Language of delinquent servant himself indicating recklessness of character.
- e. Minority.
- f. Previous experience of the servant.
- g. Acts of negligence prior to the accident.
- h. Act of negligence which caused the accident.

its negligence in employing him, if his incompetence was not with respect to acts for the performance of which he was employed.

4. The head hostler in a roundhouse, who has no power to hire or discharge anyone, is the fellow servant of a fireman on an engine, so that his knowledge of the incompetence of a wiper, and that he attempts to move engines without authority, will not charge the railroad company with liability for injury to the fireman through the wiper's negligently moving an engine.

(July 12, 1899.)

A PPEAL by defendants from a judgment of the Circuit Court for Newton County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

II.—continued.

1. *Temporary unfitness at the time of the accident.*
- j. *Derelictions of duty subsequent to the injury in suit.*
- k. *Disclaimer of fitness by delinquent servant himself.*
- l. *Specific statements as to unfitness made by coemployees of delinquent servant.*
- m. *Reputation of delinquent servant.*
 1. *Admissibility, generally.*
 2. *Reputation not evidence of actual unfitness.*
 3. *Nicknames as evidence against the master.*
- n. *Length of the period during which the unfitness has continued.*
- o. *A promise by the master to discharge the delinquent servant.*

III. Duty to employ an adequate number of servants.

- a. *Generally.*
- b. *Whether the master has performed his duty.*

I. General principles.

a. Nature and extent of the master's duty stated.

The obligations of a master to see that the servants hired by him possess the qualifications, mental, moral, and physical, which will enable them to perform their duties without exposing themselves and their coemployees to greater dangers than the work necessarily entails, are, in their broad features, similar to the obligations which are incumbent upon him with regard to the other agencies of his business. It is manifest, however, that in their specific application to human beings, the general principles which define the nature and extent of those obligations must assume a shape somewhat different from that which they bear in their relation to the lower animals, or to inorganic instrumentalities. It is in fact apparent that the duty of a master to use care in hiring servants is very closely associated with, if not a special form of, his duty to adopt a safe system in the conduct of his business; that is to say, the duty of seeing that the unreasoning agencies employed by him perform their functions properly while they are in their normal condition. This conception emerges in statements like that which we find in a recent case, that "the law will not allow an employer, whose duty it is to provide reasonably safe appliances, to escape liability by employ-

Statement by Marshall, J.:

Damages for personal injuries. The petition alleges that the defendant company is, and at the times therein stated was, a railroad company; that on the 23d of December, 1893; the defendants, Reinhart, McCook, and Wilson, were appointed receivers of said railroad company by the United States circuit court for the district of Kansas; that at the city of Monett "the company had a roundhouse, turntable, switch yards, and coal chutes, where engines are cleaned, repaired, watered, coaled, and made ready to be used by defendant's agents, servants, and employees; that plaintiff was, on the 20th day of October, 1893, and prior thereto, an employee and in the service of the defendant railway company as locomotive fireman on a passenger engine numbered 56, on said railroad, running between Monett, Missouri, and Neo-

ing incompetent or unsuitable persons to discharge it." *Donnelly v. Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874.

The essential distinctions suggested by these considerations render it proper to treat the cases dealing with the duty of hiring servants as a distinct division of the general subject separate from the discussion of the duty to furnish a safe place of work and safe appliances.

The rule established by the cases to be reviewed in this chapter may be stated in formal terms as follows:

The hiring or retention of a servant whose unfitness for his duties, whether it arise from his want of skill, his physical and mental qualities, or his bad habits, is known, actually or constructively, to the master, is culpable negligence for which the master must respond in damages to any other servants who may suffer injury through that unfitness.

That the master is not absolved by the mere fact that the servant hired was helpful and prudent, where, as a matter of fact, he was unable to perform his duties properly owing to his ignorance and want of skill, and the injury resulted from that incompetency, was long ago settled in *Wright v. New York C. R. Co.* (1858) 28 Barb. 80, and does not seem to have been since disputed.

The plaintiff is rightly consulted where there is no evidence tending to prove that the employees, whose retention is alleged to be culpable, had ever shown any lack of skill or efficiency in the performance of their duties before the accident occurred in which the plaintiff was hurt. *Curran v. Merchants' Mfg. Co.* (1881) 130 Mass. 374, 39 Am. Rep. 457.

That the master is not liable for injuries caused by the negligent act of an incompetent servant, where that act was not one of those which he was authorized to do, see *Southern Cotton-Oil Co. v. Devond* (1894; Tex. Civ. App.) 25 S. W. 43.

The essential ground upon which the rule is based is "that the master impliedly contracts that he will use due care in engaging the services of those who are reasonably fit and competent for the performance of their respective duties in the common service." *Snow v. Housatonic R. Co.* (1864) 8 Allen, 441, 85 Am. Dec. 720.

b. Duty considered as creating an exception to the doctrine of common employment.

It is important to note that the above rule was originally introduced into Anglo-American law, and is still frequently referred to by the courts, as an exception to the doctrine which

desha, Kansas; that on the said 20th day of October, 1893, said engine No. 56 was taken out of defendant's roundhouse by its employees at the usual time, preparatory to going out on its run, and placed on the coal-chute track in the switch yard, at the usual and customary place for putting an engine that is shortly to go out on its run, and that shortly thereafter plaintiff took charge of said engine, as it was his duty to do, while it was standing on said track as aforesaid, and immediately began performing the duties required of him as such fireman in and about getting said engine ready to take out passenger train numbered 1, going west, and that while plaintiff, in the discharge of his said duties, was examining the ash pan on said engine, to see if it had been properly cleaned, and was stooping over in front of the main drive wheel of said engine in the

usual and customary and most convenient position for making such examinations, one Grant Sheldon, who was in the employ and service of said defendant railway company as an engine hostler, and who was an ignorant, incompetent, reckless, and unskilful servant, all of which the said defendant railway company well knew, or by the exercise of ordinary care and diligence might have known, got upon said engine, with the knowledge and permission of defendant, and, in the discharge of the usual and customary work and duty of an engine hostler, recklessly, carelessly, and negligently, and without ringing the bell, sounding the whistle, or giving any other warning, quickly and suddenly started said engine forward, and ran the same against the plaintiff, thereby throwing him down with his left hand upon the track rail in front of one of the drive

declares a master to be exempt from responsibility for injuries caused to one servant by the negligence of another.

From this point of view, it may be enunciated thus:

"While a railroad company is not responsible to one employee for an injury resulting from the mere negligence or incompetence of a co-employee in the same general employment, it is liable in such case where the company has been guilty of negligence in the employment of, or, after notice, continuing in employment, the negligent or incompetent employee, thereby conducing to the injury." *Ohio & M. R. Co. v. Collarn* (1881) 73 Ind. 261, 38 Am. Rep. 134.

"Though we have said," remarked Alderson, B., in a leading English case, "that a master is not in general responsible to one servant for an injury occasioned to him by the negligence of a fellow servant while they are acting in one common service, yet this must be taken with the qualification that the master shall have taken due care not to expose his servant to unreasonable risks. The servant, when he engages to run the risks of his service, including those arising from the negligence of fellow servants, has a right to understand that the master has taken reasonable care to protect him from such risks by associating him only with persons of ordinary skill and care; and the object of the plea in this case is to show that the defendants had discharged this duty, the omission to discharge which might have made them responsible to the deceased. The plea therefore appears to us not to be open to the objection insisted on." *Hutchinson v. York, N. & B. R. Co.* (1850) 5 Exch. 341, 19 L. J. Exch. N. S. 296, 14 Jur. 837.

It would be a work of supererogation to attempt to cite all the cases in which this conception emerges. The following will suffice out of many hundreds that might be mentioned: *Morgan v. Vale of Neath R. Co.* (1864) 5 Best & S. 710, L. R. 1 Q. B. 149, 35 L. J. Q. B. N. S. 23, 13 L. T. N. S. 564, 14 Week. Rep. 144; *Wiggett v. Fox* (1856) 11 Exch. 832, 2 Jur. N. S. 955, 25 L. J. Exch. N. S. 188; *Tarrant v. Webb* (1856) 18 C. B. 797, 25 L. J. C. P. N. S. 261; *Bartonsbill Coal Co. v. Reid* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767; *Searle v. Lindsay* (1861) 11 C. B. N. S. 429, 31 L. J. C. P. N. S. 106, 8 Jur. N. S. 746, 5 L. T. N. S. 427, 10 Week. Rep. 89; *Hall v. Johnson*, 3 Hurlst. & C. 589, 34 L. J. Exch. N. S. 222, 11 Jur. N. S. 180, 11 L. T. N. S. 779, 13 Week. Rep. 411; *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30; *Walker v. Bolling* (1853) 22 Ala. 294; *Alabama & F. R. Co. v. Waller* (1872) 48 Ala. 459; *Tyson v. 48 L. R. A.*

South & North Ala. R. Co. (1878) 61 Ala. 554, 32 Am. Rep. 8; *Mobile & O. R. Co. v. Thomas* (1868) 42 Ala. 672; *Hogan v. Central P. R. Co.* (1874) 49 Cal. 129; *Stephens v. Doe* (1887) 73 Cal. 26, 14 Pac. 378; *Congrave v. Southern P. R. Co.* (1891) 88 Cal. 360, 26 Pac. 175; *Keith v. Walker Iron & Coal Co.* (1888) 81 Ga. 49, 7 S. E. 166; *Chicago & N. W. R. Co. v. Swett* (1867) 45 Ill. 197, 92 Am. Dec. 206; *Chicago & N. W. R. Co. v. Taylor* (1873) 69 Ill. 461, 18 Am. Rep. 626; *Chicago & A. R. Co. v. Sullivan* (1872) 63 Ill. 293; *Columbus C. & I. Cent. R. Co. v. Troesch* (1873) 68 Ill. 545, 18 Am. Rep. 578; *Toledo, W. & W. R. Co. v. Durkin* (1875) 76 Ill. 395; *Chicago & A. R. Co. v. Rush* (1877) 84 Ill. 570; *Chicago & A. R. Co. v. Keefe* (1868) 47 Ill. 108; *United States Rolling Stock Co. v. Wilder* (1886) 116 Ill. 100, 5 N. E. 92; *Thayer v. St. Louis, A. & T. H. R. Co.* (1864) 22 Ind. 26, 85 Am. Dec. 409; *Chicago & G. E. R. Co. v. Harney* (1867) 28 Ind. 28, 92 Am. Dec. 282; *Ohio & M. R. Co. v. Collarn* (1881) 73 Ind. 261, 38 Am. Rep. 134; *Lake Shore & M. S. R. Co. v. Stupak* (1886) 103 Ind. 1, 8 N. E. 630; *Hubb v. New Orleans & C. R. Co.* (1851) 6 La. Ann. 496, 54 Am. Dec. 565; *Satterly v. Morgan* (1883) 35 La. Ann. 1166; *Poirier v. Carroll* (1883) 35 La. Ann. 699; *Beaulieu v. Portland Co.* (1860) 48 Me. 201; *Donnelly v. Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874; *Cayser v. Taylor* (1857) 10 Gray, 274, 69 Am. Dec. 317; *Farwell v. Boston & W. R. Corp.* (1842) 4 Met. 49, 38 Am. Dec. 339; *Curran v. Merchants' Mfg. Co.* (1881) 130 Mass. 374, 39 Am. Rep. 457; *New Orleans, J. & G. N. R. Co. v. Hughes* (1873) 49 Miss. 258; *Howd v. Mississippi C. R. Co.* (1874) 50 Miss. 178 (192); *McDermott v. Pacific R. Co.* (1860) 30 Mo. 116; *Harper v. Indianapolis & St. L. R. Co.* (1871) 47 Mo. 567, 4 Am. Rep. 353; *Nash v. Nashua Iron & Steel Co.* (1882) 62 N. H. 406; *Pittsburg, Ft. W. & C. R. Co. v. Devinney* (1867) 17 Ohio St. 197; *Weger v. Pennsylvania R. Co.* (1867) 55 Pa. 460; *Walton v. Bryn Mawr Hotel Co.* (1894) 160 Pa. 3, 28 Atl. 438; *Boatwright v. Northeastern R. Co.* (1886) 25 S. C. 128; *Nashville & C. R. Co. v. Elliott* (1860) 1 Coldw. 611, 78 Am. Dec. 506; *Knoxville Iron Co. v. Dobson* (1881) 7 Lea, 367; *Dallas v. Guif. C. & S. F. R. Co.* (1884) 61 Tex. 196; *Baird v. Dunn* (1895) 33 N. B. 156; *Bossout v. Rome, W. & O. R. Co.* (1890) 32 N. Y. S. R. 884, 10 N. Y. Supp. 602; *Pennsylvania Co. v. Roney* (1883) 89 Ind. 453, 46 Am. Rep. 173.

Any charge is erroneous which does not distinguish clearly between the liability of the defendant by reason of negligence in furnishing proper apparatus or in the employment of com-

wheels of said engine, the said wheel passing over said hand, mashing and mangling his hand, causing plaintiff great pain and suffering, and causing him to lose a great deal of time, and rendering it necessary to have his hand amputated above the wrist joint, to his damage in the sum of \$25,000; that the defendant railway company negligently and carelessly employed and retained in their employ, and required and permitted to work about and handle the engine aforesaid, as hostler, the said Grant Sheldon, well knowing, or by the exercise of reasonable care might have known, that he was ignorant, reckless, unskilful, and incompetent to perform the duties of such hostler, and to handle said engine, and that by reason of the carelessness and negligence of the said defendant railway company in employing and retaining in their employ and permitting to

handle said engine the said Grant Sheldon, and by reason of the ignorance, recklessness, unskilfulness, and incompetency of the said Grant Sheldon, the plaintiff was recklessly run upon by said engine, and thrown down and injured and damaged as aforesaid." The second count of the petition is the same as the first, except that, after alleging the character of the company, and that it had the roundhouse, turntable, etc., at Monett, it is further averred, "And that defendants, J. W. Reinhart, John J. McCook, and Joseph C. Wilson, are the duly appointed and qualified receivers of said railroad as aforesaid, in possession thereof, and operating same as aforesaid," and except, further, that it is charged that the engine was in a defective and dangerous condition. The answer of the company admitted the appointment of the receivers, denied the allegations of the peti-

tent co-servants, and his nonliability for a want of proper care on the part of the fellow servant at the time of the accident. *Houston & T. C. R. Co. v. Willie* (1880) 53 Tex. 318.

One necessary corollary from this rule is that a complaint which on its face shows that the injury in suit was caused by the act of a fellow servant is insufficient, unless it avers negligence in respect to the selection or retention of that servant. *Indiana, B. & W. R. Co. v. Dailey* (1886) 110 Ind. 75, 10 N. E. 631; *Lawler v. Androscoggin R. Co.* (1873) 62 Me. 463, 16 Am. Rep. 492; *Collier v. Steinhart* (1875) 51 Cal. 119; *Royce v. Fitzpatrick* (1881) 80 Ind. 527; *Bogard v. Louisville, E. & St. L. R. Co.* (1884) 100 Ind. 491; *Lake Shore & M. S. R. Co. v. Stupak* (1886) 108 Ind. 1, 8 N. E. 630; *Albro v. Agawam Canal Co.* (1850) 6 Cush. 75; *Dow v. Kansas P. R. Co.* (1871) 8 Kan. 642; *Pilkinton v. Gulf, C. & S. F. R. Co.* (1888) 70 Tex. 226, 7 S. W. 805; *Kindel v. Hall* (1890) 8 Colo. App. 63, 44 Pac. 781; *McDermott v. Pacific R. Co.* (1860) 30 Mo. 115; *Southwest Improv. Co. v. Andrew* (1889) 86 Va. 270, 9 S. E. 1015, and the cases cited above in this section.

After a trial on the merits, it is too late for the defendant to object that the question whether it had placed a competent man in charge of the work was not raised by the pleadings. Such a case comes under the rule that, where pleadings would have been amendable of course in the court below, the amendment will be considered as having been made. *Trainor v. Philadelphia & E. R. Co.* (1890) 137 Pa. 149, 20 Atl. 632.

In *Summersell v. Fish* (1875) 117 Mass. 312, an action for personal injuries caused by the fall of a derrick, which was being raised under the direction of the defendant's foreman, the declaration alleged that the defendant negligently raised the derrick; and the plaintiff's counsel stated in his opening that he made no question of the foreman's competency. No evidence was put into the case tending to show that the foreman was incompetent, except such inferences as might be drawn from the manner in which he directed the raising of the derrick; and there was no evidence of any want of care on the part of the defendant in employing the foreman. Held, that plaintiff's counsel was rightly prevented from arguing at the trial that the foreman was incompetent, and that the defendant knew his incompetency, or with due care might have known it, and that the injury in suit resulted from that incompetency.

In *Kersey v. Kansas City, St. J. & C. B. R. Co.* (1883) 79 Mo. 362, it was held that the in-

competence of another employee is immaterial if his incompetence or negligence had nothing to do with the injury.

A petition alleging that the employment of a fellow servant was careless and negligent, and that in consequence thereof an incompetent servant was taken into the company's service, who caused the injury by his incompetency, is a sufficient allegation of the negligence of employment. *Galveston Rope & Twine Co. v. Burkett* (1893) 2 Tex. Civ. App. 308, 21 S. W. 958.

A complaint is sufficient, charging death of the baggage master through the act of the conductor, alleging that he was not a careful, skilful, and attentive conductor for a passenger train, which was known to defendant, and that the death of plaintiff's intestate was caused by such conductor's negligence. *Kerlin v. Chicago, P. & St. L. R. Co.* (1892) 50 Fed. Rep. 185.

Another necessary corollary from the rule above stated is that it is error to take the case from the jury where there is evidence that there was negligence in the selection or retention of the co-servant, whose act caused the injury. *Brickner v. New York C. R. Co.* (1870) 2 Lans. 506.

A statement of plaintiff's counsel, in an action by an employee, showing that the injuries complained of were occasioned by a co-employee, is not sufficient to show that there is no cause of action. It must also appear by the affirmative testimony of the employer that the latter was a competent person for the position he occupied, or that necessary appliances were furnished by the employer. *Haley v. Western Transit Co.* (1890) 76 Wis. 344, 45 N. W. 16.

Another corollary to the above rule is that the defendant is not entitled to an unqualified instruction that the plaintiff cannot recover if he was injured by his own carelessness or that of his fellow servants. *International & G. N. R. Co. v. Cook* (1897) 16 Tex. Civ. App. 386, 41 S. W. 665.

In many of these cases, in which the existence of the duty is in a sense a factor, it is of no practical importance, as the investigation centers itself upon the single question whether the delinquent servant was or was not one of those for whose negligence the master must answer. Cases of this class will not be particularly considered here.

c. Standard of care obligatory upon the master in regard to the selection of his servants.

As in the case of the other agencies of the master's business, the question whether he has performed his duty with respect to the employ-

tion, and pleaded contributory negligence on the part of the plaintiff. The receivers adopted the answer of the company, and then pleaded that no permission to sue them had been applied for or granted by the United States circuit court for the eastern district of Missouri, or any court having jurisdiction of their receivership.

The facts developed on the trial were, substantially, that about 6:40 P. M. on the 20th of October, 1893, the plaintiff, while in the employ of the company as a locomotive fireman, went to his engine, which was standing on what is called the "coal-chute track," at Monett, Missouri, to prepare to go out on his run. He lit the lamps on the engine, and, finding that the engine did not have enough coal, he left the engine, and went to the roundhouse, which was 40 or 50 feet distant, and asked for more coal. Then he returned

to the engine, opened the valve that lets oil into the lubricator, opened the cylinder cocks, and then stooped down within 4 or 5 feet of the cylinder cocks, with his hands on his knees, and with his head and shoulders under the main rod, which connects the drive wheels of the engine, and which communicates the power to the wheels, to examine the ash pan under the engine. While he was in the position described, the engine started forward. No bell was rung or whistle sounded. The main rod struck him on the head, and he lost his balance, and, to save himself from falling, he threw out his left hand upon the track rail, and one of the drive wheels ran over it, injuring it so that amputation became necessary. After his hand was run over, he raised up, and, as the gangway of the engine passed him, he saw a man getting off of the engine on the oppo-

ment of servants is sometimes considered with reference to the general standard furnished by the supposed conduct of a man of average prudence and intelligence under the circumstances, and sometimes with reference to the actual qualifications of the servant hired.

The former standpoint is apparent in the doctrine that an employer is in no case held to an undertaking to select absolutely competent and careful servants. The rule requires of him no more than the exercise of reasonable care in either case,—such care only as men of reasonable and ordinary prudence exercise; and that when he has done this he cannot be held responsible for injuries which result from the incompetency of the servants so selected. *Holland v. Tennessee Coal, I. & R. Co.* (1890) 91 Ala. 444, 12 L. R. A. 232, 8 So. 524.

"The extent of the undertaking is that the company will exercise reasonable care in the selection of an employee, and, if his incompetency is discovered, it will dismiss him from its service." *Columbus, C. & I. Cent. R. Co. v. Troesch* (1873) 68 Ill. 545, 18 Am. Rep. 578.

The phrase "reasonable care" also occurs in *Wright v. New York C. R. Co.* (1858) 28 Barb. 80; *Chicago & G. E. R. Co. v. Harney* (1867) 28 Ind. 28, 92 Am. Dec. 282; *Rogers v. Ludlow Mfg. Co.* (1887) 144 Mass. 198, 59 Am. Rep. 68, 11 N. E. 77.

"The duty of a railway corporation is to exercise due, that is ordinary, care, in the selection and employment of its servants and agents, having respect to their particular duties and responsibilities, and the consequences that may result from their want of competence, skill, or care in the performance of their duties." *Bailec v. New York & H. R. Co.* (1874) 59 N. Y. 356, 17 Am. Rep. 325.

The following phrases are quoted as being synonymous with "reasonable care":

"Reasonable care, prudence, and discretion." *Norfolk & W. R. Co. v. Nuckols* (1895) 91 Va. 193, 21 S. E. 342.

"Ordinary care." *Lindvall v. Woods* (1891) 44 Fed. Rep. 855; *Ex parte Johnson* (1883) 19 S. C. 492.

In *Wabash R. Co. v. McDaniels* (1882) 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932, the court said that "ordinary care in [regard to] the selection and retention of servants and agents implies that degree of diligence and precaution which the exigencies of the particular service reasonably require," and approved a charge containing the words "proper and great care," and declined to accept the suggestion of defendant's counsel that "ordinary care in the employment and retention of railroad employees means only that degree of diligence

which is customary, or is sanctioned by the general practice or usage which obtains among those intrusted with the management and control of railroad property and railroad employees."

In *Ohio & M. R. Co. v. Collarn* (1881) 73 Ind. 261, 38 Am. Rep. 134, the two adjectives, "reasonable" and "ordinary," are coupled together.

In *Alabama & F. R. Co. v. Waller* (1872) 48 Ala. 459, it was said the master is bound to use "due or reasonable" care and diligence the exercise of "ordinary" care and diligence not being sufficient to absolve him from liability. But the ruling suggests a distinction which does not seem to be warranted by the authorities.

In *Sizer v. Syracuse, B. & N. Y. R. Co.* (1872) 7 Lans. 67, the expression was used, but this was *obiter*, and is in any case too strong, as the above authorities show.

The latter is observable in the statements that the master is bound to provide servants that are "fit and competent." *Ardesco Oil Co. v. Gilson* (1869) 63 Pa. 146.

"Efficient." *Norfolk & W. R. Co. v. Ampey* (1896) 93 Va. 108, 25 S. E. 226 (not error to substitute this word for "competent" in an instruction).

"Of competent skill and prudence." *Wonder v. Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143.

But not "absolutely competent and careful servants." *Holland v. Tennessee Coal, I. & R. Co.* (1890) 91 Ala. 444, 12 L. R. A. 232, 8 So. 524.

A blending of the two produces the more complete formula that a master is bound to exercise reasonable or ordinary care in the selection and retention of sufficient and competent servants. *Matthews v. Bull* (1897; Cal.) 47 Pac. 773. Compare *Rogers v. Ludlow Mfg. Co.* (1887) 144 Mass. 198, 59 Am. Rep. 68, 11 N. E. 77; *Tonnesen v. Ross* (1890) 58 Hun. 415, 12 N. Y. Supp. 150; *Thompson v. Ross* (1890) 58 Hun. 608, 12 N. Y. Supp. 151 (same facts); *Lanin v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417; *Brown v. The D. S. Cage* (1872) 1 Woods, 401, Fed. Cas. No. 2,002.

In instructing a jury this extended statement should, it seems, always be used; for otherwise the jury might be led to suppose that the master was an insurer of the servant's competency. *Lewis v. Emery* (1896) 108 Mich. 641, 68 N. W. 569 (condemning the charge that "the law imposes upon every man that runs a sawmill the duty to employ reasonably skillful employees"); *Gulz, C. & S. F. R. Co. v.*

site side, and called to him for assistance, but the man paid no attention to him. He says that he knew the man's face, having seen him around the roundhouse, but did not then know his name; that the man was Grant Sheldon. The track on which the engine was standing had a slight grade towards the west, and the engine was a medium quick starter; that is, if "everything was tight," with the lubricator turned, and the cylinder cocks open, the engine would start without any steam being turned on, when on a grade of this character. The plaintiff testified that, if the steam is turned on, it would necessarily escape from the cylinder cocks, and that no steam escaped from this engine. Grant Sheldon was employed as a wiper or fire puller in the roundhouse, and prior to the accident had never been employed as a hostler. The employees at the

roundhouse rank—First, foreman, who in this case was J. R. Randall; second, head hostler, who was Peter Stringer; third, second hostler; fourth, third hostler; and fifth, wipers or fire pullers, whose duties are to perform manual labor cleaning engines, and who are expressly prohibited by the rules of the company from moving an engine, either in or outside of the roundhouse, except in the immediate presence of a hostler. Sheldon, although not a hostler, had, before the accident, moved an engine in the yard, without the presence of a hostler. As to Sheldon's competency, the testimony is as follows: Charles Andrews said he had heard complaints among the boys about the way he handled engines, and that the boys were afraid to haul fire under him; that he had complained to Stringer about him, but could not say whether it was before the accident

Schwabbe (1892) 1 Tex. Civ. App. 573, 21 S. W. 706, disapproving the statement that a railway company is bound to "furnish competent and qualified men to handle its engines and trains."

d. What constitutes an incompetent servant.

Incompetency connotes the converse of reliability in all that is essential to make up a reasonably safe person, considering the nature of the work and the general safety of those who are required to associate with such person in the general employment. *Maitland v. Gilbert Paper Co.* (1897) 97 Wis. 476, 72 N. W. 1124, remarking that a person may be competent to do the particular acts required of a fireman, yet be so careless in respect to obeying the rules that prohibit him from interfering with appliances not connected with his work as to render him an exceedingly dangerous and incompetent person to be associated with.

The servant should be discharged for the same measure of negligence which would have unfitted him for the original employment. *Harper v. Indianapolis & St. L. R. Co.* (1890) 44 Mo. 488, holding erroneous an instruction that, if the servant employed by the defendant was competent at the time of the original employment, then defendant would not be liable for his negligent acts, unless his subsequent negligence was known to his employer, and was also gross in its character.

The fact that a steamboat engineer is licensed is prima facie evidence of his competency, but does not justify his retention after his master becomes aware that by his habitual carelessness and recklessness he is endangering the lives of the other employees on board. *Walker v. Bolling* (1853) 22 Ala. 294.

Whether a servant is competent is primarily a question for the jury. *Devine v. Tarrytown & I. Union Gaslight Co.* (1880) 22 Hun. 26.

The most obvious kind of unfitness is that which arises from the absolute incapacity to perform the duties required, whether it be that his physical powers are reduced by some bodily defect below the standard usually found in persons of his age.

The incapacity of a yardmaster charged with the duty of having cars needing repairs run in upon repair tracks to discharge such duty in person, may be inferred from the fact that he had only one arm. *Louisville & N. R. Co. v. Davis* (1890) 91 Ala. 487, 8 So. 552.

The fact that a person is nearsighted does not necessarily render him incompetent to be engineer of a locomotive, if he can see with glasses, and uses them. *Texas & P. R. Co. v. Harrington* (1884) 62 Tex. 597.

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It is not negligence to employ, for the purpose of testing a boiler for broken stay bolts, an inspector who is partly deaf in one ear, but whose hearing is good enough to determine whether a bolt struck with a hammer is sound or broken. *Chicago & A. R. Co. v. Du Bois* (1895) 65 Ill. App. 142.

Another obvious kind of unfitness is that the employee is too old. *Harvey v. New York C. & H. R. Co.* (1882) 88 N. Y. 481, where the court remarked upon the fact of a switchman's being only fifty-six years old as one which was favorable to the master.

Where the incompetency relied upon is the old age and defective vision of an engineer, and his ignorance of the road, it is error to admit evidence going to show that, after the accident complained of had occurred, he ran his train a distance of several miles without a brakeman, and ditched his engine. Such evidence may show negligence after the accident, but is not proof of the alleged defects. *Ransier v. Minneapolis & St. L. R. Co.* (1883) 30 Minn. 215, 14 N. W. 883.

An employee who is too young to be intrusted with the work may be for that reason unfit.

See *infra*, II., e.

There may also be unfitness in the fact that the employee has not received a sufficient general education. *Mobile & O. R. Co. v. Thomas* (1868) 42 Ala. 672 (switchman incompetent who cannot read the timetable of the train); *Taylor v. Western P. R. Co.* (1873) 45 Cal. 323 (same point).

Or has not had adequate training and experience in the work to be done. See *infra*, II., f.

Or has contracted vicious habits which diminish his physical and mental efficiency and render him less trustworthy, the most common kind of incompetency under this head being that caused by intemperance. *Michigan C. R. Co. v. Gilbert* (1881) 46 Mich. 176, 9 N. W. 248; *Campbell & Z. Co. v. Roediger* (1894) 78 Md. 601, 28 Atl. 901; *Gilman v. Eastern R. Corp.* (1865) 10 Allen, 233, 87 Am. Dec. 635; *Brickner v. New York Cent. R. Co.* (1870) 2 Lans. 515; *Huntingdon & B. T. R. & Coal Co. v. Decker* (1877) 84 Pa. 419; *Kean v. Detroit Copper & Brass Rolling Mills* (1887) 66 Mich. 277, 33 N. W. 395; *Neilon v. Kansas City, St. J. & C. B. R. Co.* (1885) 85 Mo. 599; *Maxwell v. Hannibal & St. J. R. Co.* (1884) 85 Mo. 95; *Williams v. Missouri P. R. Co.* (1891) 109 Mo. 475, 18 S. W. 1098; *Laning v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417.

Intemperate habits may be proved under an allegation of injuries caused by the unskillful

to the plaintiff. David Loftin testified that he had heard the fire pullers complain, in the presence of Stringer, that Sheldon was not competent to handle an engine, but could not say that this was before the accident. James H. Coyle testified that one night Sheldon backed an engine into another engine, and broke the brake beam out of it, and knocked the fellow over that was underneath it; that this occurred a week or two before the accident to the plaintiff; that he complained to Stringer about Sheldon, because he would stop an engine, and then the engine would start up and roll away; that he heard Charlie Stringer complain to Peter Stringer about Sheldon, and Peter told him to block the engine good before he went under it, and told Coyle to do likewise; that he could not say exactly whether this was before or after the plaintiff got hurt. The

plaintiff's counsel asked the witness Charles Andrews the following question:

"Q. What was Mr. Stringer's habits there in regard to being temperate or intemperate when at work?"

The defendant objected, the court overruled the objection, and the defendant duly excepted. The witness answered:

"A. I have seen him drinking—what I would call somewhat intoxicated."

Again, the witness David Lofton was asked:

"Q. You may tell how Mr. Stringer was regarded there as to being a safe and competent man to handle an engine prior to the time of this injury."

The defendant again objected, the court overruled the objection, the defendant saved its exception, and the witness answered:

act of a coservant. *Lyons v. New York C. & H. R. Co.* (1886) 39 Hun. 385.

Or under a general allegation of negligence. *Huntingdon & B. T. R. & Coal Co. v. Decker* (1877) 84 Pa. 419; *Hobson v. New Mexico & A. R. Co.* (1886; Ariz.) 11 Pac. 545.

The question whether the delinquent servant was bright and intelligent is too general to be admissible in relation to the issue of his unfitness to act as helper of a car repairer. The witnesses should be interrogated with a view to showing what his duties were, and what was his capacity, as inferred by the witnesses from seeing him perform the same kind of duties. *Latreuille v. Bennington & R. R. Co.* (1891) 63 Vt. 336, 22 Atl. 656.

But it is also laid down that "incompetency exists, not alone in physical or mental attributes, but in the disposition with which a servant performs his duties; . . . and that, although he may be physically and mentally able to do all that is required of him, his disposition toward his work, and toward the general safety of the work of his employer, and to his fellow servants, makes him an incompetent man," as where he habitually neglects his duties. *Coppins v. New York C. & H. R. R. Co.* (1890) 122 N. Y. 557, 25 N. E. 915, Affirming (1888) 48 Hun. 292; *Cameron v. New York C. & H. R. R. Co.* (1895) 145 N. Y. 400, 40 N. E. 1; *Smith v. E. W. Backus Lumber Co.* (1896) 64 Minn. 447, 67 N. W. 358.

See also *infra*, II., g.

It has been held that negligence of a railroad company in retaining a brakeman in its employ is not to be inferred where the only evidence on the point is that he was slow and lazy, and that the company knew this, but the same witness testifies that he was always careful about his work (*Corson v. Maine C. R. Co.* (1884) 78 Me. 244); but this ruling seems contrary to principle and authority, if it is meant to be taken as expressive of a general principle. There are many kinds of work in which the safety of other servants would be constantly imperiled by a want of alertness and activity.

The question whether the delinquent servant was competent for the duties he was performing when the accident occurred must be determined with reference to that time, and not to the time when he first assumed the duties. *Harvey v. New York C. & H. R. R. Co.* (1882) 88 N. Y. 481, denying the unfitness of the servant to act as switchman where for three months previous to the injury he had had exclusive control of the switches for twelve hours every day, and, so far as the evidence discloses, he had performed this duty to the satisfaction 48 L. R. A.

of the company, and without fault or neglect on his part.

Evidence that the delinquent servant was not competent to take charge of an engine five years before the accident is irrelevant. *East Tennessee, V. & G. R. Co. v. McKeney* (1886; Tenn.) 1 S. W. 500.

A verdict for the plaintiff should be set aside where the only evidence that the delinquent servant was addicted to intemperate habits referred to a period four years previous to the accident. *Zumwalt v. Chicago & A. R. Co.* (1889) 35 Mo. App. 661.

But evidence tending to show the servant's accustomed disobedience to orders and habitual drunkenness, and his reputation for unfitness, is competent, though it relates to a time two years before the accident. *Huntingdon & B. T. Mountain R. & Coal Co. v. Decker* (1876) 82 Pa. 119.

e. Plaintiff's recovery dependent upon proof of master's actual or constructive knowledge of coservant's unfitness.

As was indicated in the general statement of principle in the first section of the present chapter, the liability of the master for injuries caused by the unfitness of a servant is limited by a doctrine analogous to that which prevails with respect to other agencies, the doctrine; namely, that actionable negligence is predicated only of cases in which the master either hired the delinquent servant with a knowledge of his unfitness, or retained him in the service after notice of such unfitness. The language used by the Supreme Court of the United States is that the plaintiff must show, not only the incompetency, but that "the defendant failed to exercise proper care and diligence to ascertain his qualifications and competency prior to his appointment, or failed to remove him after his incompetency had come to the notice of some agent or officer of defendant having the power to remove the servant. *Wabash R. Co. v. McDaniels* (1882) 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932.

Under ordinary circumstances a master is allowed a reasonable time to discharge the servant after his inefficiency has become known. *Lake Shore & M. S. R. Co. v. Stupak* (1889) 123 Ind. 210, 23 N. E. 246 (finding that defendant knew of servant's careless habits the day before the accident does not warrant entry of judgment that master's retention of him was negligent).

This ruling was made the basis of a later decision, that a special verdict, including a finding that the master knew of the servant's

"There was a good deal of complaint against him."

The testimony shows that Randall, the foreman, alone had power to employ and discharge men, and that the head hostler had no such power, and that, in case anything went wrong, Stringer had no power to act, but had to send for Randall, who was alone authorized to act for the company at the roundhouse. Grant Sheldon testified that prior to the accident he was a wiper, and that he never had moved an engine, as he knew the rules of the company forbade his doing so; that when the plaintiff called for coal he was 15 or 20 feet outside of the roundhouse, and shortly afterwards he saw the engine start west towards the coal chute; that he supposed there was a hostler on the engine, and he ran to help get the coal, and when he stepped on the step he saw there

was nobody in the cab; that he heard somebody halloo, and he got upon the engine, and stopped it; that he did not start the engine, and was not on it when plaintiff was hurt. Peter Stringer, the head hostler, testified that Sheldon was a wiper or fire puller, and that the rules of the company positively prohibited a wiper or fire puller to move an engine under any circumstances, and that he never heard of Sheldon moving an engine until after plaintiff was injured, and that he (Stringer) had no power to employ or discharge men, but was simply the head hostler at night, and got his orders from Randall. J. F. Randall testified that he was the foreman, and alone had power to employ and discharge men; that Sheldon was employed as a wiper, and was prohibited by the rules of the company to move an engine under any circumstances. At the close of the

unfitness before the accident, but not stating how long before the accident that knowledge was acquired, does not warrant the entry of a judgment for the plaintiff. *Louisville, N. A. & C. R. Co. v. Breedlove* (1894) 10 Ind. App. 657. 38 N. E. 357.

On the one hand, therefore, a verdict for the plaintiff will always be upheld where there is adequate proof that the master knew of the delinquent servant's incompetency before the time when the accident happened. *Walker v. Bolling* (1853) 22 Ala. 294; *Illinois C. R. Co. v. Jewell* (1867) 46 Ill. 99, 92 Am. Dec. 240; *Chicago & G. E. R. Co. v. Harney* (1867) 28 Ind. 23, 92 Am. Dec. 282; *Nordyke & M. Co. v. Van Sant* (1884) 99 Ind. 188; *Cincinnati, H. & I. R. Co. v. Madden* (1892) 134 Ind. 462, 34 N. E. 227; *Kansas P. R. Co. v. Salmon* (1875) 14 Kan. 512; *Union P. R. Co. v. Young* (1878) 19 Kan. 488; *Poirier v. Carroll* (1883) 35 La. Ann. 699 (under Louisiana Code, art. 2320, providing that a master is liable for damages by servants which he might prevent); *Norfolk & W. R. Co. v. Hoover* (1894) 79 Md. 253, 23 L. R. A. 710, 29 Atl. 904; *Michigan C. R. Co. v. Gilbert* (1881) 46 Mich. 176, 9 N. W. 243; *New Orleans, J. & G. N. R. Co. v. Hughes* (1873) 49 Miss. 258; *Huffman v. Chicago, R. I. & P. R. Co.* (1883) 78 Mo. 50; *Houston & T. C. R. Co. v. Myers* (1881) 55 Tex. 110; *Kerlin v. Chicago, P. & St. L. R. Co.* (1892) 50 Fed. Rep. 185; *Ross v. Chicago, M. & St. P. R. Co.* (1881) 2 McCrary, 235, 8 Fed. Rep. 544; *Galveston, H. & S. A. R. Co. v. Davis* (1893) 4 Tex. Civ. App. 468, 23 S. W. 301.

See also the cases with reference to incompetency arising from intemperate and other bad habits, in the preceding section, and those reviewed in the following sections, which all assume the existence of the rule stated in the text.

Since evidence that the master knew of the servant's unfitness is always competent, error cannot be predicated of the fact that the court admitted it at a certain stage on the trial, simply because it proves to be irrelevant as to the issue finally taken. *Altee v. South Carolina R. Co.* (1884) 21 S. C. 550.

The same rule holds under Cal. Civ. Code, § 1971, providing that an employer must in all cases indemnify an employee for losses caused by the former's want of ordinary care, although under § 1970 he is not liable unless he neglected to use ordinary care in the "selection" of the negligent employee. *Gier v. Los Angeles Consol. Electric R. Co.* (1895) 108 Cal. 129, 41 Pac. 22.

A case which seems to be wholly opposed to the general current of authority is *Texas & N. 48 L. R. A.*

O. R. Co. v. Tatman (1895) 10 Tex. Civ. App. 434, 31 S. W. 833, where it was held, for reasons which are not explained in the opinion, that the mere fact that a railroad company knows that its servants are negligent and careless will not render it liable to one for injuries inflicted on another by such negligence. This ruling is certainly wrong unless the court intended to make a distinction between habitual and isolated acts of negligence. See *infra*, II., g.

On the other hand, in the absence of evidence that he possessed such knowledge, the master is, as a matter of law, deemed to be free from culpability. *Reiser v. Pennsylvania Co.* (1892) 152 Pa. 38, 25 Atl. 175; *Mulhern v. Lehigh Valley Coal Co.* (1894) 161 Pa. 270, 28 Atl. 1087 (a case under the mining law); *Louisville & N. B. Co. v. Kelly* (1871); 24 U. S. App. 103, 63 Fed. Rep. 407, 11 C. C. A. 260; *Union P. R. Co. v. Milliken*, 8 Kan. 647; *Galveston, H. & S. A. R. Co. v. Faber* (1885) 63 Tex. 344 (1889) 77 Tex. 153, 8 S. W. 64; *Conrad v. Gray* (1895) 109 Ala. 130, 19 So. 398; *St. Louis Press Brick Co. v. Kenyon* (1893) 57 Ill. App. 640.

A special verdict which does not find, as facts, that the delinquent servant was incompetent, and that the master knew of his incompetency, will not support a judgment for the plaintiff. *Evansville & T. H. R. Co. v. Tohill* (1895) 143 Ind. 49, 41 N. E. 709.

In this instance, as in the case of the other instrumentalities of the business, the knowledge or ignorance contemplated by the law connotes the situations in which the master could or could not, by the exercise of due care, have ascertained the servant's unfitness. *Chicago, R. I. & P. R. Co. v. Doyle* (1877) 18 Kan. 58; *Cameron v. New York C. & H. R. R. Co.* (1894) 77 Hun. 519, 28 N. Y. Supp. 898; *East Tennessee, V. & G. R. Co. v. Gurley* (1883) 12 Lea, 46; *Blake v. Maine C. R. Co.* (1879) 70 Me. 60, 35 Am. Rep. 297.

An allegation that the master knew of the delinquent servant's incompetency is sustained by proof that it ought to have been known. *Chicago, R. I. & P. R. Co. v. Doyle* (1877) 18 Kan. 58.

A verdict for the plaintiff will not be set aside where one of the plaintiff's coservant's gave evidence that the delinquent servant had been intoxicated in the master's presence, while engaged in his duties, and another that he had been so drunk on one occasion as to be compelled to leave his work and go home, and the superintendent testified that he had seen the servant drunk several times, and did not state that these were not times when the servant

plaintiff's case, and again at the close of the whole case, the defendants separately demurred to the evidence. The court overruled the demurrer, and defendants excepted.

Defendant asked, and the court refused to give, the following instructions: "(3) The court instructs the jury that notice to or knowledge by a fellow servant of plaintiff of the incompetency of Grant Sheldon is not notice to the defendant railway company; and notice to the head hostler or crew foreman of the defendant of the incompetency of Sheldon was not of itself notice to said defendant, unless said head hostler or crew foreman had power to employ or discharge said Sheldon. (4) The court instructs the jury that plaintiff and Grant Sheldon, under the evidence in this case, were, at the time of the injury, fellow servants with each other, and plaintiff cannot recover for any

negligent act of said Grant Sheldon, and that the only ground on which plaintiff can recover is that the defendant railway company was negligent in employing said Sheldon, or was negligent in retaining him in its employ, after notice to it that he was habitually careless and incompetent to perform the duties he was employed or directed to perform, or after it might have learned of such alleged incompetency or carelessness by the use of reasonable care." At the instance of the plaintiff the court gave the following instruction: "The court instructs the jury that any foreman for the master, though not the head foreman, is vice principal as to a servant, if he has the control of the work in which the servant is engaged, and is the person intrusted by the master with authority to direct the servant how, when, and where to work. You are therefore instructed that

was at his work. *McPhee v. Scully* (1895) 163 Mass. 216, 39 N. E. 1007.

In *Chapman v. Erie R. Co.* (1874) 55 N. Y. 579, evidence that a negligent servant had been in the habit of drinking daily many times, and had become somewhat dissipated, and that he was intoxicated on the night of the accident, was held sufficient, in connection with testimony that the master's representatives had been accustomed to daily intercourse with him and had seen him in drinking places, and on some occasions when he drank, and that one of them had reprimanded him for drinking, to justify a verdict against the master, though the evidence was somewhat in conflict.

Evidence that a servant was intoxicated as often as two or three times a week for a period of nearly two years before the accident, during which he had been working for the defendant, and that the latter's superintendent was at the place of work every other day, was held to make a question for the jury as to the master's knowledge, or means of knowledge, of the servant's habits. *Tennessee v. Ross* (1890) 58 Hun, 415, 12 N. Y. Supp. 150.

A verdict finding negligence of the employer in failing to learn of an engineer's habit of intoxication was sustained in *Hilts v. Chicago & G. T. R. Co.* (1885) 55 Mich. 437, 21 N. W. 878, where there was a special finding that he had been intoxicated, or under the influence of liquor, three times when running his engine.

See also the cases cited under the following sections, I. f, and g.

But it is obvious that the responsibilities which arise out of the employment of a rational living creature as an industrial agency must in some respects be essentially different from those which attend the use of an inorganic instrumentality, or of an animal which, for juridical purposes, is regarded as a mere chattel devoid of reasoning capacity. This difference is reflected in the nature of the master's obligations with regard to ascertaining the qualifications of his servants, both at the time they are hired and while they are at work.

f. Duty to inquire into the fitness of a servant at the time he is hired.

Although an employer is to a great extent entitled to act upon the assumption that instrumentalities purchased from persons whose business it is to manufacture them are in a sound condition when they are first put in use, he clearly would not be justified in acting upon the assumption that a servant who seeks a position is qualified for it. It is therefore well established that, where the service in

which the servant is employed is such as to endanger the lives and persons of coemployees, the master, upon engaging such servant, is required to make reasonable investigation into his character, skill, and habits of life. *Western Stone Co. v. Whalen* (1894) 151 Ill. 472, 38 N. E. 241; *s. p. Mann v. Delaware & H. Canal Co.* (1883) 91 N. Y. 495; *Norfolk & W. R. Co. v. Nuckols* (1895) 91 Va. 193, 21 S. E. 342; *Chicago & G. E. R. Co. v. Harney* (1867) 28 Ind. 28, 92 Am. Dec. 282; *Alabama & F. R. Co. v. Waller* (1872) 48 Ala. 459.

Except where the work is of a simple kind, which anyone of fair intelligence and requisite physical ability is competent to perform. *Timm v. Michigan C. R. Co.* (1893) 98 Mich. 226, 57 N. W. 116 (loading ties on a handcar). Whether the master at the time of engaging the servant, or afterwards, ought to have inquired whether he was experienced or not, or should have taken notice, under all the facts, of the probability that he was not, nothing being said on the subject by either party,—is a question for the jury. *May v. Smith* (1893) 92 Ga. 95, 18 S. E. 360.

This investigation need not necessarily assume the form of questioning an applicant for work as to his competency. An omission to do this is negligence only when there is no better source of information at hand, and cannot be imputed as culpable where information is sought from the applicant's former employer. *Gier v. Los Angeles Consol. Electric R. Co.* (1895) 108 Cal. 129, 41 Pac. 22.

It is competent to show what the servant's previous record with other employers has been, as it is for the jury to say whether such facts might not have been known to the master, if he had made proper inquiry. *Baltimore & O. R. Co. v. Camp* (1895) 31 U. S. App. 213, 65 Fed. Rep. 952, 13 C. C. A. 235.

On the other hand, the employer's duty is fully discharged if "he makes careful inquiry into the habits and competency of the men employed, and upon such inquiry believes, and has reason to believe, them sober and competent and careful. *Moss v. Pacific R. Co.* (1872) 49 Mo. 167, 8 Am. Rep. 126. See *Indiana Mfg. Co. v. Millican* (1882) 87 Ind. 87; *Baltimore & O. R. Co. v. Henthorne* (1896) 43 U. S. App. 113, 73 Fed. Rep. 634, 19 C. C. A. 623; *Fines v. Silberry* (1893) 73 Hun, 549, 26 N. Y. Supp. 181.

It is not the duty of the master to ascertain the qualifications of a servant "as a fact," for the imposition of such an obligation would be tantamount to a requirement that his qualifications should be warranted. *Illinois C. R. Co. v. Morrissey* (1891) 45 Ill. App. 127.

if you believe, from the evidence, that, prior to the injury of plaintiff, Peter Stringer had control and direction of the men engaged in performing the work in and about the round-house in Monett, Missouri, and was intrusted by the defendant with authority to direct the said persons so working for said defendant when and where to work, then the knowledge of Peter Stringer would be the knowledge of the defendant."

There was a verdict for the plaintiff for \$2,637 against all the defendants personally, and after due steps the defendants appealed to the St. Louis court of appeals, which court transferred the case to this court. The trial took place at the December term, 1895, and afterwards, at the May term, 1896, on motion of the plaintiff, and notice to defendants, the court amended the judgment *nunc pro tunc* so as to provide that the judgment

should be entered against the defendant company, and that such judgment be certified to the defendant receivers, "to be satisfied out of any fund that may be liable to same."

Mr. L. F. Parker, for appellants:

The presumption is that the railway company exercised due care in Sheldon's selection and employment, and that it had no knowledge of his incompetency or lack of skill.

1 Bailey, Master & Servant, § 1418; *Blake v. Maine C. R. Co.* 70 Me. 60, 35 Am. Rep. 297; *Roblin v. Kansas City, St. J. & C. B. R. Co.* 119 Mo. 476, 24 S. W. 1011.

The evidence is not sufficient to show that Sheldon was either incompetent or unskilful.

Dusart v. Kansas City, Ft. S. & M. R. Co. 145 Mo. 88, 46 S. W. 751.

Carelessness and inattention on the part

out ascertaining what his knowledge or experience is, constitutes negligence as matter of law. *Vitto v. Farley* (1895) 15 Misc. 153, 86 N. Y. Supp. 1105.

On the duty to instruct servants, see also note to *James v. Rapides Lumber Co.* (1898; La.) 44 L. R. A. 33.

g. Duty of the master to keep himself informed as to the fitness of a servant already in his employment.

The consequences of the essential difference between the situations in which the master is utilizing the work of human beings and of other appliances are still more conspicuous when we come to consider his duties with regard to keeping himself informed as to the fitness of servants after their employment. That he is bound to do this, so far as it can be accomplished by proper supervision and superintendence, is well settled. *Baltimore & O. R. Co. v. Henthorne* (1896) 43 U. S. App. 113, 73 Fed. Rep. 634, 19 C. C. A. 623; *Norfolk & W. R. Co. v. Nuckols* (1895) 91 Va. 193, 21 S. E. 342; *Ohio & M. R. Co. v. Collarn* (1881) 73 Ind. 261, 38 Am. Rep. 134; *Wabash R. Co. v. McDaniels* (1883) 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932; *Holland v. Tennessee Coal, I. & R. Co.* (1890) 91 Ala. 444, 12 L. R. A. 232, 8 So. 524; and the cases cited under the following sections.

A plea that the company had exercised ordinary care and diligence to secure a skilful engineer who was reputed to be careful and skilful, and supposed to be such at the time of the collision, is not good, as "supposed" means no more than "believed." *Alabama & F. R. Co. v. Waller* (1872) 48 Ala. 459.

But the rule of conduct based upon the physical law that inorganic appliances are constantly tending to deteriorate with use finds no analogy in cases where it is a question whether the master should have known of a servant's unfitness.

On the contrary, when suitable and competent persons have been employed, good character and proper qualifications may be presumed to continue, and the master may rely on that presumption until notice of a change. *Blake v. Maine C. R. Co.* (1879) 70 Me. 60, 35 Am. Rep. 297; *Michigan C. R. Co. v. Dolan* (1875) 32 Mich. 510; *Michigan C. R. Co. v. Gilbert* (1881) 46 Mich. 176, 9 N. W. 243; *Lake Shore & M. S. R. Co. v. Stupak* (1889) 123 Ind. 210, 23 N. E. 246.

In *Chapman v. Erie R. Co.* (1874) 55 N. Y. 579, the defendant complained of the following charge: "But if, after a competent and proper

An employer is also bound to institute affirmative inquiries in order to ascertain the qualifications of a servant whom he promotes to a position for which special qualifications are demanded, unless the servant has given proof of his capacity in some similar position. *Evansville & T. H. R. Co. v. Guyton* (1888) 115 Ind. 450, 17 N. E. 101. There the court, in commenting upon the evidence which was held to justify the jury in finding the defendant liable for the negligence of a conductor whom it had promoted without the usual examination, said: "It should be remembered that Stice [the conductor] had served the company as brakeman until quite recently before the unfortunate accident, and while his service as brakeman is not to be disregarded in determining his competency to act in the more responsible position of conductor. It does not follow, without more, that because he was an efficient and competent brakeman, and fit for promotion, he was also competent to take charge of and run a wild train."

It should be noted that, where the injury in suit is one resulting, not from the unfitness of a fellow servant, but for the unskilfulness of the plaintiff himself, the obligations of the master as to inquiry are determined upon another footing.

Some of the cases involving this feature have been made to turn upon the principle (which is not here discussed at length) that, if a person of apparently full age and complete understanding undertakes certain duties, he is presumed to appreciate and accept the risks incident to those duties. This principle is the basis of the doctrine that an employer who is hiring a man twenty years of age is not bound to examine him as to his experience and capacity with a view to ascertain whether he needs instruction as to the dangers of the work. *O'Neal v. Chicago & I. Coal R. Co.* (1892) 132 Ind. 110, 31 N. E. 669; *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151, 5 N. E. 187.

Another theory is that, by applying for work, a servant holds himself out as possessing competent knowledge and skill, and that, if these qualifications are lacking, any injury which results from his unfitness is to be attributed to his own fault. *Huber v. Jackson & S. Co.* (1895) 1 Marv. (Del.) 374, 41 Atl. 92.

But these principles cease to be applicable where a servant hired for one kind of work is directed to perform some other requiring special skill.

Thus, the act of a foreman in directing a common laborer employed to break stone and drill holes, to draw a charge from a blast, with-
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of another servant is one of the assumed risks of the service.

Core v. Ohio River R. Co. 38 W. Va. 456, 18 S. E. 596.

No causal connection was shown between the allegation of negligence on the part of the railway company and the injury.

Harvey v. New York C. & H. R. R. Co. 88 N. Y. 481; 1 Bailey Personal Injuries, § 1446.

Notice of the incompetency of a fellow servant must be had by one who has authority in the premises to bind the master.

Reiser v. Pennsylvania Co. 152 Pa. 39, 25 Atl. 175; *Wabash Western R. Co. v. Brown*, 31 U. S. App. 192, 65 Fed. Rep. 941, 13 C. C. A. 222; *Ohio & M. R. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134.

A receiver cannot be sued, as such, in any other tribunal than the one by which he is

appointed, without first securing permission of that court.

Beach, Receivers, 2d ed. pp. 697, 698; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Turner v. Hannibal & St. J. R. Co.* 74 Mo. 602; *Heath v. Missouri, K. & T. R. Co.* 83 Mo. 617; *Fullerton v. Fordyce*, 121 Mo. 1, 25 S. W. 587.

An exception to this rule, as to suits against receivers appointed by courts of the United States, is made by act of Congress March 3, 1887, 24 Stat. at L. p. 554, as to a cause of action "in respect of any act or transaction" of the receivers; but as to all other actions the rule remains the same.

The injury to plaintiff occurred before the receivers were appointed, and created no cause of action against them.

Decker v. Gardner, 124 N. Y. 334, 11 L. R. A. 480, 26 N. E. 814; *Pringle v. Wool-*

person is employed for such a duty, his habits become such that it is unsafe to trust him any longer in that capacity, the company are bound to use, through their proper officers, such reasonable care and diligence in ascertaining what the man is, after he is employed, as they would be in his original employment." The court of appeals upheld the objection, saying: "Good character and proper qualifications, once possessed, may be presumed to continue, and I see no reason why a principal may not rely upon that presumption as to these personal qualities until he has notice of a change, or knowledge of such facts as would be deemed equivalent to notice, or at least such as would put a reasonable man upon inquiry. The charge permitted the jury, without restriction or limit, to determine what particular supervision or watchfulness was necessary to exonerate the defendant from the charge of negligence. They might require periodical investigations, or an efficient detective system. They were at liberty to adopt any rule, and might adopt one which would practically make the defendant a guarantor of the correctness of every act of its employees. We have been referred to no authority for such a doctrine, and it would be manifestly unjust to adopt it." The court held that reasons for inspection of machinery or implements are not applicable to the case of an employee, and said: "If competent when employed, additional experience would naturally render him more so, and while his habits might change for the worse, there is no such depravity in human nature as in law requires special vigilance on the part of the employer to prevent it."

Even after a notification that the servant has become unfit for his duties, the master is not ordinarily bound to discharge such servant without an investigation into such charge, unless such notice is accompanied by such evidence as leaves no doubt of the truth of such charge. A rule that would require the master to discharge a servant, careful and competent when employed, without investigation, upon a charge of carelessness, is deemed to be a harsh one, and would often result in great injustice to employees. *Lake Shore & M. S. R. Co. v. Stupak* (1889) 123 Ind. 210, 23 N. E. 246. In that case the material charge against the defendant was that, with notice of the negligence and carelessness of an engineer, it carelessly and negligently retained him in its service. The court said: "The jury found that the appellant had knowledge of the careless habits of Pool before the day on which the injury occurred, but this does not authorize us to say, 48 L. R. A.

as a matter of law, that it negligently retained him in its service after such knowledge."

All that the master is required to do when his attention is directed to circumstances indicating a diminution in the servant's efficiency is to make careful and frequent investigation as to the fact, if he retains him in his service. Whether he performs this duty is a question for the jury to pass upon. *Michigan C. R. Co. v. Gilbert* (1881) 46 Mich. 176, 9 N. W. 243.

II. Probative value of various facts as tending to show culpability on the master's part.

a. Incompetence of servant.

The principle that the gravamen of the action is negligence, that is, the employment of an unfit servant with knowledge, actual or constructive, of his unfitness (see *supra*, I. e) involves the corollary that a complaint is demurrable which merely alleges that it was the master's duty to employ careful and skillful servants, and that he failed to select those that were competent. A want of care and diligence in the selection should also be charged. *Moss v. Pacific R. Co.* (1872) 49 Mo. 167, 8 Am. Rep. 126.

That the gravamen of the action is negligence in the selection of the servant, see also *Stevens v. San Francisco & N. P. R. Co.* (1893) 100 Cal. 554, 35 Pac. 165.

As a general rule the master's knowledge must be proved by independent evidence, and cannot be inferred from the mere fact of the servant's unfitness, supposing that to be proved or admitted. *Roblin v. Kansas City, St. J. & C. B. R. Co.* (1893) 119 Mo. 476, 24 S. W. 1011 (incompetency said to be not even prima facie proof of negligence in employing the servant); *Thomas v. Herrall* (1890) 18 Or. 346, 23 Pac. 497.

An instruction is erroneous by which the master's liability for the negligence of a servant is made to hinge upon his competency alone. The essential question is whether the master used ordinary care to procure a competent person. *Tarrant v. Webb* (1856) 18 C. B. 797, 25 L. J. C. P. N. S. 281.

It is error to charge a jury that if a servant did not possess some indispensable qualification for his duties, this of itself showed the master to have been negligent, for it may be that all reasonable precautions were taken to ascertain his competency for the place, and that the master was nevertheless deceived. *Taylor v. Western P. R. Co.* (1873) 45 Cal. 323.

The only authority which distinctly countenances the doctrine that proof of the serv-

worth, 90 N. Y. 502; *Arnold v. Suffolk Bank*, 27 Barb. 424; *Re Dexterville Mfg. & Boom Co.* 4 Fed. Rep. 873; *Hiles v. Case*, 9 Biss. 549, 14 Fed. Rep. 141; *Central Trust Co. v. East Tennessee, V. & G. R. Co.* 30 Fed. Rep. 895; *Euston v. Houston & T. C. R. Co.* 38 Fed. Rep. 12; *Farmers' Loan & T. Co. v. Green Bay, W. & St. P. R. Co.* 45 Fed. Rep. 664; *Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co.* 46 Fed. Rep. 508.

Messrs. W. Cloud and J. T. Burgess, for respondent:

Where the master gives to a person power to superintend, control, and direct the men engaged in the work, such person is, as to the men under him, a vice principal, and a foreman who has charge of a gang of men, with power to direct their movements, is such vice principal. In this case Peter Stringer was night foreman of defendant's

roundhouse and yard, and in control of same; and notice to him of the incompetency and recklessness of said Sheldon to handle engines was notice to defendant company.

Dayharsh v. Hannibal & St. J. R. Co. 103 Mo. 570, 15 S. W. 554; *Schroeder v. Chicago & A. R. Co.* 108 Mo. 322, 18 L. R. A. 827, 18 S. W. 1094; *Bradley v. Chicago, M. & St. P. R. Co.* 138 Mo. 293, 39 S. W. 763; *Loe v. Chicago, R. I. & P. R. Co.* 57 Mo. App. 350.

Sheldon was incompetent to handle engines, and defendant knew of the same, or by the use of ordinary care could have known it; and yet, after knowing that fact, still it permitted him to so handle engines under protest from the company's employees.

Williams v. Missouri P. R. Co. 109 Mo. 475, 18 S. W. 1098; *Francis v. Kansas City, St. J. & C. B. R. Co.* 127 Mo. 658, 28 S. W. 842.

ant's unfitness renders it necessary to submit to the jury the question whether the master was negligent is *Skerritt v. Scallan* (1877) 1 Ir. Rep. 11, C. L. 389 (unskilful construction of scaffold), where the jury had specially found, among facts, that the delinquent co-servant was incompetent, but that the defendant was not aware of it, and the trial judge directed a verdict for the defendant. A new trial was awarded on the ground that the question whether the master had used due care in the selection of the servant had not been submitted to the jury. *Dowse, B.*, did not express a decided opinion as to whether the onus of proving negligence still lay on the servant after the incompetence of the delinquent servant was shown. *Palles, C. B.*, held that the onus of disproving negligence was transferred by such evidence to the master, adopting the theory of *Deasy, B.*, in *Murphy v. Pollock* (1863) 15 Ir. C. L. Rep. 224, that, as the mode and circumstances of the employment were matters peculiarly within the knowledge of the master, evidence showing that the delinquent fellow servant had started an engine after the plaintiff's decedent, who was killed by its exploding, had suggested that there was something wrong with it, was sufficient to be submitted to the jury on the question of his incompetency. *Fitzgerald and Hughes, B. B.*, intimated an opinion to the contrary, but held that, at all events, it was not evidence of negligence in selecting the servant.

In Minnesota it has been held that proof that the servant was incompetent at the time of his employment casts upon the master the burden of disproving negligence. *Crandall v. McIlrath* (1877) 24 Minn. 127.

This rule, however, is subject to a qualification analogous to that which, in the case of injuries caused by inanimate agencies, is created by the doctrine of *res ipsa loquitur*.

An instruction which declares, without qualification, that negligence in hiring a servant cannot be inferred merely from the fact of his incompetency, is erroneous, as there may be a degree of incompetency which, of itself, might justly be regarded by the jury as imparting notice. *East Tennessee, V. & G. R. Co. v. Gurley* (1883) 12 Lea, 46. Compare *II. g. infra*, as to acts prior to accident.

Another qualification also arises in practice from the fact that "the testimony by which the incompetency of a servant is established may be such as to warrant the inference that the master had notice of his incompetency, or that he omitted to make such inquiries as common prudence would have dictated." *Murphy v. St. Louis & I. M. R. Co.* (1879) 71 Mo. 202. 48 L. R. A.

In one case it was said that, in the absence of evidence as to the exercise of any care in his selection, proof that a servant who had been in the service but two or three weeks was incompetent when employed need not be supplemented by proof of the company's knowledge of his incompetency, the presumption that the employer had done his duty being overcome by proof that the servant was incompetent; and the general rule was laid down as follows: Where one competent at the time of his employment becomes incompetent, or indulges in a habit which renders him incompetent during its indulgence, notice of the incompetency or of the habit must be brought home to the company, or the incompetency or habit must be so notorious as to charge the company with knowledge; but when the incompetency does not arise after the employment, but existed at the time, proof of notice is not necessary. *Lee v. Michigan C. R. Co.* (1891) 87 Mich. 574, 49 N. W. 909.

b. Race and color of delinquent servant.

Notice of a servant's want of competency for the duties of a brakeman cannot be imputed to an employer from the fact that he is a negro. *Missouri P. R. Co. v. Christman* (1886) 65 Tex. 369. The court said: "The competency or incompetency of no one to perform a given duty, in the absence of some law so declaring, can be made to depend on color or race; but in each case this must depend upon intelligence to know, and ability and disposition to perform, the duties pertaining to any given position. Proof of facts which show the non-existence of such intelligence, ability, or disposition must be made by the party who asserts its nonexistence." The law does not presume it because the person whose qualities may be the subject of investigation may be of one or another race or color; nor is a jury at liberty to infer it from such fact. If, however, this were not true, and the rule were that a jury might infer that a person was an unsuitable person for brakeman from the fact that he was a negro, then such inference would have to be based on the fact that all negroes are wanting in intelligence, ability, or disposition to perform faithfully and safely the duties of brakeman. If this were true, the appellee would stand charged with knowledge of their unfitness, and, knowing that the brakemen on his train were negroes, would be held to have voluntarily assumed such risks as result from such incompetency. The invocation of such a rule would be suicidal to the appellee's case."

Evidence of the general reputation of an employee showing unfitness for the duties assigned the employees, and specific acts of negligence or of incompetency on the part of such employee, with evidence of knowledge thereof on part of the master, is competent to go to the jury.

Grube v. Missouri P. R. Co. 98 Mo. 330, 4 L. R. A. 776, 11 S. W. 736.

Allowing a person, not having the qualifications, to handle an engine, renders the company responsible for the negligence of the foreman in allowing such person to handle the engine, from which an injury results.

Harper v. Indianapolis & St. L. R. Co. 47 Mo. 567.

Marshall, J., delivered the opinion of the court:

1. This proceeding against the receivers

c. Appearance and manner of the servant while testifying.

That the appearance and manner of the servant while testifying do not constitute circumstances from which, apart from other evidence, a jury ought to be allowed to infer that he was unfit for his duties, is a rule no less conformable to principle than to authority.

In *Corson v. Maine C. R. Co.* (1884) 76 Me. 244, the court held that if the jury undertook to decide that a person was unfit to be employed as a brakeman on account of what they saw, or supposed they saw or could read, in his face and manner while testifying before them as a witness, they fell into a very grave error, and said: "As well might a jury find a man guilty of murder because in their opinion they could see guilt in his face." The law does not recognize physiognomy as an art or science sufficiently reliable to found a verdict upon,—not even against a railroad corporation." In *Keith v. New Haven & N. Co.* (1885) 140 Mass. 175, 3 N. E. 28, the court declined to rule that the appearance and conduct of a car inspector in the presence of a jury, when considered together with other testimony tending to show his unfitness, might not be legally sufficient to satisfy them that he was an incompetent person. In *Peaslee v. Fitchburgh R. Co.* (1890) 152 Mass. 155, 25 N. E. 71, it was argued that the jury had a right to determine from the appearance of a witness that he was so manifestly incompetent that the defendant was negligent in employing him as engineer. The court said there was nothing in the exceptions to show that there was anything in his appearance that would justify such an inference, and that it could not be presumed that there was. *Keith v. New Haven & N. Co.* (1885) 140 Mass. 175, 3 N. E. 28, was distinguished on the ground that there was other evidence of incompetency in that case, while in the case at bar the only evidence of incompetency was the single act of negligence.

But it would seem that, even in cases where there is corroborative evidence, the risk that injustice may result from such a doctrine in its practical operation is very considerable.

Men who, as employees, may be perfectly efficient, often appear to great disadvantage as witnesses, when under the influence of the nervous embarrassment which is apt to be produced in a greater or less degree by the unfamiliar surroundings of a courtroom. At the very most, it is submitted, a jury should not be allowed to draw any conclusions from their view of a witness, except in the most extreme cases of glaring mental and physical defects which 48 L. R. A.

appointed by the circuit court of the United States for the eastern district of Missouri is without any permission or authority from that court, and hence cannot be maintained. The cause of action did not arise or accrue while the receivers were in charge of and conducting the business, and therefore the plaintiff does not come within the provisions of the act of March 3, 1887 (24 U. S. Stat. at L. p. 554). The accident complained of occurred on the 20th of October, 1893, and the receivers were not appointed until December 23, 1893. Receivers are officers of court to hold and manage property which is in the registry of the court, and persons having any claim to property so situated must submit their claims to the court that has obtained jurisdiction over the res, and the court will not permit its officers to be sued in any other tribunal without its

any reasonable person would concede to be incompatible with efficiency. But even in these cases, it would, upon general principles, be necessary to show by independent testimony that the defects existed at the time of the accident. It is difficult, therefore, to see why, if that testimony must ultimately be relied upon, the jury should be permitted at all to consider the demeanor and appearance of the delinquent servant on the witness stand. The obvious perils of the doctrine applied by the Massachusetts court do not seem to be counterbalanced by the consideration that the circumstances which it introduces into the case possess some probative force.

d. Language of delinquent servant himself, indicating recklessness of character.

In a suit against a railroad company by a brakeman, to recover damages for injuries received while coupling cars, evidence that the engineer, shortly before, had declared to the plaintiff that he "would as soon run over him as not," is admissible as bearing upon the question whether the company selected an unsuitable man for engineer, but the jury should be charged that, if the malice of the engineer toward the plaintiff was the cause of the injury, there could be no recovery. *Houston & T. C. R. Co. v. Willie* (1880) 53 Tex. 318, 37 Am. Rep. 756.

e. Minority.

The fact that the delinquent servant was a minor is an important, though not decisive, element in the inquiry. Its evidential weight depends upon the character of the work to be done, the servant's previous experience, and his actual age.

Incompetency for the duties of telegraph operator cannot be inferred from the mere fact that the servant was seventeen years old, when it is also in evidence that he has discharged his duties efficiently for a year, and that young men are generally better operators than old ones. *Sutherland v. Troy & B. R. Co.* (1891) 125 N. Y. 737, 26 N. E. 609.

The mere fact of employing a boy twelve years old for the purpose of running an elevator is not evidence from which a want of care in selecting a servant can be inferred. *Smillie v. St. Bernard Dollar Store* (1891) 47 Mo. App. 402 (dissenting, Thompson, J.).

A statute empowering mine owners to employ boys of a certain age does not create a presumption that any boy of that age is fit for his duties, but it is still permissible for the jury to

consent. This is not only a law of comity among courts, but is a jurisdictional necessity, for it is manifest that two courts could not, acting separately, successfully manage the property, or harmoniously distribute it. Beach, Receivers, Alderson's ed. §§ 229-240; Kerr, Receivers, 2d ed. pp. 196 *et seq.* The petition does not aver that the consent or permission of the United States circuit court to sue its receivers was asked or obtained before this action was begun, and there is a total lack of any evidence of such steps having been taken. The action cannot, therefore, be maintained, and the judgment against the receivers, or, as amended, that the judgment against the company be certified to the receivers, is reversed.

2. The case made against the defendant company by the pleadings is that it employed Grant Sheldon as a hostler at its roundhouse

at Monett, knowing that he was unskilful, and incompetent to handle an engine, or that it might have ascertained that fact by the exercise of ordinary care; and that the plaintiff, a locomotive fireman in the defendants' employ, was injured, while in the discharge of his duty, by the carelessness of said Sheldon in starting the engine to which plaintiff was attached as such fireman, without ringing the bell or sounding the whistle. This is the substance of the first count. The second count is the same, except that it contains an averment that the engine was in a defective or dangerous condition; but, as there is no evidence to support that averment, and no instructions were asked by the plaintiff predicated a right to recover upon the defective or dangerous condition of the machinery, the plaintiff must be regarded as having abandoned that count. We will

consider the boy's size, age, previous experience, strength, and intelligence, and the fact that he was kept at his post thirteen hours a day. *Carlson v. Wilkeson Coal & Coke Co.* (1898) 19 Wash. 473, 53 Pac. 725.

The mere fact that the servant is under fourteen years of age will not justify the inference that he is incompetent, where the duties to be performed are of a simple character, such as repeating to the engineer of the hoisting machinery above a quarry the signals received from the men in the quarry. *Rickert v. Stephens* (1890) 133 Pa. 538, 19 Atl. 410 (evidence that such work was done by boys).

1. Previous experience of the servant.

Whether the master is chargeable with negligence on the ground that he should have seen that the servant's previous experience was not such as to qualify him for the duties to which he was assigned is a question the answer to which is obtained by considering two variable factors, *viz.*, the character of the duties, and the extent of the servant's experience in the same or similar duties. It is manifest that a question dependent upon factors which may assume such infinitely diverse forms as these is pre-eminently one for the jury.

What time or training is requisite to make one a competent engineer is a question of fact solely. Hence it is error to instruct a jury that "proof of the employment of one who had always been a manual laborer or a mule driver to run a steam engine raises a presumption of negligence of the master, without showing that he had actual notice of the servant's antecedents." *Joch v. Dankwardt* (1877) 85 Ill. 331.

This instruction, which follows the rule formulated in *Shearman & Redfield on Negligence*, § 123, was, however, approved by the court, *arguendo*, in *Harper v. Indianapolis & St. L. R. Co.* (1871) 47 Mo. 567, 4 Am. Rep. 353.

The commentator, therefore, can do little more than indicate the broad category under which the cases fall, and state the effect of the rulings under each head.

In some cases the propriety of requiring that the servant shall have had some practical experience, or been in a position in which he had an opportunity of observing others do the work, is too manifest to be a matter of doubt.

If the employment demands special knowledge or experience, only men of special knowledge and experience should be employed. *Holland v. Tennessee Coal, I. & R. Co.* (1890) 91 Ala. 444, 12 L. R. A. 232, 8 So. 524.

It is negligence to intrust the handling of a dangerous material, like dynamite, to inexperienced workmen. *Stewart v. New York, O. & W. R. Co.* (1889) 54 Hun. 638, 8 N. Y. Supp. 19 (verdict for plaintiff warranted by evidence that the foreman in charge for the day was a stone mason with an imperfect knowledge of the properties of dynamite).

The master may properly be found negligent where common laborers, engaged in stowing stone posts in a schooner, were charged with the duty of securing the platform, and allowed to select the gear, without instruction, and there is no evidence that they possessed the requisite skill, intelligence, or care. *Donnelly v. Booth Bros. & H. I. Granite Co.* (1897) 90 Me. 110, 37 Atl. 874.

On the other hand, negligence on the master's part is not established where the only testimony as to incompetency is that of the delinquent servant himself, who admitted on cross-examination that he had never done any wiring of holes loaded with dynamite, and had not had charge of deep drilling and dynamite blasting with electricity, but also testified that he knew how it ought to be done. *O'Neill v. O'Leary* (1895) 164 Mass. 387, 41 N. E. 662.

The incompetency of a servant may arise from the fact that he has not worked at the employment for several years, as well as from unfamiliarity with it. *Curran v. A. H. Stange Co.* (1898) 98 Wis. 598, 74 N. W. 377.

But if the work may be well done by the unskilled and inexperienced, it cannot be said that the master is lacking in the measure of care he owes to other employees, if he employs unskilled and inexperienced men upon it. *Holland v. Tennessee Coal, I. & R. Co.* (1890) 91 Ala. 444, 12 L. R. A. 232, 8 So. 524.

It is not negligence to employ other employees to employ a man twenty-two years of age, physically and mentally qualified for the business, to assume the active duties of brakeman, merely because he has not yet had experience. *Gorman v. Minneapolis & St. L. R. Co.* (1889) 78 Iowa, 509, 43 N. W. 303.

Complaint by a yard switchman, charging incompetency of the fireman through failure to understand signals, and alleging his inexperience, is sufficient as to the allegation of his incompetency. *Galveston, H. & S. A. R. Co. v. Eckols* (1894) 7 Tex. Civ. App. 429, 26 S. W. 1117.

A verdict for the plaintiff has been set aside where the evidence showed that such fellow servant was an intelligent man, that the duties of a signalman and a switchman which he was discharging when the accident occurred were so simple that, according to the testimony of one witness, they could be learned in one or two days, or, according to the testimony of another

therefore treat the case as resting upon the first count only. The evidence wholly failed to support the allegation that Sheldon was employed by defendant as a hostler. On the contrary, all the evidence shows that he was employed as a wiper or fire puller, and that the rules of the company positively prohibited a wiper or fire puller to move an engine under any circumstances, except in the immediate presence and under the direction of a hostler who was on the engine. The plaintiff produced some evidence that on at least one occasion before this accident Sheldon did move an engine, and backed it into another engine; but there is no evidence that the company, or any of Sheldon's superior officers, knew of this fact, and, on the contrary, the head hostler and the foreman both testify that they never knew of Sheldon moving an engine at any time before the acci-

dent. The plaintiff's witnesses Andrews, Loftin, and Coyle testify to hearing or making complaints against Sheldon, and that the fire pullers were afraid to go under the engine when he was moving it, but none of them would swear that this occurred prior to the accident to the plaintiff; and when it is remembered that the plaintiff was injured on the 20th of October, 1893, and that the trial at which this testimony was introduced took place on the 3d of January, 1896, the inability of the witnesses to locate these "talks" among "the boys," as to whether they were before the accident or afterwards, is easily understood. The witness Coyle also testified to hearing complaints made to Stringer, the head hostler, about Sheldon, but he was unable to state whether this was before or after the accident; he finally saying: "I do not know for certain. It was

witness, in two or three weeks; and that, previous to the accident he had been employed for three weeks in the yard and one week in the duties of switchman and signalman. *Deverill v. Grand Trunk R. Co.* (1866) 25 U. C. Q. B. 517.

Between these two extreme predicaments lie those in which some experience is admitted to be necessary, and the question presented is whether that which the servant has had is sufficient to qualify him for his duties. The following cases will indicate the views taken by the courts as to a variety of circumstances.

In *Bunnell v. St. Paul, M. & M. R. Co.* (1882) 29 Minn. 305, 13 N. W. 129, there was held to be sufficient evidence to sustain a verdict for the plaintiff where the testimony showed that the man hired as a foreman of carpenters had been in the defendant's employ only about four months before the accident caused by his negligence; that for three years before that time he had been in the insurance business; that he had never learned the carpenter's trade, and had, in all, never worked more than twelve weeks as a carpenter.

In *Gibson v. Northern C. R. Co.* (1880) 22 Hun, 289, a car inspector, who failed to discover and note a defect, was thirty-four or thirty-five years old, and had worked for three or four months in a railroad yard in Ireland, putting brasses into freight cars, but, with this exception, had been employed as a common laborer, and was not a mechanic, and was without knowledge of machinery up to the time of entering the service of the defendant. He worked in the defendant's carpenter shop, repairing cars, putting in brasses, bolting, and putting in boxes, and assisting in the shop, from one to two years, and was then made car inspector. His evidence showed clearly that he understood the details of his business, and appeared to have been given intelligently. It was held that negligence in employing him as a car inspector was not shown.

Incompetency to act as flagman for an approaching train at night-time may be properly found where the servant had had scarcely any experience as brakeman or flagman, had not been instructed as to the rule requiring the use of torpedoes, and had never flagged a train except once before, on which occasion he had been found fault with by defendant's conductor, and discharged for disobedience. *Mann v. Delaware & H. Canal Co.* (1883) 91 N. Y. 495.

Whether a railway company is liable for an injury caused by the unskillfulness of a yard conductor in turning a switch is for the jury, where the tracks are so complicated that without experience in the operation of the switches,

mistakes would be likely to be made, and the delinquent servant's duties as yard conductor only occasionally required him to turn the switches, and before his appointment to that position he had been engaged in coupling cars. *O'Loughlin v. New York C. & H. R. R. Co.* (1895) 87 Hun, 538, 34 N. Y. Supp. 297.

The fact that a man is competent for the general duties of a locomotive engineer will not excuse a railway company for an accident caused by his lack of knowledge and experience as to the road at the place where the accident occurred. *Missouri P. R. Co. v. Patton* (1894: Tex. Civ. App.) 25 S. W. 339. Affirmed in (1894: Tex.) 26 S. W. 978, where, however, this point was not discussed.

In *Wright v. New York C. R. Co.* (1858) 28 Barb. 50, the court expressed its dissatisfaction with a verdict finding that a man was not competent to act as engineer of a night train on the line between Rochester and Niagara, where the evidence was that he had served as an engineer some four years, and had been in the employ of the defendant nineteen months, but not on the section of the road in question; that he had, however, as engineer, run over the road a dozen times in the nineteen months, and had ridden on the cars at other times; and that he had run up to the bridge with a freight train, the night before; and several witnesses of the defendant, engineers, also state facts tending strongly to show that such an acquaintance with a road was amply sufficient. The court of appeals held that the man was certainly competent. (1862) 25 N. Y. 562.

The competency of a fireman to act as engineer on a run between stations is for the jury where the evidence is that he had been in the employment of the defendant several years, part of the time as a fireman, and at two different periods of about six months each had served as an extra engineer in charge of freight trains, but never as a regular engineer; that he had been over the section of the road on which the accident occurred about twenty-four times in all, in his service as an engineer, the last time about a month before the accident; that he had never inspected the switches or side tracks at the point where the accident occurred, so as to learn their exact location, and knew nothing on that subject except what he had noticed when he passed over them, and had been told by others; that he had had no experience in running an engine disabled as was the one which caused the injury, and had never observed the effect of such disability upon the holding power of an engine or the ability of those in charge of it to stop it; and that he had been examined when promoted to the posi-

on or about that time, to the best of my knowledge—about. It might have been prior to that, and it might have been afterwards, but it was about that time." When the evidence is analyzed, therefore, it amounts to this: That Sheldon was not employed as a hostler, as charged in the petition, but was employed as wiper or fire puller, and was prohibited by the rules of the company from moving an engine, except when a hostler was on the engine directing him; that neither the head hostler, nor the foreman had ever heard of Sheldon moving an engine before the accident; that Sheldon did move an engine once before the accident, but neither the head hostler nor the foreman ever heard of it; that the fire pullers and wipers complained about Sheldon, and at least one of them spoke to the head hostler about Sheldon, but it does not appear

that this was before the accident; that Peter Stringer was the head hostler, and directed the men around the roundhouse as to what work they should do, but that he had no power to employ or discharge anyone, and, if anything unusual occurred, he had to report to, and act under the orders of, Randall, who was the foreman and master mechanic, and whose office was within a few feet of the roundhouse, and who alone had power to employ or discharge the men.

The case was put to the jury by the court upon instructions which authorized a recovery by the plaintiff if the defendants employed Sheldon, and permitted him to move engines around the roundhouse or yards at Monett, and if Sheldon was unskilful or incompetent, and the defendant knew it, or by the exercise of reasonable care could have ascertained it, or kept him in its employ aff-

tion of engineer, but not upon that subject. *O'Laughlin v. New York C. & H. R. R. Co.* (1887) 9 N. Y. S. R. 884.

The negligence of the railway company is for the jury where the evidence is that the accident occurred on the first occasion when he had charge of a train in the night-time; that, prior to the accident, he had had little or no experience as engineer, except such as he derived from making a few short trips by daylight; that he had also acted for a short time as fireman on day trips, and that the accident, a collision, might have been prevented if he had not neglected his duty to light the headlight. *Newell v. Ryan* (1886) 40 Hun, 286.

A railroad engineer is presumably a competent person to inspect an engine to see if it is in such repair as to prevent the escape of fire. *Menominee River Sash & Door Co. v. Milwaukee & N. R. Co.* (1895) 91 Wis. 447, 65 N. W. 176.

The principle governing the liability of a railway company for injuries caused by the incompetency of a fireman who has been temporarily permitted to handle an engine for switching, and similar work, has been formulated as follows:

"Railroad companies are not required to employ skilled engineers as firemen; and, if it is the prevailing custom of engineers to leave the firemen in charge of their engines when switching or similar work is to be done, then it is to be presumed that brakemen, when they engage or continue in their employment, do so with the knowledge of the custom, assuming the additional hazard that the custom involves, and can be entitled to compensation from the company for injury caused by a fireman's incompetent management of an engine only when his fitness was below what ought to be required of firemen." *Louisville & N. R. Co. v. Kelly* (1894) 24 U. S. App. 103, 63 Fed. Rep. 407, 11 C. C. A. 260. A requested instruction in this case, "that firemen after a certain period of service as firemen are promoted to engineers," was held objectionable because it assumes that such promotions of firemen to engineers were of uniform or at least customary occurrence "after a certain period of service as firemen," without regard to the capacity, habits, and temper of the particular individuals. The court says: "There was no proof of such custom; none such, of course, has ever prevailed."

One who has served as a fireman for a long time, and on several occasions has run an engine in a switchyard, is not to be deemed incompetent to act as engineer on a train in such yard because he is not regularly engaged as an engineer. *Ohio & M. R. Co. v. Dunn* (1894) 48 L. R. A. .

138 Ind. 18, 36 N. E. 702, Rehearing Denied in (1894) 138 Ind. 28, 37 N. E. 546.

Permitting a fireman who has been employed as a brakeman for six months and as a fireman for twenty months, and who has handled an engine more or less, to operate a switch engine in coupling cars, is not negligence which will render the company liable for injuries to a switchman by starting the engine too suddenly. *Thompson v. Lake Shore & M. S. R. Co.* (1890) 84 Mich. 281, 47 N. W. 584.

In *Norfolk & W. R. Co. v. Thomas* (1893) 90 Va. 205, 17 S. E. 884, a railroad company was held liable where the engineer in charge allowed a flying switch to be made by an inexperienced fireman, who had only been in service three or four weeks and never on a railroad before, and the conductor (a vice principal as to such matters in Virginia) knew he was running the engine.

Unfitness for the duty of handling a switch-engine is not proved where the servant had had two years' experience as fireman, and during that time had frequently been intrusted with switching. *East Tennessee, V. & G. R. Co. v. McKenney* (1886; Tenn.) 1 S. W. 500.

It is not negligence to promote a fireman to the post of engineer after he has been one year in the service, where the evidence is that two years' experience as fireman with the opportunities thus obtained, for learning an engineer's duties, is generally considered sufficient to qualify the fireman for those duties, and the representative of the railway company had good reason to suppose, from the familiarity with his work shown by the fireman in question, that he had had considerable previous experience under other employers. *Texas & N. O. R. Co. v. Berry* (1887) 67 Tex. 238, 5 S. W. 817.

Incompetency to act as engineer is not established where the servant has been fireman for four years, during which time he has frequently taken charge of the engine while the regular engineer was sick; and it also appears that from three to five years' service as fireman is all that is customarily required of a fireman before he is promoted. *Roblin v. Kansas City, St. J. & C. B. R. Co.* (1893) 119 Mo. 483, 24 S. W. 1011.

In *Chicago & E. I. R. Co. v. Beatty* (1895) 13 Ind. App. 604, 40 N. E. 753, 42 N. E. 284, a verdict for the plaintiff was sustained where the evidence tended to prove that the delinquent servant, an engine wiper, had some experience as a brakeman, and had, in other places, as well as in the defendant's yard, acted as hostler in running engines on switches to and from roundhouses, but had never had any

er it knew or might have known of his incompetency, and if Sheldon's incompetency or unskillfulness caused the injury to the plaintiff, and that, if Peter Stringer, the head hostler, had authority to direct the men in their work around the roundhouse, he was a vice principal, and his knowledge was the knowledge of the company. The instructions did not fit the issues, in that they did not require the jury to find that Sheldon was employed as a hostler. They simply required the jury to find that Sheldon was employed by the defendant, without specifying in what capacity, and then to find that the defendant permitted Sheldon to run engines around the roundhouse and yards; and, in order to carry knowledge of Sheldon's acts to the company, so as to draw the inference of a permission from the company, the fact that Stringer had the right to direct the

men around the roundhouse as to what work they should do was declared by the court to make Stringer a vice principal, so that his knowledge was the knowledge of the company; but neither this instruction, nor any other instruction given to the jury, required them to find that even Stringer knew that Sheldon had ever run an engine before the accident, or that Stringer had ever permitted Sheldon to do so. And the jury, if so required, could not have so found, for, as above pointed out, the evidence shows only one occasion prior to the accident when Sheldon ever moved an engine, and there is no evidence whatever that even Stringer ever heard of it, but, on the contrary, Stringer testified positively that he never had heard of it, and never had given him permission to do so, but that, on the contrary, the rules absolutely prohibited him from doing so.

other experience as a fireman or as an engineer; and the appellee introduced testimony tending to prove that, in order to qualify a man to handle engines in taking them to and from a roundhouse, he should have good judgment, and also two years' experience as a fireman, under the direction and supervision of a competent engineer.

Evidence which merely goes to show that a servant has been employed in an inferior capacity will not justify the inference that the master was negligent in employing him in a much higher capacity in the same line of business. *Edwards v. London & B. R. Co.* (1865) 4 Post. & F. 531; *s. p. Haskin v. New York C. & H. R. Co.* (1873) 65 Barb. 129, holding that the promotion of a car-coupler to the place of conductor in a yard is not of itself evidence of negligence, where his experience in the inferior positions has been such as to qualify him for the higher.

g. Acts of negligence prior to the accident.

(This and the following section should be compared with those dealing with the parallel case of the prior satisfactory and unsatisfactory operation of inanimate agencies.)

That neither evidence of one, nor of several, acts of negligence committed by a servant before that which caused the injury in suit is competent to show that the latter act was negligent, is perfectly plain upon general principles, and is not disputed. *Hatt v. Nay* (1887) 144 Mass. 186, 10 N. E. 807; *Connors v. Morton* (1894) 160 Mass. 333, 35 N. E. 860; *Baltimore Elevator Co. v. Neal* (1886) 65 Md. 438, 5 Atl. 338.

It has also been laid down broadly in several cases that a single prior act of negligence is incompetent as evidence to prove the unfitness of the servant. *Gallagher v. Piper* (1864) 16 C. B. N. S. 660, 13 L. J. C. P. N. S. 329; *Chapman v. Erie R. Co.* (1874) 55 N. Y. 579; *Holland v. Southern P. Co.* (1893) 100 Cal. 240, 34 Pac. 666; *Ohio & M. R. Co. v. Dunn* (1894) 138 Ind. 18, 36 N. E. 702, 37 N. E. 546; *Dallas City R. Co. v. Beeman* (1889) 74 Tex. 291, 11 S. W. 1102; *Houston & T. C. R. Co. v. Myers* (1881) 55 Tex. 110 (rule assumed *arguendo*); *McKeever v. Homestake Min. Co.* (1898) 10 S. D. 599, 74 N. W. 1053 (verdict rightly directed for defendant where the servant had made only one mistake during twelve years).

That notice of the prior act must in some way be brought home to the master before it can become a factor bearing upon the question of his negligence follows from the general principles stated *supra*, i. e. See *Mulhern v. Le-48 L. R. A.*

high Valley Coal Co. (1894) 161 Pa. 270, 23 Atl. 1087.

The receipt of information that the servant has been guilty of such an act is said merely to impose on the master the obligation of using ordinary care in investigating the cause of the accident and the competency of the servant, and acting with reference to his retention or discharge as reasonable prudence would dictate in view of the facts ascertained. If these facts prove to be such that a careful man would have considered himself justified in retaining the servant, no fault can be imputed to the master. *Baulec v. New York & H. R. Co.* (1872) 62 Barb. 623, Affirmed in (1874) 59 N. Y. 356, 17 Am. Rep. 325. In the opinion delivered in the lower court it was denied that "intelligent men of good habits who are engineers or brakemen or switchmen on railroads must inevitably be discharged . . . for the first error or act of negligence."

Though undoubtedly notice of the servant's lapse, if it is at all serious, will impose upon the master and his representatives the obligation of exercising increased vigilance in observing the servant's conduct afterward. *Chapman v. Erie R. Co.* (1874) 55 N. Y. 579.

This doctrine, however, holds good to its full extent only in cases where the act of negligence was casual or accidental. *Baulec v. New York & H. R. Co.* (1874) 59 N. Y. 356, 17 Am. Rep. 325, where the plaintiff was held to have been rightly nonsuited. The court said: "An individual who by years of faithful service has shown himself trustworthy, vigilant, and competent is not disqualified for further employment, and proved either incompetent or careless, and not trustworthy, by a single mistake or act of forgetfulness and omission to exercise the highest degree of caution and presence of mind. The fact would only show, what must be true of every human being, that the individual was capable of an act of negligence, forgetfulness, or error of judgment. This must be the case as to all employees of corporations until a race of servants can be found free from the defects and infirmities of humanity. A single act may, under some circumstances, show an individual to be an improper and unfit person for a position of trust, or any particular service, as when such act is intentional and done wantonly, regardless of consequences, or maliciously. So the manner in which a specific act is performed may conclusively show the utter incompetency of the actor, and his inability to perform a particular service. But a single act of casual neglect does not, *per se*, tend to prove the party to be careless and imprudent, and unfit for a position requiring

The case presented therefore does not show that the company employed Sheldon as a hostler, or that it ever permitted him to run an engine, or ever heard of his doing so, before the accident, and that the rules prohibited his moving an engine. Sheldon was employed as a wiper or fire puller, and there is no pretense that he was incompetent to do that work. There was, therefore, no evidence upon which to predicate the instructions given for the plaintiff. The third instruction given for the plaintiff lacked the essential element of requiring the jury to find that Stringer knew of Sheldon's incompetency to move an engine, and that Stringer permitted him to do so; and the jury could not so find because there was no evidence whatever adduced upon which the jury could have so found, but the evidence was all to the contrary. The instructions were fur-

ther erroneous in that, while not being consistent with the issues as to Sheldon's employment as a hostler, and not specifying in what capacity Sheldon was employed, and assuming that there was evidence that defendant permitted him to move engines, and while declaring that, because Stringer directed the work of the men around the roundhouse, he was a vice principal, and without requiring the jury to find that Stringer had any knowledge that Sheldon ran engines, or that he was incompetent, it was declared that Stringer's knowledge was the knowledge of the company.

It might be sufficient now to say that, if all the knowledge that Stringer is shown by this record to have had is assumed to have been possessed by the company, it would not make out a case against the defendant, for it would amount only to this: That Sheldon

care and prudence. Character is formed and qualities exhibited by a series of acts, and not by a single act. An engineer might from inattention omit to sound the whistle or ring the bell at a road crossing, but such fact would not tend to prove him a careless and negligent servant of the company. The company is only charged with the duty of employing those who have acquired a good character in respect to the qualifications called for by the particular service, and no one would say that a good character acquired by long service was destroyed or seriously impaired by a single involuntary and unintentional fault. In *Walker v. Bolling* (1853) 22 Ala. 294, Phelan, J., declares that the master will be responsible for the negligence of a general manager in employing or retaining incompetent subordinates.

The incompetency of a fireman for the duties of an engineer cannot be predicated on the ground that he failed, while the train was running between stations, to notice a signal to stop, given from the rear of the train. *Core v. Ohio River R. Co.* (1893) 38 W. Va. 456, 18 S. E. 596.

The mere fact that a yard master had sent an engine upon the track when a coming train was overdue does not conclusively show that the company was negligent in keeping him in its service, since he might have had information showing that the train would not arrive for some time. *Michigan C. R. Co. v. Gilbert* (1881) 46 Mich. 176, 9 N. W. 243.

It must necessarily be subject to a qualification similar to the one noted above in discussing the evidential weight of the servant's incompetency, since even a single careless act may sometimes be of such a nature as, not only to indicate that the servant is unfit for his duties, but that the master will be culpably negligent if he does not discharge him immediately after the delinquency comes to his knowledge. See *Evansville & T. H. R. Co. v. Guyton* (1888) 115 Ind. 450, 17 N. E. 101, putting the case of carelessness so extreme as to allow two trains to meet while running in opposite directions on the same track.

In another case it was said that, although a single act of a locomotive engineer in running a train 12 miles in forty minutes, while the schedule time is one hour, and a portion of such distance at 40 or 45 miles an hour, in daylight and without accident or injury to anyone, did not necessarily show him to be unfit or reckless of the lives of employees at work upon the track, yet this inference might perhaps have been justifiable if it had been shown that the want of accident on such run was due more to chance or good fortune than the management 48 L. R. A.

of the engine and the actual condition of the road, and that men working upon the track could not have been easily seen or had time to escape after being warned of the approach of the train. *Holland v. Southern P. R. Co.* (1893) 100 Cal. 240, 84 Pac. 666.

Especially is it legitimate to draw the inference of unfitness where the dereliction of duty was one which the physical qualities of the servant rendered extremely probable.

The negligence of a railway company is for the jury, where it has retained in its employ as a night operator a boy eighteen years of age, who a few months before the accident had gone to sleep while on duty. *Baltimore & O. R. Co. v. Camp* (1895) 31 U. S. App. 213, 65 Fed. Rep. 952, 13 C. C. A. 233.

Nor is there any difficulty in holding that, when proof of the commission of a negligent act is accompanied by proof that the delinquent servant had a reputation for recklessness (see *infra*, II. m.), and this reputation was known to the master, a verdict for the plaintiff is warranted. *Mexican Nat. R. Co. v. Mussette* (1894) 86 Tex. 708, 24 L. R. A. 642, 26 S. W. 1075.

In regard to the question whether the plaintiff is entitled to introduce evidence that the delinquent servant had been guilty of several acts of negligence prior to the time of the accident in suit, the courts are not unanimous. The doctrine which seems to be the most logical, and which is sustained by a considerable array of authorities, is that such evidence is competent to establish the unfitness of the delinquent servant. *Gier v. Los Angeles Consol. Electric R. Co.* (1895) 103 Cal. 120, 41 Pac. 22, and other cases cited below, which clearly assume the correctness of this rule.

Of course the prior acts put in evidence must be such as fairly to import negligence in the doer, before the further question whether they indicate unfitness can be considered. Thus, evidence that a locomotive fireman who had caused an accident while running a locomotive had on another occasion run an engine faster than in the judgment of another engineer was proper, and at still another time, while running a locomotive, had struck a car in coupling to it with force which the witness considered excessive,—is insufficient to raise a question of fact as to the competency of such fireman. *Marrinan v. New York C. & H. R. R. Co.* (1897) 13 App. Div. 439, 43 N. Y. Supp. 606.

Such evidence is also admissible to establish the negligence of the master, on the ground that he retained the servant in his employ after he or his representative had obtained actual

was employed as a wiper or fire puller; that he was prohibited by the rules from moving an engine; that he never had moved an engine before the injury to plaintiff; and that he was not ordered or given permission to do so on that occasion, or given permission to do so at any other time prior to the accident. This is what the evidence shows was the knowledge of Stringer. It wholly fails to show any knowledge on Stringer's part which would impose a liability on the defendant. In *Dysart v. Kansas City, Ft. S. & M. R. Co.* 145 Mo., loc. cit. 88; 46 S. W. 752, Williams, J., said: "Plaintiff and the engineer were fellow servants. . . . It was essential to plaintiff's case . . . to show, not only the incompetency of the engineer, but also, that defendant failed to exercise reasonable care in employing and retaining him in its service. *Roblin v. Kan-*

sas City, St. J. & C. B. R. Co. 119 Mo. 476, 24 S. W. 1011. "There is no dispute as to this proposition of law; namely, that the master must use ordinary care in employing and retaining competent and suitable servants. This is a personal duty devolved upon the master, and he is liable for a failure to perform this duty, resulting in an injury to a fellow servant." *Williams v. Missouri P. R. Co.* 109 Mo. 482, 18 S. W. 1098. It is equally well established that the burden is on the plaintiff seeking to recover for injuries caused by the negligence of a fellow servant to show want of proper care on the part of the master in employing or retaining the latter. *Roblin v. Kansas City, St. J. & C. B. R. Co.* 119 Mo. 476, 24 S. W. 1011. If there was a failure to make this proof, then, without reference to any other questions in the case, the instruction, which re-

knowledge of the specific acts of negligence. *Copplins v. New York C. & H. R. Co.* (1890) 122 N. Y. 557, 25 N. E. 915 (servant absent from his post several times a month); *Sutton v. New York, L. E. & W. R. Co.* (1892) 50 N. Y. S. R. 514, 21 N. Y. Supp. 312; *Wood v. New York C. & H. R. Co.* (1898) 32 App. Div. 606; *Pittsburgh, Ft. W. & C. R. Co. v. Ruby* (1871) 38 Ind. 294, 10 Am. Rep. 111; *Gulf, C. & S. F. R. Co. v. Pierce* (1894) 87 Tex. 144, 27 S. W. 60 (brakeman had frequently gone to sleep while at a switch, and failed to throw it); *Houston & T. C. R. Co. v. Patton* (1888; Tex.) 9 S. W. 175 (careless handling of engine in making coupling); *Wabash W. R. Co. v. Brow* (1895) 31 U. S. App. 192, 65 Fed. Rep. 941, 13 C. C. A. 222.

In *Pittsburgh, Ft. W. & C. R. Co. v. Ruby* (1871) 38 Ind. 294, 10 Am. Rep. 111, the court said: "We think that it is well settled, not only by the authorities, but in reason and on principle, that for the purpose of showing that the officers of a railroad company had not exercised due care, prudence, and caution in the employment, or in retaining in service of careful, prudent, and skillful persons to manage and operate such road, and for the purpose of charging such corporation with notice of the incompetency of its employees, it may be shown that such employees had been guilty of specific acts of carelessness, unskillfulness, and incompetency, and that such acts were known to such officers prior to the employment of such agents, or that such employees had been retained in such service after notice of such acts."

Such evidence is also admissible to establish the master's negligence on the ground that those acts were so frequent that he would have learned of their commission if he had exercised proper vigilance in supervising the conduct of his servants. *Michigan C. R. Co. v. Gilbert* (1881) 46 Mich. 176, 9 N. W. 248.

A verdict for plaintiff on this ground was held proper in *Whittaker v. Delaware & H. Canal Co.* (1891) 126 N. Y. 544, 27 N. E. 1042. Affirming (1890) 84 N. Y. S. R. 822, 11 N. Y. Supp. 914 (habitual violation of rules); *Wall v. Delaware, L. & W. R. Co.* (1889) 54 Hun, 454, 7 N. Y. Supp. 709 (engine negligently handled in yard on numerous occasions); *Daly v. Sang* (1895) 91 Wis. 336, 64 N. W. 997 (acts of negligence extending over two weeks).

"The law will not go so far as to hold a railroad corporation to such an extreme of circumspection as to compel it to note, at its peril, every lapse of its employees, where no notice thereof is directly communicated, and where the circumstances are not such as to afford a rea-

sonable inference of the derelict conduct of the employee having become known to the employer prior to the act which gives origin to the action for damages." *Huffman v. Chicago, R. I. & P. R. Co.* (1883) 78 Mo. 50 (where an engineer had several times run his engine at excessive speed, but in remote rural districts).

For different reasons other courts have declined to adopt this doctrine in its entirety. The cases are reviewed in the following cases: In Pennsylvania it has been held that character for care must be proved by evidence of general reputation, and not of special acts. *Fralter v. Pennsylvania R. Co.* (1860) 38 Pa. 104, 80 Am. Dec. 467. The court referred to *Greenl. Ev.* §§ 461-469, for the general principle, and said: "Character grows out of special acts, but is not proved by them. Indeed, special acts do very often indicate frailties or vices that are altogether contrary to the character actually established. And sometimes the very frailties that may be proved against a man may have been regarded by him in so serious a light as to have produced great improvement of character. Besides this, ordinary care implies occasional acts of carelessness, for all men are fallible in this respect, and the law demands only the ordinary."

This decision, however, has been strongly condemned by other courts. (*Baulec v. New York & H. R. Co.* (1874) 59 N. Y. S. 356, 17 Am. Rep. 325; *Pittsburgh, Ft. W. & C. R. Co. v. Ruby* (1871) 38 Ind. 294, 10 Am. Rep. 111.) The reasoning upon which it is based will clearly not bear analysis. The real question to be decided is, not whether the commission of several negligent acts is inconsistent with the hypothesis of fitness for the duties of a position, but whether that commission may not sometimes be consistent with the hypothesis of unfitness.

In Massachusetts it is laid down categorically that the character or reputation of a servant as a careful or careless man, either generally or in any department of business, cannot be shown by introducing evidence of particular acts, and by trying the question whether those acts were severally careless or done with due care. To do this, it is said, would introduce a multiplicity of issues of which the parties ordinarily could not have previous notice, and which it would be impracticable properly to try. *Hatt v. Nay* (1887) 144 Mass. 186, 10 N. E. 807; *Connors v. Morton* (1894) 160 Mass. 333, 35 N. E. 860.

The importance of the consideration here emphasized seems to us unduly exaggerated. No such difficulties of procedure seem to have

sulted in a nonsuit, was entirely proper." The case then before the court was much stronger for the plaintiff than the case at bar, for there the employee complained of as incompetent was employed as an engineer, and it was shown that on a prior occasion he backed the engine when the signal was to go ahead, and it was further shown that his reputation was bad among the employees of the road with respect to care and caution; but there was no evidence that the company ever heard of these matters, nor that it was guilty of want of ordinary care in employing or retaining him. So the judgment was affirmed. The law imposes a duty upon the master to exercise ordinary care in employing competent and suitable persons to transact the master's business committed to their care; and the degree of care required of the master varies with the nature of the duties

to be performed by the servant. The master is required to exercise greater care in the employment of a railroad engineer than in the employment of a brakeman or track hand. Wood, Mast. & S. 2d ed. § 418; Bailey, Master's Liability, p. 54. So the master must exercise ordinary care in retaining servants in his employ, and, if he retains a servant who has proved himself incompetent to the knowledge of the master, the master will be liable. But this is the extent of the master's duty to a fellow servant. All other risks the servant assumes when he enters the master's employment. Wood, Mast. & S. 2d ed. § 416. If the servant's reputation is so generally known to be bad that it could have been easily ascertained upon inquiry, the master is liable, for he is negligent in not making the inquiry. Wood, Mast. & S. 2d ed. § 421; Bailey, Master's Liability, p.

been experienced by the courts who have admitted this sort of evidence.

In *Baltimore Elevator Co. v. Neal* (1886) 65 Md. 438, 5 Atl. 338, and *Baltimore v. War* (1893) 77 Md. 593, 27 Atl. 85, it was admitted that evidence of prior acts of carelessness or unskillfulness is admissible upon the question of negligence in retaining the servant, when a proffer of evidence that they were known to the master is also made. Yet in both cases the language of the court, if taken strictly, goes to the extent of denying that evidence of any number of previous acts of negligence can be sufficient to prove incompetency. On page 599 of the last-cited case it is said: "If you say the case fell the day before the accident, because Burns was then negligent, you do not thereby prove him incompetent, because negligence may be predicable of competency." The logic here seems to be decidedly faulty. How can a jury be justified in finding that there was negligence in retaining a servant because the master knew of his prior derelictions of duty and at the same time not be at liberty to infer incompetency from those derelictions?

In *Kindel v. Hall* (1896) 8 Colo. App. 63, 44 Pac. 781, it was held that a jury should not be told that if they find the delinquent fellow servant was frequently, and for an improper length of time, absent from his post, and the practice was known, they might consider the fact as bearing on the question of his skill and competency.

But perhaps it is not intended to deny the admissibility of such evidence altogether. Logically it certainly bears on the question of the servant's habitual carelessness, and this is one form of unfitness.

The Missouri court of appeals has laid it down that simple acts of negligence do not tend to establish general incompetency. *Cook v. St. Louis, I. M. & S. R. Co.* (1880) 8 Mo. App. 573, Appx.: but the opinion is not reported at length, and it is impossible to say what the grounds of the judgment were.

b. Act of negligence which caused the accident.

According to some decisions evidence which merely shows that the delinquent servant was negligent in respect to the particular act which caused the injury will not warrant either a finding that the servant was incompetent (*Curran v. Merchants' Mfg. Co.* (1881) 130 Mass. 174, 39 Am. Rep. 457; *Salem Stone & Lime Co. v. Chastain* (1894) 9 Ind. App. 453, 36 N. E. 110; *Lindvall v. Woods* (1891) 44 Fed. Rep. 355; *Texas & N. O. R. Co. v. Berry* (1887) 67 Tex. 238, 5 S. W. 817; *Baltimore v. War* 8 L. R. A.

(1893) 77 Md. 593, 27 Atl. 85; *Peaslee v. Fitchburg R. Co.* (1890) 152 Mass. 155, 25 N. E. 71; *Spring Valley Coal Co. v. Patting* (1898) 58 U. S. App. 575, 86 Fed. Rep. 433, 30 C. C. A. 168; *Hathaway v. Illinois C. R. Co.* (1894) 92 Iowa, 337, 60 N. W. 651; *Buckley v. Gould & C. Silver Mtn. Co.* (1882) 8 Sawy. 394, 14 Fed. Rep. 833) or that the master retained him with knowledge of his incompetency. *Conrad v. Gray* (1895) 109 Ala. 130, 19 So. 398.

So far as this doctrine depends on considerations analogous to those relied on in the cases which deny the justifiability of inferring incompetence from one act of negligence committed before the accident in suit, it must seemingly be subject to the same qualification as the general rule laid down in those cases, *viz.*; that the delinquency which caused the accident may be of such a flagrant character as to warrant the conclusion that only an unfit servant could have committed it.

In *Sullivan v. New York, N. H. & H. R. Co.* (1892) 62 Conn. 209, 25 Atl. 711, the court, taking the ground that negligence, as regards the retention of the servant, was not "necessarily shown" by such evidence, refused to set aside a verdict for the plaintiff on the ground that the delinquent servant was negligent in respect to the particular incident which led to the injury.

Nor, we think, do the considerations appropriate only in cases where the evidential weight of the negligence which caused the injury is in question furnish sufficiently strong grounds for refusing to admit the propriety of this qualification.

"If," it was said in *Lee v. Detroit Bridge & Iron Works* (1876) 62 Mo. 565, "a single act of negligence is to be regarded as tending by itself to show incompetency, and furnish any ground for conjecture that such incompetency is known to the company or its agents, then it must follow that all cases of damage by negligence of a fellow servant may be allowed to be traced to the negligent appointment of incompetent subordinates."

But plainly this would not necessarily be the consequence of admitting in appropriate cases the competency of the evidence condemned. The questions whether a negligent act was merely a temporary lapse by a capable servant, or indicates an essential unfitness, are entirely distinct, and it seems impossible, from a purely logical standpoint, to maintain that such evidence, so far as it bears upon the latter question, should be rejected simply because the other one is also suggested by it. It may be readily conceded that the practical result of leaving juries untrammelled as regards the con-

48. Applying these principles to this case, it appears that, as defendant employed Sheldon as a wiper or fire puller, it was not bound to exercise the same degree of care that it would if he had been employed as an engineer or hostler, and that no negligence is shown in employing him as a wiper, for there is no complaint as to his competency in that employment, nor was the injury to the plaintiff caused in any manner by any unskillfulness in discharging his duty as a wiper. The plaintiff's case must rest, then, upon the alleged knowledge of Stringer. Aside from the defects in the third instruction above noted, and the total absence of any proof that Stringer knew of or consented to Sheldon's moving an engine, the instruction is erroneous for the further reason that Stringer and the plaintiff were fellow servants. as were Sheldon and the plaintiff

fellow servants. Stringer had no power to hire or discharge anyone. Randall was the foreman and master mechanic in charge of the defendant's roundhouse and all that was done there, and he alone had power to hire or discharge servants. He was the vice principal of the company. And it is not even pretended that he knew of or permitted Sheldon to run an engine, or ever heard anything about his competency or incompetency to do so. He hired Sheldon as a wiper, and no negligence is imputable to the defendant from that employment. In *Williams v. Missouri P. R. Co.* 100 Mo. 475, 18 S. W. 1098, it was held that the knowledge of the foreman of the roundhouse (here, Randall) was the knowledge of the company, because "it was his duty to look after the engines and men, and make reports to his superior." *Bailey, Master's Liability*, p. 65.

struction of this kind of testimony would inevitably be a serious inroad upon the doctrine of common employment. But this is hardly an adequate reason for excluding it altogether.

The power of the court to direct the deliberations of the jury by differentiating clearly the two issues to which the evidence is applicable, and to make peremptory rulings upon its effect in extreme cases, is a sufficient guaranty against its being used to sap the foundations of the doctrine in question.

It has also been said that to allow a jury to infer negligence or unskillfulness on the delinquent servant's part from the simple fact of the happening of the accident in suit would conflict with the principle that it is incumbent on the plaintiff to establish by affirmative proof that his injury was caused by the negligent and unskillful act of the fellow servant. *Baltimore Elevator Co. v. Neal* (1886) 65 Md. 438, 5 Atl. 338.

"The occurrence itself," said the same court in another case, "raises no presumption of negligence and justifies no inference of incompetency." *Baltimore v. War* (1893) 77 Md. 593, 27 Atl. 85.

Clearly, however, no logical reason can be suggested why the principle of *res ipsa loquitur* should not be as applicable under appropriate circumstances to cases where the injury arises from the negligence of a servant, as it is to cases where the injury is due to the defective quality of some inanimate agency of the master's business. The rule as to the burden of proof, therefore, is not necessarily infringed by admitting the competency of the evidence objected to. Whether it is sufficient, unsupported, to establish incompetency, depends upon the character of the servant's act.

1. Temporary unfitness at the time of the accident.

The fact that the servant was intoxicated at the time of the accident is competent evidence on the question whether the master was in fault in employing him. *Probst v. Delamater* (1895) 100 N. Y. 286, 3 N. E. 184; *Huntington R. Co. v. Decker* (1877) 84 Pa. 419.

Under a general allegation of negligence, evidence that the servant was drunk when the accident occurred is admissible as part of the *res gesta*. *Hobson v. New Mexico & A. R. Co.* (1886; Ariz.) 11 Pac. 545.

j. Derelictions of duty subsequent to the injury in suit.

Subsequent derelictions of the servant have been held not to be competent evidence of fault 48 L. R. A.

on the master's part in having had the delinquent servant in his employment. *Couch v. Watson Coal Co.* (1877) 46 Iowa, 17; *Craig v. Chicago & A. R. Co.* (1893) 54 Mo. App. 323 (demurrer to evidence sustained, where there was no evidence that the servant had been reckless, till after the accident).

That this is true without qualification of acts which do not tend to show unfitness of the kind complained of is, of course, indisputable. *Ransler v. Minneapolis & St. L. R. Co.* 32 Minn. 331, 20 N. W. 332.

But if it indicates a want of fitness at the time when the act was committed, it is difficult to see why it should not be at least competent when the act was sufficiently close in point of time to the accident in suit to render it not unreasonable to infer that the servant's capacity for his duties was the same at the later as at the earlier date.

k. Disclaimer of fitness by delinquent servant himself.

Under ordinary circumstances, it would seem, the self-deprecatory statements of the delinquent servant himself are to be wholly disregarded where his previous experience and conduct are such as to justify the master in supposing that he is competent to do the work assigned to him.

Where boys of the age and size are commonly considered competent to do the work in which the servant whose act caused the injury in suit was engaged, and for six months he had done the work to the satisfaction of all his collaborators, the mere fact that, on the occasion in question, he had told the master's vice principal that he did not feel strong enough to do the work will not render the master liable for the act of the vice principal in setting him to work notwithstanding this statement. *Juanitch v. Michigan Malleable Iron Co.* (1895) 105 Mich. 270, 63 N. W. 296.

In *Wright v. New York C. R. Co.* (1858, 2 Barb. 80, the supreme court remarked that the statement of an engineer to his superior officer that he did not feel competent to take a train over a particular piece of road at night, was "very slight evidence" to prove incompetency for that duty; but did not express any definite opinion as to the precise evidential weight of the fact. The court of appeals (25 N. Y. 562) held that the engineer was certainly competent, a ruling which necessarily implies that the evidence in question was inadequate to justify the inference of negligence on the master's part.

lays down the rule that knowledge must be shown to have been possessed by the master, or "by one who has authority in the premises, or whose duty it is to convey it to one having such authority. Knowledge by one not sustaining such relation is not sufficient;" and, quoting from *Ohio & M. R. Co. v. Col-larn*, 73 Ind. 261, 38 Am. Rep. 134, he says: "Notice to the master mechanic, whose duty is to employ or discharge the incompetent servant, will be notice to the master." Stringer occupied no such relation to the defendant company as would charge it with his knowledge. He was in no sense a vice principal. He was the head hostler, and as such was not of as much rank or dignity as an engineer. The plaintiff was a fireman, and he and the engineer were fellow servants. So he and Stringer were fellow servants, and Stringer's knowledge was no more

the knowledge of the company than that of any other servant. We are not disposed to extend the doctrine of vice principal any further than was done in the *Williams Case*, *supra*. It follows that the third instruction given for the plaintiff was erroneous, and that the converse of that instruction embodied in instruction 3 asked by defendant should have been given. Instruction 4, asked by defendant, should have been given in any aspect of the case. It asserted perfectly correct principles of law, and bore upon the vital points at issue, which were not covered by any other instruction given.

It follows that the judgment of the Circuit Court must be reversed, and the cause remanded for a new trial in conformity herewith.

It is so ordered.

L. Specific statements as to unfitness made by employees of delinquent servant.

The following cases discuss the evidential weight of remarks made by individual coworkers as to the incapacity of the delinquent servant:

Recovery cannot be had where the only evidence going to show the master's knowledge is the testimony of the plaintiff, that he told the master's representative that the delinquent servant was incompetent, and there is no evidence that he was actually incompetent, and the master's representative denies that such statements were made. *Snodgrass v. Carnegie Steel Co.* (1896) 173 Pa. 228, 33 Atl. 1104.

The mere fact that the plaintiff testifies that he thought the servants by whose negligence he was injured were not "fair hands," and told the employer that he had better get rid of them, will not constitute evidence sufficient to carry the case to the jury. *Sanders v. Etiwan phosphate Co.* (1883) 19 S. C. 510.

Evidence that the yardmaster of one railroad company, who was short a man, employed a switchman on the statement of a yardmaster of another company that he "had one that he was done with that he could have," about an hour before an accident to a fellow servant, is insufficient to show negligence on the part of the company in hiring him. *Ohio & M. R. Co. v. Dunn* (1894) 138 Ind. 18, 36 N. E. 702, Rehearing Denied in (1894) 138 Ind. 28, 37 N. E. 546.

A strong expression of opinion as to the unfitness of the delinquent servant, uttered by a mere fellow servant on the day following the accident, is not competent evidence on that point, as an admission binding the defendant. *Carlin v. Michigan C. R. Co.* (1887) 66 Mich. 358, 35 N. W. 515.

M. Reputation of delinquent servant.

1. Admissibility, generally.

The doctrine which declares the notoriety of a certain fact in the community where the parties live to be competent evidence of a defendant's knowledge of the fact operates both to the advantage and disadvantage of a master in the type of case now under review.

On the one hand, testimony that the delinquent servant had a general reputation for competency at the time and place of employment is admissible as tending to disprove that the master was negligent in employing him. *Illinois C. R. Co. v. Morrissey* (1891) 45 Ill. App. 127.

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It should be noted, however, that, as a master is absolutely liable for the negligence of a vice principal evidence on the defendant's behalf, that he had the reputation of being a careful workman, is incompetent, where the ground of the action is the delinquency of such an agent. *Malcolm v. Fuller* (1890) 152 Mass. 160, 25 N. E. 83.

On the other hand, evidence that such servant was generally reported to be unfit for the work which he was hired to do is competent to show that the master, if he had exercised ordinary care, would have discovered that unfitness.

In *Monahan v. Worcester* (1890) 150 Mass. 439, 23 N. E. 228, the court said: "The master is bound to use reasonable care in selecting his servants, and if a person is incompetent for the work he is employed to do, the fact that he is generally reputed in the community to want those qualities which are necessary for the proper performance of the work certainly has some tendency to show that the master would have found out that the servant was incompetent, if proper means had been taken to ascertain the qualifications of the servant."

In *Davis v. Detroit & M. R. Co.* (1870) 20 Mich. 105, 4 Am. Rep. 364, the court said: "If the defendants continue a man in their employ who is so notoriously unfit as to have established a general reputation to that effect, it is unreasonable, the plaintiff argues, to suppose the officers of the defendants ignorant of that fact, unless we excuse their want of information on the ground of neglect of duty on their part to their employees and the public, so gross as to make it proper and just to hold them responsible to the same extent as if they were fully informed of all the facts. And if they fail to inquire into the cause of accidents, where manifestly this is an important part of their duty, and a high obligation rests upon them to accomplish it thoroughly and faithfully, they cannot afterwards justly plead their ignorance to excuse their principal from responsibility for other accidents resulting from the same cause."

For other cases on this point, see also, *Hatt v. Nay* (1887) 144 Mass. 186, 10 N. E. 807; *Gilman v. Eastern R. Corp.* (1805) 10 Allen, 233, 87 Am. Dec. 635 (1866) 13 Allen, 433, 90 Am. Dec. 210 (Intemperance); *Western Stone Co. v. Whalen* (1894) 151 Ill. 472, 38 N. E. 241 (approving the statement of principles in *Shearn & Redf. Neg. § 223*); *Norfolk & W. R. Co. v. Hoover* (1894) 79 Md. 253, 25 L. R. A. 710, 29 Atl. 994; *Chicago & A. R. Co. v. Sullivan* (1872) 63 Ill. 293 (Intemperance); *St. Louis, I. M. & S. R. Co. v. Hackett* (1894) 58

Ark. 381, 24 S. W. 881; *Lake Shore & M. S. R. Co. v. Stupak* (1889) 123 Ind. 210, 23 N. E. 246; *Grube v. Missouri P. R. Co.* (1889) 98 Mo. 330, 4 L. R. A. 776, 11 S. W. 736; *Mexican Nat. R. Co. v. Mussette* (1894) 86 Tex. 708, 24 L. R. A. 642; *Snodgrass v. Carnegie Steel Co.* (1896) 173 Pa. 228, 33 Atl. 1104; *Texas & P. R. Co. v. Johnson* (1896) 89 Tex. 518, 35 S. W. 1042.

In one case we find this remark: "Reputation is not competent evidence to charge a master with negligence in the employment of a servant. Because, first, it may be false, and, secondly, he may never have heard it." *Haskin v. New York C. & H. R. R. Co.* (1873) 65 Barb. 129.

But this statement is altogether too sweeping, as the foregoing authorities very clearly indicate.

In *Stevens v. San Francisco & N. P. R. Co.* (1893) 100 Cal. 554, 35 Pac. 165, the court approved of the refusal of the trial judge to permit the plaintiff to prove the general reputation of the delinquent servant for intemperance among his coemployees, the reason assigned being that the offer was general, and that, if offered for the purpose of affecting the master with notice, it should have been so specified.

In *Cook v. Parham* (1853) 24 Ala. 21, the court held that the answer of a witness, that the delinquent servant "had no reputation, for the reason that he had no experience, and he regarded him as wholly incompetent," for his duties, was held to have been properly admitted. The statement in the first clause was plainly competent, and, no specific objection having been made to the second clause, the court was not bound to separate it from the other.

But the cases in which evidence of a servant's reputation for unfitness is admissible are those, of course, in which the injury in suit was due to the particular kind of unfitness for which the servant was notorious. *Hawk v. Pennsylvania R. Co.* (1887; Pa.) 9 Cent. Rep. 786, 11 Atl. 459 (recklessness); *Norfolk & W. R. Co. v. Hoover* (1894) 79 Md. 253, 25 L. R. A. 710, 29 Atl. 994 (intemperance). In this case an instruction was held erroneous which told the jury that unless the culpable servant was drunk at the time of the accident, and his negligence by reason of such drunkenness produced or contributed to the accident, evidence of general reputation as to his incompetency was not relevant and could not be considered, "unless such reputation was brought home to the knowledge of the defendant before the accident." The court said that the condition thus appended was inaccurate, because, on the one hand, if the culpable servant did not cause the accident, the master's knowledge of his reputation had nothing to do with the case; while, on the other hand, if the culpable servant did, by his intemperance, cause the accident, it was immaterial whether the master had actual knowledge of his bad reputation, inasmuch as he was negligent in not knowing it.

See also the cases cited above as to reputation for competency.

Evidence of the servant's reputed unfitness is also admissible to show that the unfitness is one in regard to which a general reputation may grow up.

In *Monahan v. Worcester* (1890) 150 Mass. 439, 23 N. E. 228, the court refused to say that it might not be a matter of common repute in a community that a man is physically weak, and is partially blind and deaf.

But the servant's general character is, of course, only one among many kinds of probative facts, and not the only kind from which 48 L. R. A.

the master's notice of the servant's incompetency may be inferred. As was pointed out in *Pittsburgh, Ft. W. & C. R. Co. v. Ruby* (1871) 38 Ind. 294, 10 Am. Rep. 111, the servant's general character might be, not only good, but very good, while the defendant had actual knowledge that he was, in point of fact, careless, negligent, reckless, unskilful, and incompetent; or his general reputation might be that of a sober man, when, in point of fact, the defendant knew that he was in the habit of getting drunk, and that when drunk he was desperate and reckless.

In *Zumwalt v. Chicago & A. R. Co.* (1889) 35 Mo. App. 661, it was said that notoriety as to the bad habits of a servant was the only evidence which could supply the place of evidence of actual knowledge on the part of the master's representatives. But this is clearly an inaccurate way of stating the rule, as there are other sources of constructive knowledge.

It has been held that negligence cannot be imputed to the master for not knowing the reputation acquired by a servant ten or fifteen years before the accident in suit, at a time when he was still attending school, and had not yet entered the master's employment. *Baird v. New York C. & H. R. R. Co.* (1897) 16 App. Div. 490, 44 N. Y. Supp. 926.

But the doctrine formulated above, as to the duty of the master to inquire into the qualifications of the servant when he is hired, indicate that this immunity must terminate at some point of time anterior to the hiring. Upon what principle that point should be fixed is a question which has apparently not been discussed. Of course the reputation of the delinquent servant for unfitness at any time during his employment, prior to the accident in suit, is admissible in evidence. *Mexican Nat. R. Co. v. Mussette* (1893) 7 Tex. Civ. App. 163, 24 S. W. 520 (testimony as to such reputation not objectionable for the reason that it is not distinctly confined to a period just preceding the accident).

Whether it will be allowed any probative force depends upon whether, taking into consideration the ordinary method of conducting the business, it can reasonably be supposed to have reached the master.

Thus, there can be no inference of negligence in regard to the employment of a servant where there is no evidence that he had not a good reputation at the time of his hiring, or at any other time than during two days during which he had been engaged in making a single trip on a certain train. *Van Dusen v. Lake Shore & M. S. R. Co.* (1887) 12 N. Y. S. R. 351.

What is a general reputation depends upon the nature of the unfitness imputed. Where it is sought to charge the master by this means with a knowledge of the servant's bad habits or deficient mental and physical qualifications for his duties, it would seem that the doctrine is satisfied by nothing short of a reputation which pervades a considerable section of the community in which he lives. *Gilman v. Eastern R. Corp.* (1865) 10 Allen, 233, 87 Am. Dec. 635 (intemperance); *Monahan v. Worcester* (1890) 150 Mass. 439, 23 N. E. 228 (physical weakness); and cases last cited above.

In *St. Louis, I. M. & S. R. Co. v. Hackett* (1894) 58 Ark. 381, 24 S. W. 881, the fact that the servant's reputation was a matter of common knowledge in the county was held sufficient.

"The reputation of a foreman amongst a few workmen employed under him is not a general reputation. It is merely the opinion of a small number of men, of which there is no sufficient reason to suppose the master may be cognizant, or which he may be bound to heed." *Driscoll*

v. Fall River (1895) 163 Mass. 105, 39 N. E. 1003.

In *Davis v. Detroit & M. R. Co.* (1870) 20 Mich. 105, 40 Am. Rep. 364, the court, in discussing the evidence, said: "It is plain, however, that Harris is not shown to have a general reputation for carelessness or unfitness of any description. No one ventures to express an opinion to that effect. The evidence only tends to show that when an accident occurred remarks were made that he was careless, or that he went too fast. They were such remarks, we suppose, as are almost certain to be made in any case, when an unfortunate accident occurs, while the consequences are exciting the bystanders, and before inquiry and calm consideration have determined whether there is any basis for them in justice or not. Such remarks are of very trifling importance, and if they would tend to convict a man of negligence, few engineers of much experience, we apprehend, would escape condemnation. And of how little importance they were in the present case, and how little likely to express settled opinions, may be inferred from the fact that no one of the persons supposed to have made these remarks is placed upon the stand to testify to facts which would justify them. We think, therefore, that the evidence of reputation should be dismissed from further consideration."

But where a man is engaged in an occupation which brings him into contact with only one class of the community, the material point is his reputation among that class, and inquiries as to it must be confined to that class. *Galveston, H. & S. A. R. Co. v. Davis* (1893) 4 Tex. Civ. App. 468, 23 S. W. 801, holding that a question worded: "Do you know what Thomas Henry's general reputation was, and how he was generally regarded as to care and competency, while running his engine?"—was too general, where the delinquent servant was a railway engineer.

In one case the master's knowledge of intemperate habits was held to have been properly inferred, where they had been "notorious among his fellow employees, and long continued" (*Chicago & A. R. Co. v. Sullivan* (1872) 63 Ill. 293); and in another, where several co-employees testified that he was a very reckless man. *Illinois C. R. Co. v. Jewell* (1867) 40 Ill. 99, 92 Am. Dec. 240.

2. Reputation not evidence of actual unfitness.

In some cases it has been contended that the servant's reputation for incompetency is evidence that he is actually incompetent, and not simply a circumstance which puts the master upon inquiry as to whether he is or is not competent. But this contention has been rejected. *Cosgrove v. Pitman* (1894) 103 Cal. 268, 37 Pac. 232 (where negligence was held to be negatived by proof that the servant was not really intemperate, though he had that reputation); *Lee v. Michigan C. R. Co.* (1891) 87 Mich. 574, 49 N. W. 909 (reputation of incompetency as yardmaster not sufficient when based only on the fact that he had had no experience as switchman).

So, also, in *Gier v. Los Angeles Consol. Electric R. Co.* (1895) 108 Cal. 129, 41 Pac. 22, the court said that it is the character of the employee which is the object of ultimate determination, not his reputation, and that as evidence of reputation becomes necessary only where there is an inability to furnish direct proof of the employer's knowledge, so it is proper only after the establishment of the fact that the employee is in truth an unfit person; and proceeded thus: "Reputation is not proof of that fact. A man's reputation may be

at variance with his character or in accord with it. He may be reputed reckless, and in fact be careful. An employer is not bound to discharge an employee merely because of his ill repute; but he is culpable if he retains in his employ a servant with a bad reputation well founded."

To the same effect, see *Galveston, H. & S. A. R. Co. v. Davis* (1893) 4 Tex. Civ. App. 468, 23 S. W. 301; *Baltimore & O. R. Co. v. Henthorne* (1896) 43 U. S. App. 113, 73 Fed. Rep. 634, 19 C. C. A. 623 (intemperance), and subsec. 3, *infra*.

Still less is reputation competent evidence to establish that the particular form of incapacity which it ascribes to him existed at the time of the injury, and contributed to produce it. *Baltimore & O. R. Co. v. Colvin* (1888) 118 Pa. 230, 12 Atl. 337 (reputation for carelessness not evidence of inefficient performance of duty at the time of the accident); *Baltimore & O. R. Co. v. Henthorne* (1896) 43 U. S. App. 113, 73 Fed. Rep. 634, 19 C. C. A. 623 (reputation for drunkenness not evidence that servant was drunk when the accident occurred).

3. Nicknames as evidence against the master.

The proper inference to be drawn from the fact that the delinquent servant bore some nickname which, if deserved, indicated that he was unfit for his position, has sometimes been discussed with the result of producing a diversity of opinion among the courts. If the nickname is the outcome of a general reputation, which would of itself be sufficient to lay a foundation for the imputation of notice to the master, it is simply to be regarded as a corroborative piece of evidence. *Park v. New York C. & H. R. R. Co.* (1895) 85 Hun, 184, 32 N. Y. Supp. 482 (evidence that the culpable servant's general reputation prior to the accident was that he was "a little off" and that among railroad men he was usually called "Crazy Brown," held admissible to prove the master's knowledge of his unfitness).

Nor is there any difficulty in accepting the doctrine that "nicknames are not so generally expressive of the characteristics of the persons to whom they are applied as to be competent evidence for the purpose of proving that the bearer of the name possessed the characteristics denoted by the nickname." *Marrinan v. New York C. & H. R. R. Co.* (1897) 13 App. Div. 439, 43 N. Y. Supp. 606 (fact that a servant is called by his fellow employees "Crazy Nolan" not, in the absence of other proof, competent evidence to show that he is actually crazy).

In a subsequent case this ruling was cited with approval, and a new trial ordered, on the ground that the jury had not been left uninfluenced by the evidence of a nickname ("crazy") which had been applied to the culpable servant. *Baird v. New York C. & H. R. R. Co.* (1897) 16 App. Div. 490, 44 N. Y. Supp. 926.

But, in view of the fact that the servant's reputation is put in evidence merely as a circumstance indicating constructive notice on the master's part, it is doubtful whether the Illinois court of appeals has not gone too far in declaring without qualification that evidence that the delinquent servant was known by the nicknames of "Crazy Pete" and the "Wild Irishman," is inadmissible either for the purpose of showing that the engineer was incompetent or negligent, or for the purpose of showing that the employer knew of his incompetence or negligence. *St. Louis, A. & T. H. R. Co. v. Corgan* (1891) 49 Ill. App. 229.

If such epithets are bestowed on a man by

a large number of those with whom he comes into contact, in his work, and reach the master's ears, it can scarcely be said, as a matter of law, that the master is acting as a prudent man in omitting to make inquiries with a view to ascertaining what is the man's real character and capacity.

n. Length of the period during which the unfitness has continued.

To affect the employer with liability for the incompetency of a servant, it is not necessary that it should actually be brought to his knowledge. If it continue for such a length of time that a careful and diligent supervision of its business ought to bring it to light, he is chargeable with notice of its existence. *Whittaker v. Delaware & H. Canal Co.* (1891) 126 N. Y. 544, 27 N. E. 1042.

In *Cameron v. New York C. & H. R. R. Co.* (1895) 145 N. Y. 400, 40 N. E. 1, a verdict was set aside by which a railroad company was declared to be negligent in retaining a brakeman who had habitually violated a rule. The following extracts from the opinion sufficiently explain the grounds upon which the conclusion was based: "There is no arbitrary rule of law that charges the master with constructive notice of the negligent omissions of duty on the part of a coservant, after the lapse of a certain time, under all circumstances. The doctrine of constructive notice is founded upon reasonable and just considerations, and the mere lapse of time is not always the test of negligence on the part of the master. If a defect exists in the appliances furnished the servant for doing his work, of such a character and for such a length of time as to enable the master to discover and remedy it by reasonable vigilance, inspection, or examination, then the law will imply notice, since he ought to know what can thus be ascertained. The same rule will apply where the place furnished to the servant to do his work becomes defective, dangerous, or unsafe by use or otherwise. So, when the negligence of a coservant in performing his work is of such a character as to leave traces or evidence of it in the work itself, which can be seen or discovered by reasonable examination, the master might be chargeable after it had continued for such a length of time as to render it reasonable to assume that he either must have known of the omission of duty, or could have known of it by the exercise of reasonable care; or where the incompetency of the servant is frequently displayed under the eye and observation of some officer or foreman who represents the corporation or has the power to discharge him. But how was the master in this case to know that Norton habitually violated the rules for his own protection and that of his coservants? His work was performed on freight trains running over a long line of railroad, with little, if any, opportunity for any officer or representative of the company to watch or observe him at any one point. He had sufficient ability and intelligence to do his work, and his omissions of duty were purely wilful or thoughtless. It would be manifestly unreasonable and unjust under such circumstances to impute negligence to this defendant for the sole reason that during four months it failed to detect his delinquencies. The defendant had given him by its rules plain and simple instructions to govern his conduct with respect to the switches, and there was no reason to suspect that they would be disregarded, since it was quite as convenient for him to obey as to violate them. Moreover, it had in these same rules invited and requested all of his coservants to make prompt report to the company of any neglect or disobedience of 48 L. R. A.

the rules on his part, and no complaint had been made. It was reasonable to assume that his coemployees, whose lives might be endangered by his neglect, would observe and report his omissions of duty, if any; and if they failed to observe any, how can it be said that the defendant itself was in fault for not discovering what his coservants themselves had not discovered? The negligent acts of Norton took place while he was working on the same train and in a like capacity with the deceased. It is more reasonable to suppose that they were done in his presence, or under his observation, than to imply knowledge on the part of the defendant, and if it can be said that the deceased knew of these omissions of duty on the part of his fellow brakeman, and failed to report them, he might be regarded as voluntarily assuming the risks and dangers incident to his association in a common work with a careless or incompetent coservant. There is a manifest inconsistency in assuming that the officers or representatives of the defendant knew, or could have known, of Norton's violation of the rules, and at the same time that the deceased did not. On the evidence in the case it is true that the defendant's servant was unfaithful, and that his want of care resulted in the death of the plaintiff's intestate. But the defendant cannot be made liable for his negligent act, unless it was at fault in selecting him for the work, which is not claimed, or in failing to adopt such means as ordinary prudence and care would dictate to secure his fidelity, and we are unable to perceive what more it could have done, unless it employed other men to watch his conduct, and that would be plainly an unreasonable requirement."

o. A promise by the master to discharge the delinquent servant.

The master's promise to discharge a servant is tantamount to an admission that the servant is incompetent, and that the master is aware of his incompetency. *Poirier v. Carroll* (1883) 35 La. Ann. 699.

III. Duty to employ an adequate number of servants.

a. Generally.

A duty of the master which, as a matter of logical arrangement, it seems equally appropriate to associate either with that discussed in the foregoing sections or with that of conducting the business upon a safe system, is the duty of employing a staff of servants sufficiently large to perform the work with reasonable safety to themselves. *Filke v. Boston & A. R. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545; *Mad River & L. E. R. Co. v. Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312; *Burke v. Syracuse, B. & N. Y. R. Co.* (1893) 69 Hun. 21, 23 N. Y. Supp. 458; *McMullen v. Missouri, K. & T. R. Co.* (1894) 60 Mo. App. 231; *Alberts v. Bache* (1890) 32 N. Y. S. R. 1014, 10 N. Y. Supp. 639; *Jones v. Old Dominion Cotton Mills* (1886) 82 Va. 140; *Johnson v. Ashland Water Co.* (1888) 71 Wis. 553, 37 N. W. 823.

A ship is "seaworthy," as regards the sufficiency of her crew, if the required number can be made up by counting in the fireman. *Re Meyer* (1896) 74 Fed. Rep. 881.

In an action resulting from a collision due to the fact that one of the trains was sent out with two instead of three brakemen, it is not error to refuse to charge that, if the jury believed that the third brakeman would not have been at his post, the plaintiff could not recover. It cannot be assumed that, if the third brakeman had been sent, he would not have done his

duty. *Booth v. Boston & A. R. Co.* (1878) 73 N. Y. 38, 29 Am. Rep. 97.

The fact that some slight inconvenience or expense will be caused by engaging the services of another employee will not excuse the master if the work could not safely be done without him. *Trainor v. Philadelphia & R. R. Co.* (1890) 137 Pa. 148, 20 Atl. 632 (master held liable where the plan adopted for taking down a pole required the superintendence of the competent person, but the laborers were left to manage for themselves).

Nor can the master conduct his business on a system which ignores physical laws. Thus, for an injury to an employee caused by the depletion of a train crew the company is liable, as for negligence, where the timetable is so arranged that some of the men cannot procure their meals without absenting themselves from their posts. *Pennsylvania Co. v. McCaffrey* (1894) 139 Ind. 430, 29 L. R. A. 104, 38 N. E. 67.

In the case of a railway company, what would be inadequacy as regards a passenger is not necessarily inadequacy as regards trainmen.

An instruction is erroneous which declares that a railroad company is negligent towards the employees operating a freight train in failing to furnish a conductor, where a passenger coach is attached. *Means v. Carolina C. R. Co.* (1898) 122 N. C. 990, 29 S. E. 939.

As in the case of an alleged breach of other duties, the servant's right to receive is dependent upon proof that the master knew, actually or constructively, that the number of employees was inadequate at the time and place where the injury was received. *Parker v. New York & N. E. R. Co.* (1895) 18 R. I. 773, 30 Atl. 849 (mere fact that a substitute did not remain at a switch continuously during the temporary absence of the regular switchman cannot properly be construed by the jury as an implied notice to the company that said switch was unattended).

b. Whether the master has performed his duty.

The performance of the master's duty in employing a sufficient number of servants is a question of fact in each case, to be determined by the jury, subject to the revision of the court.

A railroad company is not, as a matter of law, free from negligence in having only one brakeman to control ten loaded cars in descending a grade to a place where they are to be coupled to a stationary car. *Georgia P. R. Co. v. Propst* (1889) 90 Ala. 1, 7 So. 635.

A railway company must keep enough trackmen, not only to supervise the line under ordinary circumstances, but also for extraordinary occasions, as after a rainstorm, when it needs a more minute inspection. *Hardy v. Carolina C. R. Co.* (1877) 76 N. C. 5.

A railway company is not obliged to provide for the stationing of a watchman on the rear end of backing trains. *Chicago & N. W. R. Co. v. Donahue* (1874) 75 Ill. 106.

No obligation on the part of a railway company, to keep an agent at a flag station where there is an unblocked siding, can be predicated, in the absence of evidence that the track is in such a condition that there is danger that cars may escape onto the main line. *Hewitt v. Flint & P. M. R. Co.* (1887) 67 Mich. 61, 34 N. W. 659.

Whether a railway company is negligent in employing no more than one watchman to look after the live engines in a yard, and prevent them from being tampered with, is a question for the jury, where the watchman has also to perform the duties of a wiper. *Southern P. Co. v. LaFerty* (1893) 15 U. S. App. 193, 57 Fed. Rep. 537, 6 C. C. A. 474 (two engines got out on main track in some unexplained manner).

A railway company is bound to see that a derrick provided for the use of shippers, the arm of which is liable, when not fastened, to swing out over the track, and so endanger trainmen, is placed under the charge of a competent servant, so that it may be kept properly fastened when not in use. *Gates v. Chicago, M. & St. P. R. Co.* (1892) 2 S. D. 422, 50 N. W. 907.

The fact that the number of the servants was smaller than usual on the occasion when the accident occurred is one which tells with especial force against the master. *South West Improv. Co. v. Smith* (1888) 85 Va. 306, 7 S. E. 365 (verdict for plaintiff proper, where loaded coal cars in a mine got out of control, owing to there being only one brakeman on duty, instead of two, as was usual); *Thorpe v. Missouri P. R. Co.* (1886) 89 Mo. 650, 58 Am. Rep. 120, 2 S. W. 3 (verdict for plaintiff proper where the switching crew of which he was one was smaller than usual, and he was injured while coupling cars, owing to the fact that his signals to the engineer were not transmitted); *Stoddard v. St. Louis, K. C. & N. R. Co.* (1877) 65 Mo. 515 (not error to refuse to direct a verdict for the defendant, where the master's representative has been notified that one of the regular hands is too sick to attend to his duties, and no substitute is provided).

But evidence to that effect will not establish negligence, where it appears that the safety of the other servants is sufficiently secured by the methods actually adopted in the performance of the work. *Gulf, C. & S. F. R. Co. v. Compton* (1890) 75 Tex. 667, 13 S. W. 667 (company broke custom of sending out water trains equipped with a conductor).

Still less can the master be held liable on the ground that, although the usual number of servants was engaged on the work to be done, use might have been made of an additional servant on the occasion when the accident occurred, with the possible result of preventing it. *Rel-yea v. Kansas City, Ft. S. & G. R. Co.* (1892) 112 Mo. 80, 18 L. R. A. 817, 20 S. W. 480 (rear collision of two freight trains equipped with the customary number of brakemen).

C. B. L.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH of Massachusetts

v.

Clarence MURPHY.

(174 Mass. 369.)

A sentence of conviction imposed un-

NOTE.—As to plea of former jeopardy where judgment of conviction has been set aside on the application of the convict, see *People v. Murray* (Mich.) 14 L. R. A. 809.

The above case was affirmed in *Murphy v. Massachusetts*, 177 U. S. 155, 44 L. ed. —, 20 Sup. Ct. 630.

48 L. R. A.

der authority of Mass. Pub. Stat. chap. 187, § 13, after the reversal of a former judgment, on the application of the convict, because it was imposed under a statute that was passed after the offense was committed, and was therefore unconstitutional so far as it related to that offense, does not violate the constitutional provision against double jeopardy, or abridge the privileges and immunities of the accused as a citizen, or deprive him of his liberty without due process of law, although he had partly served the invalid sentence before it was re-

versed, including one day's solitary confinement, to which each of the sentences condemned him.

(October 19, 1899.)

EXCEPTIONS by defendant to the action of the Superior Court for Essex County resentencing him after a former sentence had been set aside for error. *Overruled.*

The facts are stated in the opinion.

Messrs. Ezra B. Thayer and Edward F. McClennen, with **Messrs. Brandeis, Dunbar, & Nutter**, for defendant:

The defendant has suffered imprisonment for his offense for a substantial time under sentence of a court having jurisdiction to sentence.

The crime of which he stood convicted was punishable by imprisonment in the state's prison for a fixed term.

Mass. Pub. Stat. chap. 203, §§ 20, 40; *Murphy v. Com.* 172 Mass. 264, 43 L. R. A. 154, 52 N. E. 505.

The error committed was the failure to fix the exact time of termination of the sentence. This error would not place the whole sentence beyond the jurisdiction of the court.

Re Petty, 22 Kan. 477; *Stalker, Petitioner*, 167 Mass. 11, 44 N. E. 1068; *People v. Whitson*, 74 Ill. 20; *Riley's Case*, 2 Pick. 172; *Re Swan*, 150 U. S. 637, 37 L. ed. 1207, 14 Sup. Ct. Rep. 225; *United States v. Pridgeon*, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. Rep. 746; *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *Ex parte Friday*, 43 Fed. Rep. 916.

Where a court has jurisdiction of the person, and of the subject-matter, the imposition by mistake of a sentence in excess of what the law permits is within the jurisdiction, and does not render the sentence void, but only voidable by proceedings upon a writ of error.

Sennott's Case, 146 Mass. 489, 16 N. E. 448.

A person who has suffered imprisonment for a substantial time under sentence of a court having jurisdiction to sentence to the place to which sentence is passed cannot be resentenced for the same offense.

A court may correct, vacate, or change its sentences of its own motion before they go into execution.

Plain v. State, 60 Ga. 284; *Com. v. Weymouth*, 2 Allen, 144, 79 Am. Dec. 776; *State v. Cannon*, 11 Or. 312, 2 Pac. 191; *People v. Meservey*, 76 Mich. 223, 42 N. W. 1133; *People v. Kelley*, 79 Mich. 320, 44 N. W. 615; *Brown v. Rice*, 57 Me. 55, 2 Am. Rep. 11; *Re Mason*, 8 Mich. 70.

Although the first sentence is erroneous, a second would be double jeopardy.

State v. Addy, 43 N. J. L. 113, 39 Am. Rep. 547; *State v. Warren*, 92 N. C. 825; *Re Jones*, 35 Neb. 499, 53 N. W. 468.

At common law, the court could not resentence after reversal of sentence on writ of error.

Shepherd v. Com. 2 Met. 419; *Stevens v. Com.* 4 Met. 360; *State v. Gray*, 37 N. J. L. 368; *King v. Ellis*, 5 Barn. & C. 395. 43 L. R. A.

Although the first had never gone into execution.

Christian v. Com. 5 Met. 530.

The statute was passed to prevent a convict from going free of punishment, and was never intended to authorize a second sentence where the convict had actually suffered punishment.

Shepherd v. People, 25 N. Y. 406; *Feeley's Case*, 12 Cush. 598; *Com. v. Loud*, 3 Met. 328, 37 Am. Dec. 139; *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *Brown v. Rice*, 57 Me. 55, 2 Am. Rep. 11.

Messrs. Hosea M. Knowlton, Attorney General, and **Arthur W. DeGosh**, for plaintiff:

The appellate court has the right, when there has been an erroneous sentence, to remand the case to the trial court for sentence according to law.

Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244; *Re Bonner*, 151 U. S. 242, 33 L. ed. 149, 14 Sup. Ct. Rep. 323; *Roberts v. State*, 30 Fla. 82, 11 So. 536; *Beale v. Com.* 25 Pa. 11; *Henderson v. People*, 165 Ill. 607, 46 N. E. 711; *Lowrey v. Hogue*, 85 Cal. 601, 24 Pac. 995; *Brooks v. Com.* 4 Leigh, 669; *Oliver v. State*, 5 How. (Miss.) 14; *Lynn v. State*, 84 Md. 67, 35 Atl. 21; *Re Harris*, 68 Vt. 243, 35 Atl. 55; *Papworth v. Fitzgerald*, 106 Ga. 378, 32 S. E. 363; *Herrington v. State*, 87 Ala. 1, 5 So. 831; *State v. Taylor*, 124 N. C. 803, 32 S. E. 548; *State v. Williams*, 40 S. C. 373, 19 S. E. 5; *Hathcock v. State*, 88 Ga. 91, 13 S. E. 959; *Graham v. State*, 79 Wis. 651, 48 N. W. 863; *United States v. Pridgeon*, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. Rep. 746; *Coleman v. Tennessee*, 97 U. S. 509, 24 L. ed. 1118; *United States v. Harman*, 68 Fed. Rep. 472.

The term jeopardy "has no relation to the reversal of an erroneous judgment and pronouncing a legal one pursuant to a legal conviction."

McKee v. People, 32 N. Y. 239; *State v. Lee*, 65 Conn. 265; 27 L. R. A. 498, 30 Atl. 1110.

Statutes authorizing retrials and resentences have been in force from time immemorial. Even the right of the government to a new trial after a verdict of not guilty has been upheld.

State v. Lee, 65 Conn. 265, 27 L. R. A. 498, 30 Atl. 1110; *United States v. Sanges*, 144 U. S. 310, 36 L. ed. 445, 12 Sup. Ct. Rep. 609.

Morton, J., delivered the opinion of the court:

The defendant in this case was the plaintiff in error in the case of *Murphy v. Com.* 172 Mass. 264, 43 L. R. A. 154, 52 N. E. 505. In that case it was held that the statute under which he was sentenced was unconstitutional so far as it related to past offenses, and the sentence which had been imposed was reversed, and the case remanded to the superior court, under Pub. Stat. chap. 187, § 13, for sentence according to the law as it was when the offense was committed, and before the statute under which he was sentenced took effect. The defendant was

brought before the superior court on January 7, 1899, pursuant to that decision, and resented; the sentence being to the state prison for nine years, ten months, and twenty-nine days,—the first day solitary, and the rest at hard labor. Under the previous sentence he had been sentenced to the state prison for not less than ten nor more than fifteen years,—the first day to be in solitary confinement. When he was resented he had served the solitary confinement and two years, seven months, and ten days under the original sentence. Prior to imposing the last sentence the court said that, as defendant had already served the term of solitary confinement, he would prefer not to resentence him to solitary confinement, if a written waiver thereof was filed by defendant's attorney. The attorney stated that he did not feel justified in filing such waiver, and thereupon sentence was imposed as aforesaid. The defendant duly excepted to the imposition of the last sentence, and requested that all his rights might be reserved, which was done.

The contention of the defendant is, in substance, that one who has been sentenced by a court having jurisdiction of the offense and of the person, and the right to sentence to the place designated, and who has served a substantial portion of the time for which he was sentenced, cannot be resented if it turns out on a writ of error brought by him that the original sentence was unlawful. He contends in his own case that the resentence constituted a second punishment for the same offense; that he has been twice put in jeopardy thereby, and has been deprived of his constitutional rights. The statute under which the case was remanded contains no limitation on the power to remand for sentence in case of a reversal for error, but it is manifest that it cannot authorize the imposition of another sentence under such circumstances as would make it an interference with the constitutional rights of the prisoner. The question then is, Was the effect of the last sentence to put the defendant in jeopardy twice, or to punish him again for the same offense, or to abridge his privileges and immunities as a citizen of the United States? By "jeopardy" is meant, we think, lawful jeopardy from the commencement of the proceedings until their termination by a proper judgment and sentence or acquittal, or what the law regards as such. It has been held in numerous cases that where, either for want of jurisdiction, or from some defect in the indictment, or from such error in the course of the proceedings, the verdict has been set aside or the judgment has been arrested on a writ of error brought by the defendant, or on a motion made by him, and he has been tried again, he was not thereby put in jeopardy a second time, and his constitutional rights were not abridged. *Com. v. Wheeler*, 2 Mass. 174; *Com. v. Peters*, 12 Met. 387; *Com. v. Roby*, 12 Pick. 496, 502; *Com. v. Laky*, 8 Gray, 459; *Com. v. Gould*, 12 Gray, 171; *McKee v. People*, 32 N. Y. 239; *People v. McKay*, 18 Johns. 212; *State v. Walters*, 16 La. Ann. 48 L. R. A.

400; *Jones v. State*, 15 Ark. 261; *Turner v. State*, 40 Ala. 21; *Gerard v. People*, 4 Ill. 362; *State v. Redman*, 17 Iowa, 329; *State v. Sutton*, 4 Gill, 494; *Cooley*, Const. Lim. 3d ed. 327; *Sedgw. Stat. & Const. Law*, 2d ed. 572, 573, note a. One ground on which such a conclusion has been reached is that by bringing the writ of error or making the motion he is deemed to have waived any constitutional objection that he might have had to another trial, or to the entry of a proper judgment. 2 Bishop, *Crim. Law*, 2d ed. §§ 672 *et seq.* If a second trial, where the verdict has been set aside or the judgment arrested, does not constitute legal jeopardy, it is difficult to see how a party who may have served a portion of the sentence that has been set aside for error on proceedings instituted by him can rightfully object to the imposition of another and a lawful sentence by the court to which the case has been remanded. In this case the trial and conviction were, for aught that appears, regular and legal in all respects. The only error was in the sentence. It would be strange if there was no power anywhere to correct or to authorize the correction of the error on proceedings instituted by the prisoner, except at the risk of delivering him from any further punishment for the offense of which he had been convicted. It is said in *McKee v. People*, 32 N. Y. 239, 245, where the case was remanded under a statute similar to ours, that the term "jeopardy" "has no relation to the reversal of an erroneous judgment, and pronouncing a legal one pursuant to a legal conviction." And in *Jeffries v. State*, 40 Ala. 381, it was held that a prisoner could not plead *autre fois convict* if the former conviction had been reversed on proceedings instituted by himself, notwithstanding he had served a part of the term of his imprisonment before the reversal. See also *Jones v. State*, 15 Ark. 261. In criminal proceedings the sentence is the judgment, or at least an essential part of it.

Though the sentence in this case was in excess of the jurisdiction, it was not void, but voidable (*Sennott's Case*, 146 Mass. 489, 16 N. E. 448; *Ex parte Lange*, 18 Wall. 163, 174, 21 L. ed. 872, 878), and, if the defendant had completed the term for which he was sentenced, he would have paid the penalty required, and could not have been imprisoned or punished again for the same offense (*Com. v. Loud*, 3 Met. 328, 37 Am. Dec. 139). To that extent the sentence was lawful until reversed. *Sennott's Case*, 146 Mass. 489, 16 N. E. 448; *Reg. v. Drury*, 3 Car. & K. 193. Except for the statute authorizing the case to be remanded, he would have been entitled to a discharge, not because to resentence him was unconstitutional, but because at common law the court from which the writ of error issued could not itself pronounce the proper judgment or sentence, or send back the case to the inferior court to do so. *Shepherd v. Com.* 2 Met. 419; *King v. Bourne*, 7 Ad. & El. 58; *King v. Ellis*, 5 Barn. & C. 395. But a judgment and sentence reversed are the same as if there had been no judgment and sentence (*Reg. v. Drury*, 3 Car. &

K. 193), and this must be so even if the prisoner has served a part of the sentence. Whether the confinement under the reversed sentence has been longer or shorter can, on principle, make no difference. Besides, the length of such confinement will depend somewhat, at least, on the promptness with which proceedings are instituted to secure a reversal. No doubt, it would have been competent for the court to order that the last sentence should take effect from the date of the first sentence (*Jacquins v. Com.* 9 Cush. 279), but we do not think that it was bound to do so; and though the effect of the sentence will be to compel the defendant to suffer solitary confinement twice, and will result, it is said, in his actual confinement for a longer period than the term for which he was originally sentenced, we do not see, for reasons already given, that the last sentence is rendered invalid thereby. The case is not one of the imposition of a second sentence for the same offense, or of the attempted correction of a sentence after the term has ended at which it was imposed, and the court has adjourned without day. See *Com. v. Foster*, 122 Mass. 317, 323, 23 Am. Rep. 326. But it is a case where the sentence that was originally imposed has been reversed and declared unlawful upon a writ of error brought by the party aggrieved, and the case has been remanded, as provided by statute, to the superior court for sentence according to the law as it was when the offense was committed. Cases in regard to the imposition of a second sentence as such, or in regard to the attempted correction of a sentence after the adjournment of the court, or the substitution of one sentence for another, do not apply. The defendant relies upon *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872, and *Feeley's Case*, 12 Cush. 598. In *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872, the statute authorized fine or imprisonment, but the court imposed both. The prisoner paid the fine, and, after it had been paid, the court at the same term attempted to modify the sentence by changing it to imprisonment, and substituting the sentence as thus modified for the original sentence of fine and imprisonment.

But the supreme court held that, the prisoner having satisfied one of the alternative penalties provided by the statute, the sentence could not be changed and the other alternative penalty imposed. Manifestly, that case is not like this. *Feeley's Case*, 12 Cush. 598, was much the same. The statute provided fine or imprisonment. The court imposed both, and the prisoner paid the fine, and was committed pursuant to the other part of the sentence, and then petitioned for a writ of habeas corpus on the ground that he was unlawfully restrained of his liberty. This court granted the writ and ordered his discharge on the ground that he had paid the fine, and the court below had no power to impose imprisonment. It is manifest that this case, also, does not help the defendant. The course that was followed in *Murphy v. Com.*, 172 Mass. 264, 43 L. R. A. 154, 52 N. E. 505, seems to have been followed in the Supreme Court of the United States, and apparently was not regarded as putting the prisoner in jeopardy or punishing him twice, or as interfering with his constitutional rights. *Re Bonner*, 151 U. S. 242, 262, 38 L. ed. 149, 153, 14 Sup. Ct. Rep. 323; *Reynolds v. United States*, 98 U. S. 145, 168, note, 25 L. ed. 244, 251; *Coleman v. Tennessee*, 97 U. S. 509, 519, L. ed. 1118, 1123. We do not discover in what has been done anything by which the privilege or immunities of the defendant as a citizen of the United States have been abridged, in violation of the 14th Amendment. The equal protection of the laws has not been denied to him, and he has not been deprived of his liberty without due process of law. *Re Converse*, 137 U. S. 624, 34 L. ed. 799, 11 Sup. Ct. Rep. 191; *Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179. The fact that he court in *Murphy v. Com.* 172 Mass. 264, 43 L. R. A. 154, 52 N. E. 505, may have taken a somewhat different view of Stat. 1895, chap. 504, from that taken in *Com. v. Brown*, 167 Mass. 144, 45 N. E. 1, does not constitute an interference with the defendant's rights.

Exceptions overruled.

Affirmed by Supreme Court of United States, April 9, 1900.

MICHIGAN SUPREME COURT.

Arthur D. HOLMES

v.

David J. McALLISTER et al., Plffs. in Err.

(.....Mich.....)

1. An employer is not liable for the services of a physician summoned by his manager or foreman to attend an employee in case of an injury by accident in a laundry during the employer's absence.
2. A promise to pay for services en-

gaged by an employee without any authority, for the benefit of a third person, when accompanied by a denial of any liability, does not constitute a ratification, but is a mere promise to pay the debt of another, which is void under the statute of frauds.

(March 27, 1900.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to recover the value of medical services rendered to defendants' employee. *Reversed.*

NOTE.—For duty of master to furnish medical aid to servant, see *Ohio & M. R. Co. v. Early* (Ind.) 28 L. R. A. 546, and note. 48 L. R. A.

Statement by Grant, J.:

Plaintiff, a physician, sued the defendants, copartners in a laundry business, for medical services rendered one of their employees, and recovered a verdict of \$50. The case was submitted to the jury upon two theories: (1) That there was an original contract of employment between plaintiff and defendants; (2) that the act of the forewoman of defendants in sending for plaintiff to attend the employee, if unauthorized by them, was subsequently ratified. Defendants insist that there was no original contract, and no ratification of an unauthorized contract. There is little, if any, dispute about the material facts. Plaintiff had no conversation with either of the defendants in regard to the service, and the parties had never met until the trial in the justice court. The employee, Augusta Senken, had her hand seriously injured on April 19. Neither of the defendants was in the laundry at the time. Defendant James usually spent most of his time there. One Miss McGrath, the forewoman, had charge of the work on the four floors of the building; hired and discharged girls when she saw fit; and, when James was not there, acted in case of an emergency. The injury was so serious that Miss McGrath deemed prompt medical assistance advisable. She sent a boy for a physician, not designating any particular one. The boy called plaintiff. He immediately responded, dressed the wound, and ordered her to be taken home, saying that he would have to see her again. She was taken home in a carriage. In the afternoon of the same day she was suffering pain, and sent a note to a store near by to telephone to the laundry. Someone at the laundry telephoned to plaintiff, and he went to see her. Defendants had no knowledge of this. Plaintiff treated her at her home until she was able to go out, and then she went to his office, and there received treatment until the wound was healed. She was under treatment for about three months. The only conversation plaintiff had with anyone connected with the defendants was with Miss McGrath, and he does not tell what that conversation was. It was at the house of Mrs. Knack, with whom Miss Senken lived. Miss McGrath testified: "The doctor asked me if Mr. McAllister had said anything in regard to him taking care of the girl. I said he hadn't said anything to me. He says, 'Well, I would like to make the bill as reasonable as possible for Mr. McAllister, and at the same time take care of the girl properly.' I said: 'Well, I don't know what Mr. McAllister would do in a case of this kind. We have never had an accident before, and it would be better to see him.' So he said he would call and see Mr. McAllister." Miss Senken testified that she heard this conversation, and states it as follows: "Miss Margaret McGrath came to my house several times while the doctor was there. One time he asked her if Mr. McAllister says anything, and if it was all right about the bill; and she says to him that she thought that Mr. McAllister was a very good man, and that he would pay the bill." Mr. 48 L. R. A.

Knack, husband of Mrs. Knack, testified that in June, after the accident, he went to defendant James, and asked him to help the girl; that he declined, and, after a little while, said, "I will pay the doctor's bill." Mr. Kissane, one of the attorneys for plaintiff, testified: "I went to see James McAllister with a view of collecting the bill in controversy, at the request of Dr. Holmes, shortly before the commencement of this suit. I told him the doctor was claiming \$104. I demanded the payment of the bill. He declined to pay the full amount, and said that he was willing to pay the first visit, whatever that might be worth, but he didn't think he ought to pay the entire bill; that the calling of the doctor by the forelady was all right; it was something that he would have done himself, had he been there in the laundry at the time, and that he didn't go back on that, and whatever was reasonable for that first visit he was willing to pay." The above is all the testimony bearing upon the liability of the defendants. Plaintiff called in two physicians, one for advice and another to assist him in an operation, all of which was unknown to defendants. No accident had ever happened in the laundry before. The first intimation the defendants had that plaintiff considered them liable was when they received a bill after the services were rendered.

Mr. Ira A. Lieghey, for plaintiffs in error:

The authority of a foreman in a manufacturing institution to employ a physician for an injured employee will not be presumed.

Chaplin v. Freeland, 7 Ind. App. 676, 34 N. E. 1007.

A railroad company is not under any legal obligation to provide surgical assistance for employees who are injured while in the discharge of their duties.

Sevier v. Birmingham, S. & T. River R. Co. 92 Ala. 258, 9 So. 405; *Clark v. Missouri P. R. Co.* 48 Kan. 654, 29 Pac. 1138.

A contract made by a physician of a railroad company to pay for board and nursing of an injured employee is not binding on the company where the authority of the physician is not shown.

Mayberry v. Chicago, R. I. & P. R. Co. 75 Mo. 492.

No ratification of employment was shown, and even if a promise to pay the physician was made, or the employment ratified, it was void under the statute of frauds.

1 Am. & Eng. Enc. Law, p. 1184, note 6.

A physician employed by the railroad company to attend to a case has no power, by virtue of such employment, to make a contract with another physician to look after his patient, to be paid for by the company.

Evansville & I. R. Co. v. Spellbring, 1 Ind. App. 167, 27 N. E. 239; *Terre Haute & I. R. Co. v. Brown*, 107 Ind. 336, 8 N. E. 218.

The burden of proving ratification rests upon the one who relies upon the agent's unauthorized act.

Hurley v. Watson, 68 Mich. 531, 36 N. W.

726; *Heyn v. O'Hagen*, 60 Mich. 150, 26 N. W. 861; 1 Am. & Eng. Enc. Law, p. 1188, note 1.

Knowledge of all material facts and circumstances is an essential element to an effective ratification.

1 Am. & Eng. Enc. Law, p. 1189, note 2; *Wheeler v. McGuire*, 86 Ala. 398, 2 L. R. A. 808, 5 So. 190.

It is the duty of all parties dealing with an agent to inquire into the nature and extent of his authority, and deal with him accordingly.

1 Am. & Eng. Enc. Law, 2d ed. p. 934, note 11; *Deffenbaugh v. Jackson Paper Mfg. Co.* (Mich.) 6 Det. L. N. 106, 79 N. W. 197.

A physician cannot recover without proof of authority on the part of the contracting agent.

Mobile & M. R. Co. v. Jay, 61 Ala. 247; *Swazey v. Union Mfg. Co.* 42 Conn. 556.

Messrs. Thomas Kissane and C. H. Wilson, for defendant in error:

When a doctor is employed to attend upon a sick person, his employment continues while the sickness lasts, and the relation of physician and patient continues, unless it is put an end to by the assent of the parties, or is revoked by the express dismissal of the physician.

Dale v. Donaldson Lumber Co. 48 Ark. 158, 2 S. W. 703; *Ballou v. Prescott*, 64 Me. 305; *Potter v. Virgil*, 67 Barb. 578.

It was not the duty of the plaintiff to notify the defendants that he was continuing the treatment; but it was their duty to notify him to stop.

Sevier v. Birmingham, S. & T. River R. Co. 92 Ala. 258, 9 So. 405.

An employer is obliged to pay such bills.

Marquette & O. R. Co. v. Taft, 28 Mich. 289; *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358, 49 Am. Rep. 752.

Grant, J., delivered the opinion of the court:

Had defendants' forewoman authority to bind them by sending for plaintiff to attend the injured employee? She had no general authority to do so. If she was clothed with any authority to do so, it must be because an emergency arose in which it was the defendants' duty to have someone to act for them. There are authorities which hold parties liable in certain emergencies for the acts of their managers or foremen in employing physicians. These authorities, however, go no further than to hold the parties liable for the immediate services made necessary by a present urgency. Authority to act is implied from the necessity of the case. *Chaplin v. Freeland*, 7 Ind. App. 676, 34 N. E. 1007; *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358; *St. Louis, A. & T. R. Co. v. Hoover*, 53 Ark. 377, 13 S. W. 1092; *Louisville, N. A. & C. R. Co. v. Smith*, 121 Ind. 353, 6 L. R. A. 320, 22 N. E. 775; *Arkansas Southern R. Co. v. Loughridge*, 65 Ark. 300, 45 S. W. 907. Neither the authorities nor reason carry the rule beyond the emergency. Such employment does not make the employer liable for the services rendered by 48 L. R. A.

the physician to the employee after the emergency has passed. If the physician desires to hold the employer responsible for subsequent services, he must make a special contract with him. The cases above cited, and others, are those in which the employment is hazardous, exposing the employees to dangers and risks greater than those in the ordinary pursuits of life. The ground for such liability is thus stated in *Chaplin v. Freeland*, 7 Ind. App. 676, 34 N. E. 1007: "Railroad companies occupy a peculiar position with reference to such matters, exercising quasi-public functions, clothed with extraordinary privileges, carrying their employees necessarily to places remote from their homes, subjecting them to unusual hazards and dangers. The law has, by reason of the dictates of humanity and the necessities of the occasion, imposed upon such companies the duty of providing for the immediate and absolutely essential needs of injured employees, when there is a pressing emergency calling for their immediate action. In such cases even subordinate officers are sometimes, for the time being, clothed with the powers of the corporation itself for the purposes of the immediate emergency, and no longer." There is no evidence in this case that employment in a laundry is accompanied by any such dangers. We may infer the contrary, as no accident had ever before occurred in the defendants' business, an extensive one. An employee in a bank, store, or shop, or upon a farm, may become suddenly very ill, or in some way seriously injured, so that some foreman or other employee might properly deem immediate medical attendance necessary, and in the absence of the employer, summon a physician. Is the employer liable? We are cited to no authority which so holds. It is doubtful whether such an employer would be liable if he himself sent for the physician to attend one of his employees. It is unnecessary upon this point to express an opinion. We do not, however, hesitate to hold that in those vocations of life unaccompanied by dangers an employer is not liable for the services of a physician summoned by his manager or foreman or other servant to attend an employee in a case of sudden illness or injury, whatever his moral obligation may be. If, therefore, the plaintiff had known that Miss McGrath summoned him, the defendants would not be liable. He did not know and made no inquiries as to who summoned him. He testified, "A boy from their office summoned me from the laundry." He never informed defendants that he was treating her, or that he expected them to pay him, or presented a bill, until he had ceased to treat her. He now seeks to bind, not only defendants for his own services, but for the services of other physicians whom he employed to assist him without their knowledge or assent. He could, in no event, recover for the services of the other physicians. *Mayberry v. Chicago, R. I. & P. R. Co.* 75 Mo. 492. We therefore hold that there was no original contract.

2. There is no evidence of ratification. The testimony of Mr. Knack and the attorney, Mr. Kissane, does not show a ratification. To Mr. Kissane defendant James denied liability, though willing to pay for the first visit at the laundry. As already shown, defendants were not originally liable.

The language of Knack and Kissane imports no more than the promise to pay the debt of another, which is void under the statute of frauds.

Judgment reversed, and new trial ordered.

The other Justices concur.

MISSOURI SUPREME COURT.

Grant GRATTIS, *Resp't.*,

v.

KANSAS CITY, PITTSBURG, & GULF
RAILROAD COMPANY, *Appt.*

(.....Mo.....)

1. The conductor and engineer of a freight train are both fellow servants of a fireman, so as to preclude him from recovering for injuries received by reason of the derailment of the train at a switch, that was caused by the negligence of the engineer and the conductor.
2. A master is not bound to furnish the safest and best appliances that can be used; but he is acquit of fault if what he furnishes is reasonably safe and suitable.
3. It is not negligence on the part of a railroad company towards its servants to use a stub switch, which is safe when used in the proper manner, although it is unsafe to run a train through it from the wrong direction.
4. A railroad company cannot be held negligent for placing a switch-signal target on the same side of the main track with the side track, although an injury which happened might have been avoided if the target had been on the other side of the track, where there is no uniform rule as to which side of the track such target shall be placed, and under some circumstances it is better to have it on one side, and under other circumstances better to have it on the other side.

(Brace, J., *dissent.*)

(January 10, 1900.)

A PPEAL by defendant from a judgment of the Circuit Court for Newton County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinions.

Messrs. Trimble & Braley, Benton & Sturgis, and John A. Eaton, for appellant:

The immediate and direct cause of the wreck of the locomotive and train upon which Grattis was fireman was the negligence of the engineer and his wilful violation of the rules of the company. If, therefore, the engineer and fireman are fellow servants, the plaintiff cannot recover in this action.

NOTE.—As to when a conductor is deemed to be a coservant of other railway employees, see *Jackson v. Norfolk & W. R. Co.* (W. Va.) 46 L. R. A. 387, and *note*.

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The fireman, engineer, brakeman, and conductor were fellow servants; and the conductor was not a vice principal as to either the engineer or the fireman.

McGowan v. St. Louis & I. M. R. Co. 61 Mo. 528; *Blessing v. St. Louis, K. C. & N. R. Co.* 77 Mo. 410; *Marshall v. Schricker*, 63 Mo. 308; *Shortel v. St. Joseph*, 104 Mo. 114, 16 S. W. 397; *Keegan v. Kavanaugh*, 62 Mo. 230; *Stephens v. Hannibal & St. J. R. Co.* 96 Mo. 209, 9 S. W. 589; *Higgins v. Missouri P. R. Co.* 104 Mo. 413, 16 S. W. 409; *Schaub v. Hannibal & St. J. R. Co.* 106 Mo. 75, 16 S. W. 924; *Relyea v. Kansas City, Ft. S. & G. R. Co.* 112 Mo. 86, 18 L. R. A. 817, 20 S. W. 480; *Rutledge v. Missouri P. R. Co.* 123 Mo. 121, 24 S. W. 1053, 27 S. W. 327; *Ryan v. McCully*, 123 Mo. 636, 27 S. W. 533; *Sherrin v. St. Joseph & St. L. R. Co.* 103 Mo. 378, 15 S. W. 442; *Moran v. Brown*, 27 Mo. App. 487; *Corbett v. St. Louis, I. M. & S. R. Co.* 26 Mo. App. 621; *Browning v. Wabash Western R. Co.* 124 Mo. 55, 24 S. W. 731, 27 S. W. 644; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Northern P. R. Co. v. Hamby*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; *Central R. Co. v. Keegan*, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *Oakes v. Mase*, 165 U. S. 363, 41 L. ed. 746, 17 Sup. Ct. Rep. 345; *Bailey, Mast. & S. p.* 239.

The proposition that the conductor, engineer, and fireman are all fellow servants is abundantly supported by the decisions of other states.

Louisville, N. O. & T. R. Co. v. Petty, 67 Miss. 255, 7 So. 351; *Henry v. Lake Shore & M. S. R. Co.* 49 Mich. 495, 13 N. W. 832; *Murray v. South Carolina R. Co.* 1 McMull. L. 385, 36 Am. Dec. 268; *Nashville & C. R. Co. v. Elliott*, 1 Coldw. 611, 78 Am. Dec. 506; *Gulf, C. & S. F. R. Co. v. Blohn*, 73 Tex. 637, 4 L. R. A. 764, 11 S. W. 869; *Chicago & N. W. R. Co. v. Snyder*, 117 Ill. 376, 7 N. E. 604; *Michigan C. R. Co. v. Dolan*, 32 Mich. 510; *Enright v. Toledo, A. A. & N. M. R. Co.* 93 Mich. 409, 53 N. W. 536; *New Orleans, J. & G. N. R. Co. v. Hughes*, 49 Miss. 262; *Heine v. Chicago & N. W. R. Co.* 58 Wis. 525, 17 N. W. 420; *Wright v. Southern R. Co.* 80 Fed. Rep. 260; *Jackson v. Norfolk & W. R. Co.* 43 W. Va. 380, 46 L. R. A. 337, 355, 27 S. E. 278, 31 S. E. 258; *St. Louis, I. M. & S. R. Co. v. Needham*, 27 U. S. App. 227, 63 Fed. Rep. 107, 11 C. C. A. 56, 25 L. R. A. 833; *Denver & R. G. R. Co. v. Sipes*, 23 Colo.

226, 47 Pac. 287; *Mulligan v. Montana Union R. Co.* 19 Mont. 135, 47 Pac. 795; *International & G. N. R. Co. v. Culpepper* (Tex. Civ. App.) 38 S. W. 818; *Moore v. Jones*, 15 Tex. Civ. App. 391, 39 S. W. 593; *Slater v. Jewett*, 85 N. Y. 61, 39 Am. Rep. 627.

Where the fireman is injured by the alleged negligence of the engineer, the burden is on him to show that they are not fellow servants.

Kansas City, Ft. S. & M. R. Co. v. Becker, 63 Ark. 477, 39 S. W. 358; *Eckles v. Norfolk & W. R. Co.* 96 Va. 69, 25 S. E. 545.

The master's duty is fully discharged when it uses reasonable care and precaution in procuring and keeping its appliances in good condition and order; and, while it cannot wholly disregard the improvements of the day, no rule of law requires it to immediately adopt them and put them in use.

Huhn v. Missouri P. R. Co. 92 Mo. 440, 4 S. W. 937; *Gardner v. St. Louis & S. F. R. Co.* 135 Mo. 90, 36 S. W. 214; *Elliott, Railroads*, § 1277.

With the existence of the stub switch, and the location of the switch stand, and the condition of the engine, Grattis was familiar. He continued to run over the road with this engine almost daily from the 1st day of June until the time of the injury; he assumed the risks incident thereto.

Lucey v. Hannibal Oil Co. 129 Mo. 32, 31 S. W. 340; *Holloran v. Union Iron & Foundry Co.* 133 Mo. 470, 35 S. W. 260; *Wray v. Southwestern Electric Light & W. Power Co.* 68 Mo. App. 380; *Gardner v. St. Louis & S. F. R. Co.* 135 Mo. 90, 36 S. W. 214; *Marshall v. Kansas City Hay Press Co.* 69 Mo. App. 256; *Krampe v. St. Louis Brewing Assn.* 59 Mo. App. 277.

The negligence of the engineer is clearly established; he could not recover by reason of any injuries received by him, nor could there be any recovery because of his death.

Roblin v. Kansas City, St. J. & C. B. R. Co. 119 Mo. 476, 24 S. W. 1011; *Roddy v. Missouri P. R. Co.* 104 Mo. 234, 12 L. R. A. 746, 15 S. W. 1112; *Price v. Hannibal & St. J. R. Co.* 77 Mo. 508; *Porter v. Hannibal & St. J. R. Co.* 71 Mo. 76, 36 Am. Rep. 454; *Devitt v. Pacific R. Co.* 50 Mo. 302; *Thorpe v. Missouri P. R. Co.* 89 Mo. 650, 58 Am. Rep. 120; *Berning v. Medart*, 56 Mo. App. 443; *Rutledge v. Missouri P. R. Co.* 110 Mo. 312, 19 S. W. 38; *Bohn v. Chicago, R. I. & P. R. Co.* 106 Mo. 429, 17 S. W. 580; *Friel v. Citizens' R. Co.* 115 Mo. 503, 22 S. W. 498; *Ring v. Missouri P. R. Co.* 112 Mo. 220, 20 S. W. 436.

As between the company and an employee, the court, in the absence of evidence to the contrary, will presume that there was no negligence on the part of the company in using a "passenger siding" for "storing cars."

Norfolk & W. R. Co. v. Williams, 89 Va. 165, 15 S. E. 522.

The engineer's attention was twice called to the existence of the dangers, and, had he obeyed the rules, the danger would have been averted. These rules were in the possession of both engineer and fireman, and their violation by either engineer or fireman will defeat a recovery for injuries received by either.

Francis v. Kansas City, St. J. & C. B. R. Co. 110 Mo. 387, 19 S. W. 935; *Alcorn v. Chicago & A. R. Co.* 108 Mo. 81, 18 S. W. 188; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212, 12 N. E. 380; *Bennett v. Northern P. R. Co.* 2 N. D. 112, 13 L. R. A. 465, 49 N. W. 408; *Crew v. St. Louis, K. & N. W. R. Co.* 20 Fed. Rep. 87; *Wolsey v. Lake Shore & M. S. R. Co.* 33 Ohio St. 227; *Lyon v. Detroit, L. & L. M. R. Co.* 31 Mich. 429; *Sutherland v. Troy & B. R. Co.* 125 N. Y. 737, 26 N. E. 609; *Buswell, Personal Injuries*, § 153; *Elliott, Railroads*, § 1282; *Norfolk & W. R. Co. v. Williams*, 89 Va. 165, 15 S. E. 522; *Smith v. Missouri P. R. Co.* 113 Mo. 70, 20 S. W. 896.

Messrs. Cravens & Cravens and Edward H. Stiles, for respondent:
If the conductor had control of the train and of the engineer, fireman, and brakeman assisting in running it, then he was vice principal.

Brothers v. Cartter, 52 Mo. 372, 14 Am. Rep. 424; *Gormly v. Vulcan Iron Works*, 61 Mo. 492; *Whalen v. Centenary Church*, 62 Mo. 326; *Cook v. Hannibal & St. J. R. Co.* 63 Mo. 397; *Moore v. Wabash, St. L. & P. R. Co.* 85 Mo. 588; *Stephens v. Hannibal & St. J. R. Co.* 86 Mo. 221; *Hoke v. St. Louis, K. & N. R. Co.* 88 Mo. 360; *Tabler v. Hannibal & St. J. R. Co.* 93 Mo. 79, 5 S. W. 810; *Dayharsh v. Hannibal & St. J. R. Co.* 103 Mo. 570, 15 S. W. 554; *Smith v. Wabash, St. L. & P. R. Co.* 92 Mo. 359, 4 S. W. 129; *Sherin v. St. Joseph & St. L. R. Co.* 103 Mo. 383, 15 S. W. 442; *Dixon v. Chicago & A. R. Co.* 109 Mo. 421, 18 L. R. A. 792, 19 S. W. 412; *Hutson v. Missouri P. R. Co.* 50 Mo. App. 305; *Miller v. Missouri P. R. Co.* 109 Mo. 350, 19 S. W. 58; *Foster v. Missouri P. R. Co.* 115 Mo. 165, 21 S. W. 916; *Berry v. Missouri P. R. Co.* 124 Mo. 223, 25 S. W. 229; *Covey v. Hannibal & St. J. R. Co.* 27 Mo. App. 170; *Cox v. Syenite Granite Co.* 39 Mo. App. 424; *Banks v. Wabash W. R. Co.* 40 Mo. App. 458; *Higgins v. Missouri P. R. Co.* 43 Mo. App. 547; *Hall v. St. Joseph Water Co.* 48 Mo. App. 364; *Mason v. Richmond & D. R. Co.* 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698.

The conductor is not a fellow servant with the other employees operating a train.

Patton v. Western N. C. R. Co. 96 N. C. 455, 1 S. E. 863; *Central R. Co. v. De Bray*, 71 Ga. 406; *Boatwright v. Northeastern R. Co.* 25 S. C. 128; *Coleman v. Wilmington, C. & A. R. Co.* 25 S. C. 446, 60 Am. Rep. 516; *Louisville & N. R. Co. v. Brooks*, 83 Ky. 129; *Louisville & N. R. Co. v. Moore*, 83 Ky. 675; *Louisville & N. R. Co. v. Robinson*, 4 Bush. 508; *Louisville, C. & L. R. Co. v. Carens*, 9 Bush. 559; *Kentucky C. R. Co. v. Ackcrly*, 87 Ky. 278, 8 S. W. 691; *Louisville & N. R. Co. v. Collins*, 2 Duv. 114, 87 Am. Dec. 486.

Where the servant is, in the grade of his employment, superior to the injured servant, or where one servant is placed by the employer in a position of subordination and

subject to the orders and control of another, in such a way and to such an extent that the servant so placed in control may reasonably be regarded as representing the master as his *alter ego* or vice principal, when such inferior servant, without fault and while in the discharge of his duty, is injured by the negligence of the superior servant, the master is liable in damages for the injury.

Beach, Contrib. Neg. § 110; *Chicago & A. R. Co. v. May*, 108 Ill. 288; *Lalor v. Chicago, B. & Q. R. Co.* 52 Ill. 401; *Wabash, St. L. & P. R. Co. v. Hawk*, 121 Ill. 259, 12 N. E. 253; *Louisville & N. R. Co. v. Collins*, 2 Duv. 114, 87 Am. Dec. 486; *East Tennessee & W. N. C. R. Co. v. Collins*, 85 Tenn. 227, 1 S. W. 883; *Nashville & D. R. Co. v. Jones*, 9 Heisk. 27; *Washburn v. Nashville & C. R. Co.* 3 Head, 638; *Nashville, C. & St. L. R. Co. v. Wheless*, 10 Lea, 741, 43 Am. Rep. 317; *Louisville & N. R. Co. v. Bowler*, 9 Heisk. 866; *Cowles v. Richmond & D. R. Co.* 84 N. C. 309, 37 Am. Rep. 620; *Dobbin v. Richmond & D. R. Co.* 81 N. C. 446, 31 Am. Rep. 512; *Criswell v. Pittsburgh, C. & St. L. R. Co.* 30 W. Va. 798, 6 S. E. 31; *Lake Shore & M. S. R. Co. v. Lavalley*, 36 Ohio St. 221; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287, 27 Am. Rep. 510; *Kansas P. R. Co. v. Little*, 19 Kan. 267; *Chicago, St. P. M. & O. R. Co. v. Lundstrom*, 16 Neb. 254, 20 N. W. 198; *Burlington & M. R. Co. v. Crockett*, 19 Neb. 138, 26 N. W. 921; *Smith v. Sioux City & P. R. Co.* 15 Neb. 583, 19 N. W. 638; *Moon v. Richmond & A. R. Co.* 78 Va. 745, 49 Am. Rep. 401; *Atlanta Cotton Factory Co. v. Speer*, 69 Ga. 137; *Baldwin v. St. Louis, K. & N. W. R. Co.* 63 Iowa, 210, 18 N. W. 884; *Northern P. R. Co. v. O'Brien* (Wash. Terr.) 21 Pac. 32; *Thompson, Neg.* 1028, § 34; *Shearm. & Redf. Neg.* § 102; *Wharton, Neg.* § 229; *Little Miami R. Co. v. Stevens*, 20 Ohio, 415; *Madden v. Chesapeake & O. R. Co.* 28 W. Va. 610, 57 Am. Rep. 695.

The knowledge by plaintiff of the existence of the unsafe stub switch and the bad condition of the engine does not bar his recovery, or abate the force of the combining effect of these negligent acts of defendant with the negligence of plaintiff's co-servant, the engineer.

Conroy v. Vulcan Iron Works, 62 Mo. 35; *Hamilton v. Rich Hill Coal Min. Co.* 108 Mo. 364, 18 S. W. 977; *O'Melia v. Kansas City, St. J. & C. B. R. Co.* 115 Mo. 205, 21 S. W. 503.

If the defendant had not failed in its duty to plaintiff to have a reasonably safe switch and pop, then plaintiff would have had no injuries.

The jury found by their verdict the combining negligence of defendant in producing the injury to plaintiff.

Bluedorn v. Missouri P. R. Co. 108 Mo. 439, 18 S. W. 1103; *Browning v. Wabash W. R. Co.* 124 Mo. 55, 24 S. W. 731, 27 S. W. 644; *Ellingson v. Chicago & A. R. Co.* 60 Mo. App. 679; *Ford v. Fitchburg R. Co.* 110 Mass. 240, 14 Am. Rep. 598; *Cayzer v. Taylor*, 10 Gray, 274, 69 Am. Dec. 317; *Holden v. Fitchburg R. Co.* 129 Mass. 268, 37 Am. 48 L. R. A.

Rep. 343; *Houston & T. C. R. Co. v. Lowe* (Tex.) 11 S. W. 1065.

The stub switch, the location of the switch target, and the condition of the engine were contributory proximate causes.

Ring v. Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; *International & G. N. R. Co. v. Williams* (Tex. Civ. App.) 34 S. W. 161; *Burger v. Missouri P. R. Co.* 112 Mo. 238, 20 S. W. 439.

Plaintiff may show that defendant is negligent in respect to the operation and equipment of its road by proving that the alleged negligent acts are not usual with well-managed roads, and not such as good railroading requires.

Hewitt v. Flint & P. M. R. Co. 67 Mich. 61, 34 N. W. 659; *Kehler v. Schwenk*, 144 Pa. 348, 13 L. R. A. 374, 22 Atl. 910; *Gulf, C. & S. F. R. Co. v. Warner* (Tex. Civ. App.) 36 S. W. 118; *Titus v. Bradford, B. & K. R. Co.* 136 Pa. 618, 20 Atl. 517; *Richmond & D. R. Co. v. Jones*, 92 Ala. 218, 9 So. 276; *Georgia P. R. Co. v. Propst*, 83 Ala. 518, 3 So. 764; *Louisville & N. R. Co. v. Allen*, 78 Ala. 494.

Marshall, J., delivered the opinion of the court:

The following opinion of division No. 1 is hereby adopted as the opinion of the court in banc.

It is therefore ordered that the judgment of the Circuit Court be reversed.

Gantt, Ch. J., and **Sherwood and Valiant, JJ.**, concur.

Burgess and Robinson, JJ., concur in the judgment of reversal on the ground that the negligence of the engineer was the cause of the injury, and that the engineer and fireman were fellow servants; but do not regard the "department doctrine" as involved in the case.

Brace, J., dissents.

Marshall, J.:

This is an action for damages for personal injuries received by plaintiff at McElhaney switch, in Newton county, Missouri, between the hours of 1 and 2 o'clock, P. M. on July 12, 1894. The petition charges that it was a switch station, where trains stop only when signaled; that there is a side track on the east side of the main track long enough to hold eleven standard freight stock cars; that at each end of the side track there was a switch post placed on the east side of the main track, instead of the west side, each post being about 6 feet and 4 inches from the east rail of the main track, and used to work the switch; that the switch posts have targets placed on their tops, one side being painted red and the other white, so that the color indicates whether the switch is thrown to connect with the switch or with the main track,—the red signifying that the connection is with the switch, and the white that it is with the main track,—and that, when the red appears, it is dangerous for trains to attempt to pass over from the opposite direction; that on July 12, 1894, the switch or side track was full of empty freight cars,

there being eleven standard freight cars on it, which were put there by defendant on July 11, 1894, "making it impossible to see the target on the switch post at the south end of the switch track by those seated in engine cabs of trains moving south along said place until within 60 or 80 feet of said switch post; that the ties supporting the main track at the south end of the side track were rotten, and would not hold the spikes that were intended to hold the rails in place; that at the south end of the switch track was what is known as a 'stub rail' switch,—an old and abandoned and extremely dangerous and hazardous character of switch, long since discarded by all practical railroad men, and especially dangerous and unsafe, under the circumstances, with the switch post and target on the east side of the main track; that the lock maintained on said switch was weak and old, and insufficient to hold the same;" that plaintiff was employed as fireman on a train that was going from Pittsburg, Kansas, to Siloam, Arkansas, and when the train approached McElhaney flag station, going south, it was traveling at the rate of about 15 miles an hour, and when it neared the south end of the switch it was discovered that the switch was thrown for the side track, which left the end of the main track at the switch open to this train going south; that this could not have been discovered sooner because the cars on the side track obstructed the view of the switch post and target from plaintiff and the engineer on the engine; that, if the cars on the side track had not obstructed the view, or if the target had been on the west side of the track, it could have been seen for a quarter of a mile before reaching the end of the switch; that, as soon as plaintiff discovered that the switch was open, he notified the engineer, who tried to stop the engine, but could not do so in time, and the engine was thrown from the track,—the rotten ties gave way, and the engine was thrown over on its side; that, when plaintiff saw his imminent danger, he jumped from the cab of the engine; that the engine was old, worn out, and defective, and unfit for use, and the "pops" attached to the engine on the top of the steam dome, being defective and out of repair, flew out, and the steam escaped, and scalded and burned plaintiff over his whole body. Plaintiff then sets out the negligence of the defendant to be: "In permitting the empty cars to be and remain on the side track or switch aforesaid, and thereby preventing plaintiff and said engineer [who was killed] from seeing the signal target of the switch, which would advise them of the danger on account of said switch or track being moved out of place. In having said switch rods and targets on the east side of said main track, instead of on the west, where it ought to have been for the appliance to be reasonably safe, and where proper and ordinary railroading required them to be placed, and where a person in the exercise of ordinary care and foresight would, in view of the great danger involved, have placed them. In having at that place an unsuitable

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and unsafe 'stub rail' switch, instead of a 'split' or 'spring' switch, which latter are entirely free from the danger which produced this accident, and which ordinary care and foresight on the part of the defendant would have caused it to provide. In permitting said engine to be out of repair, and said 'pops' to be and remain loose, out of repair, and unsafe, and in a dangerous condition, as above stated. In having on said switch post an unsuitable and unsafe lock."

The answer admitted its incorporation, and ownership of the road, and also the allegations as to the character, purpose, and working of the switch, and denied the other allegations of the petition. It then pleaded contributory negligence of plaintiff and the engineer, and averred: That it was the duty of the plaintiff and the engineer to see that the switch was correctly set, and the track clear, before attempting to pass over it; and that they failed to exercise ordinary care in not stopping the engine where the cars on the side track obstructed the view of the target, until they could ascertain whether the track was safe to pass over. That plaintiff knew the character of the switch and the condition of the engine, and that, notwithstanding, they ran the train over the switch at a high rate of speed, and caused the accident. That plaintiff and the engineer were in possession of the rules of the company defining and prescribing their duties, one of which (No. 65) was: "A signal imperfectly displayed, or the absence of a signal at a place where a signal is usually shown, must be regarded as a danger signal;" another (No. 78) was: "All signals must be used strictly in accordance with the rules, and trainmen and engineers must keep a constant lookout for signals;" another (No. 121) was: "In all cases of doubt or uncertainty, take the safe course, and run no risks." That plaintiff and the engineer violated said rules by not stopping the train when they could not see the signals.

The reply was a general denial, but during the trial it was amended so as to allege that when the train approached McElhaney station it slowed up with the intention of stopping there, and at a point a short distance north of the end of the switch, and had almost stopped, when the conductor ordered the engineer not to stop, but to go on, which was done against plaintiff's protest, and he was powerless to prevent it or otherwise protect himself.

The trial disclosed the facts to be that the plaintiff, about June 1, 1894, began to run as a fireman on the local freight train between Pittsburg, Kansas, and Siloam Springs, Arkansas, and, with the exception of a few days, made daily trips, and in doing so passed this switch every day. The train crew on the day of the accident were Jay Traver, engineer, George Bartholic, conductor, J. A. Cellar, brakeman, and plaintiff, fireman. There were two local freight trains running daily one each way between Pittsburg and Siloam. They usually met at Donahue, a station about 4 miles north of McElhaney switch. On this day the south-

bound train, on which plaintiff was fireman, was late, and hence the freight trains met at Neosho between 12 and 1 o'clock P. M. The accident occurred between 1 and 2 P. M. The running time between Neosho and McElhaney was fifteen or twenty minutes, so that the northbound freight passed safely over the switch in question about thirty to forty minutes before the accident. The defendant had only acquired the portion of the road between Joplin, Missouri, and Sulphur Springs in May, 1894, and had, therefore, only been operating it from May to July 12, when the accident occurred. At McElhaney station there was a switch or side track on the east side of the main track. At each end of the switch or siding there were "clearance posts;" that is, posts to designate the limits that trains might occupy on the switch, and the distance they must be kept from the main track. These clearance posts were 429 feet apart. On the day of the accident the switch was full of freight cars. At both ends of the side track there were switch stands, of the character known as "stub switches;" that is, with blunt ends of the rails coming together, so that, when the switch was opened, a train coming from the south would run onto the other side track, but a train coming from the north would be derailed. One of the claims made by the plaintiff is that a stub switch is dangerous, not to the train coming from the south, for as to it the only result would be to throw the train from the main track onto the switch or side track, but to the train coming from the north, for, as to it, the result would certainly be to derail the train; hence plaintiff claims that a "split switch" or a "split spring switch" should have been used, by which is meant a rail beveled on one side, and coming almost to a knife edge at the end, so that it rests against the rails of the main track, and changes the points of the switch from the main to the side track, and does not destroy or break the continuity of the main track; and that, if such a switch had been used, a train coming from the north would not have been derailed, but the flanges of the wheels would simply have forced the switch back, and let the train pass through the switch along the continuous rails of the main track; and, if it was a split spring switch, it would have sprung back into place after the train passed through it. When the train approached McElhaney, the engineer brought it almost to a stop at a point 80 rods north of the north end of the switch. At this point the plaintiff notified the engineer that the side track was full of cars, and that he could not see the target of the switch at the south end of the side track. The engineer said: "I am going, I have a signal from the conductor to go on." Again plaintiff told the engineer he could not see the target, but the engineer replied, "I have a signal from the conductor, and things are apparently all right, and I am going." The engineer proceeded, increasing speed the while, and when the train neared the switch at the south end of the side track the plaintiff notified the engineer that the switch was

open. The engineer tried to stop the train, but did not succeed, and it ran off the track, turned over, the "pops" were broken, the steam escaped and scalded and burned plaintiff most seriously. The court gave the jury twelve instructions at the request of the plaintiff, fifteen of the court's own motion, and four asked by defendant. There was a verdict for the plaintiff for \$6,000, and defendant appealed.

1. The case was tried below on the theory that the conductor was a vice principal, and that his orders to the engineer to go ahead overcame the rules as to signals, unless the danger was so apparent and imminent as to deter a person of ordinary prudence from proceeding; and if the plaintiff, as fireman, was under the control and subject to the orders of the engineer, and had no control over the engine, and if plaintiff notified the engineer that the switch target was obscured by the cars standing on the side track, and, notwithstanding, the engineer went ahead, "then the acts of the said engineer in so doing should not be regarded as the personal acts of plaintiff, unless he concurred therein." The controlling legal questions in the case therefore are: First. Are the conductor, engineer, and fireman of a train fellow servants, or is the conductor a vice principal and the engineer and fireman fellow servants, or is the conductor a vice principal, the engineer a lesser vice principal, and the fireman the servant? And, second, was the defendant negligent in not furnishing safe appliances and machinery; that is, in maintaining a stub switch instead of putting in a split switch or a split spring switch? The leaky pops may be disregarded, as they were not the proximate cause of the injury. Likewise the allegations as to the broken lock on the switch and the character of the ties may be eliminated, as they had nothing to do with the injury. There is no branch of the law that has received more attention than that relating to master and servant, and there is none as to which a greater diversity of opinion has been expressed, and certainly none that is to-day more uncertain. The old doctrine that all persons under the control and in the pay of a common master are fellow servants, and that the master is not liable to anyone for injuries received through the negligence of any of the others, has been relaxed, modified, distinguished, and pared down, and, with the characteristic ingenuity and inventiveness of the age, distinctions have been drawn, the first relation has been extended many degrees, and the original classification has been many times subdivided, with the result that much contrariety of opinion exists, and the whole matter is unsettled, and left in an unsatisfactory state. By some this has been called the evolution of the law from its original harshness to a more humane condition. By others it is placed upon the ground of necessity,—that is, that where the master has a small business, and only a few servants under his own eye and personal supervision, and where all of the servants are "Jacks of all trades" in respect to the mas-

ter's business, each doing any part of the whole, as he may be directed, they are fellow servants, and have no recourse against the master for injuries received through the negligence of the others; but where the master's business increases, and becomes more extended, and spreads out into many places, and perhaps over many states, so that the master cannot be always present in person to direct or to hear reports from his servants, it is, of course, necessary for him to have some one on the spot to represent him,—an *alter ego*, or vice principal, it is called,—who shall have the right to speak for the master; and in such cases such person's acts are the acts of the master, and he is liable to the servant for injuries received through his negligence, the same as if the master had been present acting himself. No serious objection can be raised to this rule in the abstract, for a master choosing to have a scattered or diversified business, which he cannot personally look after, must needs have a representative on the ground, and hence, taking the benefits of such an extended business, he must bear the burdens necessarily incident to its transaction. At first a vice principal was limited to be a person who had the right to employ and discharge the servants, but this has since been relaxed; and the rule now is that it is a question of authority to represent the master which determines the question of whether a person is a vice principal. The courts have often been asked to lay down a definite principle or rule for the determination of the question, but, as was well said by Gantt, J., in *Parker v. Hannibal & St. J. R. Co.* 109 Mo. loc. cit. 378, 18 L. R. A. 802, 19 S. W. 1123: "After a careful examination of this subject in its varied aspects, we think the attempt would be futile and unsatisfactory. The judge or court who would deal in general observations outside of the record under consideration would be treading on dangerous ground, and in a very short time would probably find 'himself hoisted by his own petard.' . . . And, after due consideration, we are of the opinion that, unsatisfactory as it may seem, the rule itself must remain general, its application specific, as the cases arise. This rule, to exempt the master, requires the servants shall be employed by a common master, and the servants must be employed in the same common employment." Accordingly, in that case it was held that a section hand engaged in repairing the track was a fellow servant with the engineer and crew running a construction train that was hauling rock to be used in ballasting the track. Some courts have undertaken to lay down a rule broad and just and elastic enough to cover all cases, unmindful, it seems to me, of the fact that in so doing they are wiping out the old rule as it was at common law, and substituting a new rule of their own creation, which the changing conditions of life may shortly prove as unacceptable to their successors as the rules of the common law are to them. In the attempt, however, they have classified the service of the master, divided it into departments of service, and say that 48 L. R. A.

a servant shall be barred of recovery only where the injury was received through the negligence of a fellow servant in the same department of service, and shall not be cut off where it came about through the negligence of a servant in another department. The reason given for this is that, "where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends to a great extent on the care and skill with which each shall perform his appropriate duty, each is an observer of the conduct of the other, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require." Yet in the practical application of the departmental doctrine to the specific cases that have arisen as much difficulty has been encountered as was found before, and different courts have disagreed as widely on the same state of facts as was the case before the introduction into the law of the new rule. In fact, the reported cases show that the decisions of the same court cannot be made to harmonize under the principles announced in the new rule. This is partly explainable from the fact that the same person in the same department may occupy the relation of vice principal and fellow servant at the same time, or may be the one to-day and the other to-morrow. Even in the same department there may be several distinct gangs of servants, each having its own foreman, or vice principal, and neither in a position to observe the conduct and give the notice of misconduct, incapacity, or neglect of duty in the other, yet under the departmental doctrine the servants in each are the fellow servants of those in the other gang.

The practical difficulty in trying to enforce the departmental doctrine is that it is nowhere stated of what the departments shall be composed. The term or name is employed as expressive of a class, but there has been no attempt to classify. The result is contrary judgments upon the same facts, an irreconcilable contrariety of opinion, with a natural, and to be expected, confusion in the law, with no better or more satisfactory results to either the master or servant than were attained before the doctrine was announced. A brief review of the decisions in our state will suffice to illustrate. *McDermott v. Pacific R. Co.* 30 Mo. 115, was the first case in which the doctrine of fellow servant was discussed. It was a suit by a brakeman who was injured by the Gasconade Bridge disaster in 1860. Napton, J., held there could be no recovery, as the brakeman and bridge builders were fellow servants, and that the rule "applied in all cases alike, without regard to the degrees of subordination in which the different servants or agents may be placed with reference to each other;" citing with approval *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339. *Wagner, J., in Rohback v. Pacific R. Co.* 43 Mo. 187, held a track repairer and a trainman were fellow servants. In

Moore v. Wabash, St. L. & P. R. Co. 85 Mo. 568, Henry, J., held that a car repairer and the crew of the engine that ran into the car the repairer was working on were not fellow servants, and allowed a recovery to stand on the ground that the company was obliged to provide for the safety of the servant, and the foreman of the repair shop had promised the repairer to see to it that no engine should run into the car, which was standing on the side track, and which he was repairing. In *McGowan v. St. Louis & I. M. R. Co.* 61 Mo. 528, Hough, J., held that a conductor and a laborer engaged in loading bridge timbers on the train were fellow servants. In *Smith v. Wabash, St. L. & P. R. Co.* 92 Mo. 359, 4 S. W. 129, Norton, J., held that a train dispatcher and the conductor, engineer, and fireman of a train are not fellow servants. In *Sherrin v. St. Joseph & St. L. R. Co.* 103 Mo. 378, 15 S. W. 442, Gantt, P. J., held that the two foremen of two different gangs of section men, working independently of each other, but under the same road master, are fellow servants. In *Sullivan v. Missouri P. R. Co.* 97 Mo. 113, 10 S. W. 852, Black, J., held that a track walker is not a fellow servant with an engineer or fireman of a passenger train. In *Murray v. St. Louis, C. & W. R. Co.* 98 Mo. 573, 5 L. R. A. 735, 12 S. W. 252, Black, J., held that the gripman and a watchman at a street crossing, whose duty it was to signal the cars to stop or go ahead, were fellow servants, because engaged in the same common employment of running the cars. In *Higgins v. Missouri P. R. Co.* 104 Mo. 413, 16 S. W. 409, Gantt, P. J., held that an engineer and laborer on a construction train were fellow servants. In *Parker v. Hannibal & St. J. R. Co.* 109 Mo. 362, 18 L. R. A. 802, 19 S. W. 1119, Gantt, J., held that a track repairer and the engineer of a construction train were fellow servants. In *Dixon v. Chicago & A. R. Co.* 109 Mo. 413, 18 L. R. A. 792, 19 S. W. 412, Barclay, J., held that a laborer, whose duty was to couple small cars used to haul rock up an incline across the track, the rock to be crushed, and used as ballast for the road, was not a fellow servant with the engineer of a passenger train. In *Tabler v. Hannibal & St. J. R. Co.* 93 Mo. 79, 5 S. W. 810, Black, P. J., held that a master mechanic and work master was not a fellow servant of a bridge carpenter. In *Miller v. Missouri P. R. Co.* 109 Mo. 350, 19 S. W. 58, Black, J., held that a conductor of a material train, having control of it and its movements, and the foreman over a crew engaged in repairing a railroad track, having power to direct them, are vice principals, and the defendant is liable for the death of a member of the crew, occasioned by their negligence. In *Relyea v. Kansas City, Ft. S. & G. R. Co.* 112 Mo. 86, 18 L. R. A. 817, 20 S. W. 480, Black, J., held that a brakeman on one freight train and a fireman on another, where they are engaged in the same department of service, and are operating trains over the same section of the road, are fellow servants. The learned judge further laid down the departmental doctrine as follows: "They are coservants who are so related and

associated in their work that they can observe and have an influence on each other's conduct, and report delinquencies to a common correcting power; and they are not coservants who are engaged in different and distinct departments of work;" and further said: "Now in this case each servant was under the immediate command of his own conductor, it is true; but that fact does not constitute a decisive or controlling circumstance. Many cases may be instanced where different gangs of men, each gang under the orders of its own foreman, are clearly coservants within the rule of exemption." In *Schlereth v. Missouri P. R. Co.* 115 Mo. 87, 21 S. W. 1110, Burgess, J., held that a locomotive engineer and track repairer are not fellow servants. In this case Macfarlane, J., wrote the opinion of the court in division No. 2, and said: "It is insisted, in the first place, that the demurrer to the evidence should have been sustained, for the reason, as is claimed, that deceased and the negligent engineer were fellow servants within the rule which exempts the master from liability for damages to one servant resulting from the negligence of the other. There is no doubt that the weight of judicial authority sustains the position for which defendant contends. *Murray v. St. Louis, C. & W. R. Co.* 98 Mo. 573, 5 L. R. A. 735, 12 S. W. 252. The majority of the members of this court are of the opinion, however, that the reasons and policy upon which the rule of exemption has been placed do not extend to those common employees of a railroad corporation occupying the relation to each other sustained by deceased and the engineer. The writer has been of the opinion that the general rule exempting the common master in all cases where the servants are engaged in a common service has been recognized and approved by the courts of this state for so long a period of time, without change or serious question, that, while the principle has been questioned, it has become the settled policy of the state, and should only have been changed by legislative action. *Rohback v. Pacific R. Co.* 43 Mo. 192, and cases cited in dissenting opinion of Gantt, J., in *Parker v. Hannibal & St. J. R. Co.* 109 Mo. 362, 18 L. R. A. 802, 19 S. W. 1119. The importance of having the rules of law firmly established, especially those under which property rights are held, or the business and wages of large classes of citizens are made to depend, is fully recognized; and we therefore hold, in accordance with the late rulings of the court, that the husband of plaintiff was not a fellow servant of the negligent engineer. . . . *Sullivan v. Missouri P. R. Co.* 97 Mo. 113, 10 S. W. 852; *Parker v. Hannibal & St. J. R. Co.* 109 Mo. 362, 18 L. R. A. 802, 19 S. W. 1119." A motion for rehearing was filed, and by reason of a division of the court the case was sent to the court in banc for review. Burgess, J., wrote the opinion in banc, and held that on the faith of *Sullivan v. Missouri P. R. Co.* 97 Mo. 113, 10 S. W. 852; *Parker v. Hannibal & St. J. R. Co.* 109 Mo. 362, 18 L. R. A. 802, 19 S. W. 1119; and *Dixon v. Chicago & A. R. Co.* 109 Mo. 413, 18 L. R. A.

792, 19 S. W. 412,—the deceased and the engineer were not fellow servants, because they were not in the same department of service. In this connection it is well to note that in the *Parker Case* Gantt, Sherwood, and Macfarlane, JJ., held that the section hand and the engineer of the construction train were fellow servants, and hence they voted to reverse the judgment in plaintiff's favor, while Black, J., held they were prima facie fellow servants, but that it might be rebutted by plaintiff, and so voted to reverse and remand, and Thomas, Brace, and Barclay, JJ., were of opinion that they were not fellow servants; while in the *Dixon Case* Black, Brace, Barclay, and Thomas, JJ., held that the laborer and the engineer were not fellow servants, and Sherwood and Gantt, JJ., held they were, and Macfarlane, J., having been of counsel, did not sit. In *Scadley v. Missouri P. R. Co.* 118 Mo. 268, 24 S. W. 140, Black, J., held that a track repairer was not a fellow servant with the train crew of a regular freight or passenger train, and distinguished the case from the *Parker Case*, where it was a crew on a construction train and a track repairer. In *Rutledge v. Missouri P. R. Co.* 123 Mo. 121, 24 S. W. 1053, and 27 S. W. 327, Barclay, Black, and Brace, JJ., held a switchman and the engineer were fellow servants. In *Jones v. St. Louis S. W. R. Co.* 125 Mo. 666, 26 L. R. A. 718, 28 S. W. 883, Macfarlane, J., held that a porter in a Pullman car is not a fellow servant with the engineer and conductor. In *Keown v. St. Louis R. Co.* 141 Mo. 86, 41 S. W. 926, Barclay, P. J., held that the foreman of a street-car line and a gripman on one of the cars were not fellow servants. In *McCarty v. Rood Hotel Co.* 144 Mo. 397, 46 S. W. 172, Sherwood, J., held the electrician and engineer in a hotel a fellow servant with the elevator boy.

This is the state of the adjudications in our state, and similar conditions exist in other states where the departmental doctrine has been introduced into the decisions. Can any man, however learned in the law, however abstruse his analytical faculties, or however discriminating his logical powers, deduce any rule from these adjudications, or define the departments, or classify or arrange the classes? Is the servant better protected or more humanely treated by this doctrine than he was before its adoption? Is the master's duty made plain, or the labors of the bar and the courts made lighter? In practical operation is it not true that these cases are at last decided according to their individual merits as they appeared from the facts proved, and as the justice of each seemed to the judge deciding them to require when gauged by the old, tried, and accepted standards of the common law? Is it not a fact that the departmental doctrine exists only in theory, and not in practice? The only definite definition of a department that is attempted by any of them is by Black, J., in *Parker v. Hannibal & St. J. R. Co.* 109 Mo. 362, 18 L. R. A. 802, 19 S. W. 1119, when he puts clerks in the office in one department and servants operating a train in another. Yet in that same case it was held 48 L. R. A.

that a track repairer and the train crew of a construction train were fellow servants, because in the same department, while in the *Dixon Case*, which immediately follows the *Parker Case* in the same volume of the Reports, it was held that a laborer who attached the rope to a small car used to haul rock to a rock crusher, and intended for ballasting the road, was not a fellow servant with the engineer of a passenger train, and on the same line in the *Sullivan Case* it was held that a track walker and an engineer were not fellow servants; yet in *Relyea v. Kansas City, Ft. S. & G. R. Co.* it was held that the brakeman on one freight train and a fireman on another were fellow servants, and in the *Schlereth Case* it was held that an engineer on a passenger train and a track repairer were not fellow servants, and in the *Scadley Case* it was held that a track repairer and the train crew on either a freight or passenger train were not fellow servants, while in the *Rutledge Case* a switchman and an engineer were held fellow servants. If it be said that these cases show the evolution of the law, how can the *Relyea Case*, bereconciled with the departmental idea? The brakeman on the one train and the fireman on the other cannot observe the conduct of each other, and give notice of "misconduct, incapacity, or neglect of duty." In short, it may be pertinently asked What is the classification into departments of service which these cases create, or authorize, or recognize? Is it that clerks in the office constitute one department, train dispatchers another, the crew of a passenger train another, the crews of two freight trains another, the crew of a construction train and the track repairers another, the track walkers a department unto themselves, the mechanics in the shops another, etc.? If so, are these all the departments, or, if not, what others are there? Measured by experience, and tested scientifically, if there is to be a division into departments, it should be: First, the mechanical; second, the operative; third, the clerical; fourth, the managerial; and, fifth, the executive. This would come nearer the natural and business division of work. The road could not be run without the engine and cars,—the mechanical appliances; nor would the mechanics move without they were operated by human beings; nor could they move without tracks, and there could be no tracks without human beings to build them, and keep them in repair; nor could the machines be built, and the tracks laid, and the cars be run without clerks to keep track of the business and attend to collecting the freight and passenger charges; nor could any of them be made to work harmoniously or successfully without managers; nor could the road be built or run or managed without the executive head that provided the finances in the first place, and provided for the regularly recurring operating expenses. Yet no court has divided the business into such departments, or made any other division or classification. The adjudicated cases in our state, when brought into contraposition or conjunction, do not, in the aggregate, define

the division into departments; but when any attempt is made to deduce a rule or create a class out of the several cases, discrepancies and inconsistencies are at once apparent. Still this court and the supreme courts of other states speak of departments of service, and yet in practice allow or deny recoveries which cannot be harmonized on the theory of departments of service. Practically, therefore, there is no difference between the old and the new rule. It leaves it where the old masters of the law put it, a mixed question of fact and law in every case. And so it should be. The lower court in this case treated the conductor as a vice principal, whose order to the engineer to go ahead amounted to a suspension of the rule which required the engineer to look out for the signals or targets; and also treated the engineer as a vice principal whose disregard of the warning of the plaintiff that he could not see the signal or target was the same as the negligence of the master, and, because of his relation to the fireman, held that they were not fellow servants. It is not denied that in so treating the conductor in his relations to the engineer and fireman, the lower court followed the case of *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, which so holds; but in the light of subsequent decisions of that distinguished tribunal the *Ross* Case cannot now be considered the law in that court. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Northern P. R. Co. v. Hambly*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; *Central R. Co. v. Keegan*, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; and *Oakes v. Mase*, 165 U. S. 363, 41 L. ed. 746, 17 Sup. Ct. Rep. 345. In the last case cited that court held the engineer of one train to be a fellow servant with the conductor of another. In our state beginning with *McDermott v. Pacific R. Co.* and running through *Rohback v. Pacific R. Co.* and *McGowan v. St. Louis & I. M. R. Co.* the conductor, engineer, fireman, and brakeman have been held to be fellow servants. If the departmental doctrine, and the reasons given for it, to wit, opportunity to observe each other, notice and report incapacity or neglect, be followed, the result is the same, and they must be held to be fellow servants. Plaintiff, however, cites many cases in other jurisdictions, which it is claimed hold that a conductor is a vice principal, and not a fellow servant with the engineer, fireman, and brakeman; but an examination of them shows the point here involved was present only in the case of *Moon v. Richmond & A. R. Co.* 78 Va. 745, 49 Am. Rep. 401 (and that case showed that the conductor had the power of placing and assigning to duty the trainmen, and the deceased was assigned to duty as a brakeman), and the case of *Cowles v. Richmond & D. R. Co.* 84 N. C. 309, 37 Am. Rep. 620 (where it was held that one who is the engineer and conductor of a train is not a fellow servant with the brakeman), and the case of *East* 48 L. R. A.

Tennessee & W. N. C. R. Co. v. Collins, 85 Tenn. 227, 1 S. W. 883 (where the engineer was held not to be a fellow servant with the brakeman). Without further reference to other cases, then, it may be said that, prima facie at least, the conductor, engineer, and fireman on the same train are fellow servants. The engineer and fireman were held to be fellow servants in *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914, and the engineer of one train and the conductor of another were held to be fellow servants in *Oakes v. Mase*, 165 U. S. 363, 41 L. ed. 746, 17 Sup. Ct. Rep. 345. In this case the order to go ahead was given by the conductor, who was in the caboose, at the rear of the train, eating his dinner, to the brakeman, who in turn signaled it to the engineer. Neither could see then, or under usual circumstances, whether the track was clear or not. It was the especial duty of the engineer and fireman to watch the track, and see that no obstructions were in the way, and to keep a sharp lookout for open switches. *Smith v. Missouri P. R. Co.* 113 Mo. loc. cit. 80, 20 S. W. 898. The conductor's signal or order to go ahead cannot have the effect of waiving or suspending the rule of the company—which the engineer and plaintiff well knew—to observe the targets and danger signals, and, in case of doubt, to stop. Nor could it overcome the express notice of danger given by plaintiff himself to the engineer that the side track was filled with cars, which obstructed the view so he could not see the target. It was plainly the duty of the engineer, under the circumstances, to stop. His failure to do so was the direct cause of the accident. The fact that plaintiff was helpless to stop the engine does not alter the case. The plaintiff assumed that risk when he entered the employment. *Gibson v. Pacific R. Co.* 46 Mo. 169, 2 Am. Rep. 497. He knew he could never stop the engine. But the engineer is not shown to have been incompetent, or an unfit person in any way; so there was no negligence on the part of the defendant in employing him. It follows that the circuit court erred in holding that the conductor was a vice principal, and also in holding that the engineer and the fireman were not fellow servants.

2. It is insisted, however, that the master was bound to furnish his servants with safe and suitable appliances for the work, and that it failed in this regard by furnishing a stub switch, instead of a split switch or split spring switch; and that, if either of the latter had been furnished, the accident in this case would not have occurred. It is settled law that it is the duty of the master to furnish safe and suitable appliances for his servants to use. He owes this duty to his servant, but his liability in this regard must not be confounded with any question of fellow servant. *Parker v. Hannibal & St. J. R. Co.* 109 Mo. loc. cit. 407, 18 L. R. A. 812, 19 S. W. 1127; *Williams v. St. Louis & S. F. R. Co.* 119 Mo. 316, 24 S. W. 782; *Bender v. St. Louis & S. F. R. Co.* 137 Mo. 240, 37 S. W. 132. The evidence shows that

with a split switch or a split spring switch an engine can safely run through a switch from the reverse side of it without being derailed, but that with a stub switch the continuity of the main track is broken, and, if an engine is run through it from the opposite side, it will be derailed. Both the engineer and the fireman knew this fact. They knew this was a stub switch. They had passed over it every day for over a month. They also knew the dangers of trying to run through a stub switch. There is no doubt that a split switch or a split spring switch is safer, when passing over it in the wrong direction, than a stub switch. In fact, the two former are comparatively and reasonably safe, while the latter is positively dangerous. But there is absolutely no evidence in this case that a stub switch is not safe and suitable when it is used in the natural and usual manner of using a switch. On the contrary, it was the only kind of a switch that was used for many years. It never was intended to be run through from the wrong direction, nor in fact is there any evidence that the split or split spring switches are intended to be used in this way. The master cannot be adjudged guilty of a failure of duty where he furnishes a servant machinery and appliances which are reasonably safe when used in the manner they are intended to be used, but which may become dangerous if their use is perverted by the servant. The master is not bound to furnish the safest and best appliances that could be used. He is acquit of fault if what he furnishes is reasonably safe and suitable. A stub switch is not the safest or best, but it is reasonably safe and suitable. The master cannot be adjudged negligent in this regard. *Tabler v. Hannibal & St. J. R. Co.* 93 Mo. 79, 5 S. W. 810.

The placing of the target on the same side of the main track with the side track is claimed to be negligence. If it had been placed on the other side of the main track, it could have been more easily seen by the engineer when going south, and would not have been hidden from view by the cars on the side track. But coming north the engineer could not have seen it as well as he could if it was on the east side of the track. Aside from this, the evidence discloses that there is no uniform rule as to which side of the track it shall be placed on. The location and topography of the surroundings usually determine the position. It matters not which side it is placed on, the rules of the company require the engineer and fireman to watch for it, and if it indicates danger, or if they cannot see it, they must take the safe course, and stop. If the cars on the side track prevented the engineer or fireman from seeing the target, it was their duty to stop. The conductor's signal to go ahead cannot be construed into meaning anything more than that, so far as his end of the train was concerned, there need be no stop. It could not reasonably be construed into an order to the engineer to shut his eyes, or disregard the rules, and run ahead through an open switch. The conductor was not in a position to know 48 L. R. A.

whether the track was clear, or the signals and targets obscured from sight, or the switch open or not. This was essentially the duty of the engineer and fireman. In no proper sense can the order of the conductor—or, rather, the brakeman, for the engineer got it from the brakeman, and could not have known that the conductor had instructed the brakeman to give it—be said to be a waiver of the rules; this, too, whether the conductor be a vice principal or a fellow servant of the engineer.

3. But Missouri is not alone in respect to the uncertain state of the law relating to this subject. Speaking on this matter, Corliss, Ch. J., in *Ell v. Northern P. R. Co.* 1 N. D. 336, 12 L. R. A. 97, 48 N. W. 222, aptly says: "This is issue of law we are to determine, and our investigation must run along the line of general principles; for the adjudications upon this subject,—so multitudinous as almost to warrant the simile, 'thick as autumnal leaves that strew the brooks in Valambrosa,'—these adjudications are so discordant, enumerating so many rules, stating so many limitations, applying the law to facts so diverse, that one is reminded of Gibbon's remark upon the infinite variety of laws and opinions when Justinian entered upon the reform of codification,—that they were beyond the power of any capacity to digest." The learned judge, speaking of the test, sometimes applied, of power to observe and right to report the conduct of each other, as decisive of the relation of master and servant, or of whether the injured and the negligent servant belong to the same department of service," says: "Many of the cases holding the master exempt from liability under the fellow-servant rule were, as we have said, cases in which the injured servant could not possibly have exerted influence over the negligent servant. Their separate departments of service, or their usual stations of employment, kept them, as a rule, entirely aloof from each other. In the following cases the relation of fellow servant was held to exist between persons who could exert little, if any, influence over each other: *Quebec S. S. Co. v. Merchant*, 133 U. S. 375, 33 L. ed. 656, 10 Sup. Ct. Rep. 397,—the carpenter, porter, and stewardess of a steamship; *St. Louis, A. & T. R. Co. v. Welch*, 72 Tex. 298, 2 L. R. A. 839, 10 S. W. 529,—foreman of a bridge gang and servants operating a train; *Elliott v. Chicago, M. & St. P. R. Co.* 5 Dak. 523, 3 L. R. A. 363, 41 N. W. 758,—a section foreman and a conductor; *Fagundes v. Central P. R. Co.* 79 Cal. 97, 3 L. R. A. 824, 21 Pac. 437,—a laborer employed to remove snow from a track and a conductor; *Baughman v. Calaveras County Super. Ct.* 72 Cal. 573, 14 Pac. 207,—a conductor and a brakeman; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322,—a brakeman and conductor of different trains; *Van Wickel v. Manhattan R. Co.* 32 Fed. Rep. 278,—a track repairer and an engineer; *McMaster v. Illinois C. R. Co.* 65 Miss. 264, 4 So. 59,—brakeman of one train and employee on another; *Naylor v. New York C. & H. R. R. Co.*

33 Fed. Rep. 801,—engineer and switchman; *Van Avery v. Union P. R. Co.* 35 Fed. Rep. 40,—engineers of different trains; *Connolly v. Minneapolis E. R. Co.* 38 Minn. 80, 35 N. W. 582,—a sectionman and an engineer or brakeman; *Howard v. Denver & E. G. R. Co.* 26 Fed. Rep. 837,—an engineer and fireman of different trains; *Houston & T. C. R. Co. v. Rider*, 62 Tex. 267; *Gormley v. Ohio & M. R. Co.* 72 Ind. 31; *Collins v. St. Paul & S. C. R. Co.* 30 Minn. 31, 14 N. W. 60; *Clifford v. Old Colony R. Co.* 141 Mass. 564, 6 N. E. 751; *Keys v. Pennsylvania Co. (Pa.)* 1 Cent. Rep. 893, 3 Atl. 15; *Whealan v. Mad River & L. E. R. Co.* 8 Ohio St. 249—in each case an engineer and a sectionman.” In the same case attention is called to the reasoning of Judge Cooley in his work on Torts (543), in which he combats the idea that the question can be solved by reference to the grades of the injured and negligent servants, respectively, and denies that reason, or logic, or public policy gives sanction to such a doctrine. Reference is also made to the article of Judge Dillon in 24 Am. Law Rev. 175, which is so appropriate to this case as to justify its verbatim reproduction here, as follows: “The master owes certain defined, personal, unalienable, nonassignable duties towards servants. These duties may be devolved on others by the master, but not without recourse on him. . . . In the general American law, as I understand it, the doctrine of vice principal exists to this extent, and no further, viz., that it is precisely commensurate with the master’s personal duties towards his servants. As to these, the servant who represents the master is what we may call for convenience a ‘vice principal,’ for whose acts and neglects the master is liable. Beyond this the master is liable only for his own personal negligence. This is a plain, sound, safe, and practicable line of distinction. We know where to find it, and how to define it. It begins and ends with the personal duties of the master. Any

attempt to refine, based upon the notion of ‘grades’ in the service, or, what is much the same thing, distinct ‘departments’ in the service (which ‘departments’ frequently exist only in the imagination of the judges, and not in fact), will breed the confusion of the Ohio and Kentucky experiments, whose courts have constructed a labyrinth in which the judges that made it seem to be able to ‘find no end; in wandering mazes lost.’ . . . The real inquiry is, Was the injury caused by another servant one of the ordinary risks of the particular employment? If so, the grade, whether higher, lower, co-ordinate, or the department of the faulty servant, it is of no consequence. It is a condition of the contract of service that the servant takes upon himself the risk of accidents in the common course of the business,—all open and palpable risks, including the negligence of all fellow servants, of whatever grade, in the same employment.” In view of the dubious state of the law on this subject in our own and sister states, brought about by the introduction of new, but not useful, rules and theories, is it not time to set the target signal of danger, and to return to the beaten track, lit up by the “glad-some light of jurisprudence,” which the experience of ages and the wisdom of the brightest legal minds of the world has laid out for us, and to cease, like moths, to burn our wings in the candles of “grades” and “departments?”

The judgment of the circuit court is reversed.

Robinson and Williams, JJ., concur in the judgment of reversal herein on the ground that the negligence shown was that of the engineer, who, under the decisions in this state, was a fellow servant with the plaintiff, but do not regard the “departmental doctrine” as involved in this case.

Brace, J., dissents.

NEBRASKA SUPREME COURT.

Andrew J. HANSCOM

v.

Max MEYER et al., Appts.

(.....Neb.....)

*1. Evidence examined, and found that the Omaha Mercury is a weekly publication, circulating among various classes of people within the county and state: that its printed matter consists principally of legal notices and information regarding the courts, and of legal matters in general, and also advertising of a miscel-

laneous character, literature of a general kind, and a limited amount of general news of current events. Held, that such publication is a newspaper within the meaning of § 497 of the Code of Civil Procedure; that the fact that it also makes a specialty of some particular class of business, and conveys intelligence of particular interest to those engaged in such business, will not thereby deprive it of its general classification as a newspaper, within the meaning of the statute.

2. Held, also, that the principal distinguishing feature of a newspaper, in contemplation of the statute, is that it be a publication appearing at regular, or almost regular, intervals, at short periods of time, as daily or weekly, usually in sheet form, and containing news; that is, reports of happenings of recent occurrences of a varied character, such as political, social, moral, religious, and other subjects of a

*Headnotes by HOLCOMB, J.

NOTE.—As to what constitutes a newspaper within meaning of statute as to publication of legal notices, see *Lynch v. Durfee* (Mich.) 24 L. R. A. 793; and *Lynn v. Allen* (Ind.) 33 L. R. A. 779.
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similar nature, local or foreign, intended for the information of the general reader.

(March 21, 1900.)

APPEAL by defendants from an order of the District Court for Douglas County refusing to set aside a foreclosure sale of real estate on the ground that the notice of sale was not published in a legal newspaper. *Affirmed.*

The facts are stated in the opinion.

Mr. **Charles S. Elgutter**, for appellants:

In 1842 the Attorney General of the United States was called upon by the Postmaster General for an opinion as to what, under the postal laws of the United States, was a "newspaper." He made the following summary:

"On the whole, the only requisites of a newspaper, which I think must be judicially held indispensable, are:

"1. That it be bona fide published; that it is for everybody's use.

"2. That it is published in numbers, not perhaps with exact regularity, but something approaching to it.

"3. That it conveys news, not mere dissertation and discussion, or literary and poetical miscellanies.

"4. That it be in sheets, and in rather a cheap form."

This opinion is in the line of what is regarded as a true interpretation of the word "newspaper," as used in the statute under consideration.

Beecher v. Stephens, 25 Minn. 146; *Hull v. King*, 38 Minn. 349, 37 N. W. 792; *Lynch v. Dufce*, 101 Mich. 171, 24 L. R. A. 793, 59 N. W. 409; *State ex rel. Elliott v. Holliday*, 35 Neb. 333, 53 N. W. 142; *Kerr v. Hitt*, 75 Ill. 51; *Kellogg v. Carrico*, 47 Mo. 157; *Kingman v. Waugh*, 139 Mo. 360, 40 S. W. 884; *Williams v. Colwell*, 18 Misc. 399, 43 N. Y. Supp. 720; *Lynn v. Allen*, 145 Ind. 584, 33 L. R. A. 779, 44 N. E. 646.

Measured by these standards, the scope of the "Omaha Mercury" is altogether too narrow to be classed as a "newspaper."

Measures. **L. F. Crofoot** and **James S. McIntosh** also for appellants.

Mr. **George E. Fritchett** for appellee.

Holcomb, J., delivered the opinion of the court:

In proceedings of foreclosure of a real-estate mortgage in the district court of Douglas county, on an application for confirmation of a sale of real estate made in said action, the defendants (appellants) objected thereto, and moved to set aside the sale on the ground that notice of sale by publication in the Omaha Mercury was insufficient; alleging that that publication was not a newspaper, as provided for by § 497 of the Code of Civil Procedure. The objection was overruled, and by appeal the case is brought to this court.

The section referred to provides as follows: "Lands and tenements taken in execution shall not be sold until the officer cause public notice of the time and place of sale 48 L. R. A.

to be given, for at least thirty days before the day of sale, by advertisement in some newspaper printed in the county, or in case no newspaper be printed in the county, in some newspaper in general circulation therein. . . . All sales made without such advertisement shall be set aside on motion by the court to which the execution is returnable." The point in issue is whether the Omaha Mercury is a newspaper, within the meaning of the section quoted. In the affidavit in support of the motion to set aside it is said: "That said Omaha Mercury, published weekly at Omaha, Nebraska, is a class paper, devoted especially to the interests of the lawyers of Douglas county, Nebraska; that said Omaha Mercury is a paper which is confined to the particular trade, calling, or business, of the lawyers of Omaha, and has a limited circulation, and is not a newspaper, as by law provided and required." A copy of one issue of the paper is made an exhibit, which is said to be "a fair sample of said publication." The proprietor of the publication challenged makes affidavit that "he is the owner and proprietor of the Omaha Mercury, a newspaper printed and circulated every Friday in the city of Omaha, Douglas county, Nebraska, and elsewhere. . . . This affiant says that it is not true that said Omaha Mercury is a class paper, or that it is confined to the interests of the lawyers of Omaha or Douglas county; that said Omaha Mercury, then known as the 'Omaha Watchman,' was established in the year 1870, and has been published weekly ever since said date; that said paper contains each week news of a general character, such as is to be found in the average weekly paper published in Nebraska; that of late years it has made a specialty of the news of the courts and of legal matters in general, but that it is not true that it is devoted to the legal profession in any sense which would render it a 'class publication'; that said paper has a large and valuable subscription list, and that its said subscribers are of all classes and professions; that said newspaper has a wide circulation in Douglas county and the state of Nebraska, but that it is also taken and paid for by various classes of people in a great number of the states of the Union; that for the past twenty years it has been the custom of lawyers and others to publish legal notices in said paper,—so much so that the people of Douglas county and the state of Nebraska, and throughout the entire United States, look first in its columns for legal advertisements in which they are interested; that it has published in the past, and still continues to publish, the greater percentage of legal notices in Douglas county, including orders required to be published by the district and circuit courts of the United States and of the district and county courts of Douglas county; and that said paper is commonly designated by the judges of the aforesaid courts as the paper in which to publish the various orders required to be published by said courts." Webster's Dictionary defines

a newspaper to be: "A sheet of paper, printed and distributed at stated intervals, for conveying intelligence of passing events, advocating opinions, etc.; a public print that circulates news, advertisements, proceedings of legislative bodies, public announcements, etc." Burrill, Law Dictionary, gives this definition: "A printed publication, issued in numbers at stated intervals, conveying intelligence of passing events. The term 'newspaper' is properly applied only to such publications as are issued in a single sheet and at short intervals, as daily or weekly."

It is difficult, if not impossible, to determine with clearness and exactness where the lines of demarcation should be drawn between a newspaper, in a legal and common acceptance of the term, and the numerous publications devoted to some special purpose, and which circulate only among a certain class of the people, and which are not within the purview of statutes requiring publication of legal notices in some newspaper. The daily and weekly newspapers common to all parts of the country, of general circulation among the people, without regard to class, vocation, or calling, devoted to the gathering and dissemination of news of current events of interest to all, and usually espousing and advocating principles of some political party with persistency, if not at all times with consistency, are, without doubt, newspapers, within the meaning of the statute. On the contrary, many publications, such as literary, scientific, religious, medical, and legal journals, that are obviously for but one class of the people, and that class always but a small part of the entire public, are not newspapers, within the legal and ordinary meaning of the word; and it would be manifestly unjust, as well as against the letter and spirit of the law, to recognize such publications as proper for the advertisement of legal notices,—the object in all cases being to give wide and general publicity regarding the subject of which notice is required to be published. The paper in question partakes, in a degree, of the characteristics of each of the two classes mentioned. If, however, it has the distinguishing features required to make it a newspaper as ordinarily defined, the fact that it also makes a specialty of some particular class of business, and conveys intelligence of particular interest to those engaged in such business, will not thereby deprive it of its general classification as a newspaper, within the meaning of the statute. In *Lynch v. Duffee*, 101 Mich. 171, 24 L. R. A. 793, 59 N. W. 409, it is held: "A weekly paper, containing matter of general interest, and having a general circulation among professional and business men, is a newspaper, within the meaning of How. Stat. § 5801, providing for publication in a newspaper of certain notices in probate proceedings, though it is primarily devoted to disseminating matters of interest to the legal profession." In the opinion it is said: "But a newspaper, even 48 L. R. A.

in the days when these statutes were enacted, meant what it means to-day,—a sheet of paper, printed and distributed at short intervals, for conveying intelligence of passing events; a public print that circulates news, advertisements, proceedings of legislative bodies, public documents, and the like." In *Lynn v. Allen*, 145 Ind. 584, 33 L. R. A. 779, 44 N. E. 646, it is held that a periodical, ephemeral in form, issued daily except Sundays, devoted to the general dissemination of legal news, and containing other matter of general interest to the public, is such a paper. In the case of *Railton v. Lauder*, 126 Ill. 219, 18 N. E. 555, the evidence in the case showed that the Chicago Daily Law Bulletin was in general circulation throughout the city of Chicago and the state of Illinois, among judges, lawyers, and real-estate brokers, merchants and business men generally. Its contents consisted for the most part of legal matters, but it contained advertisements not confined to any one calling or trade. It also published news and information of a general secular character, was published in Chicago, and had a general circulation. The paper in question was held to be a secular newspaper of general circulation, within the meaning of the statute. To the same effect is *Williams v. Colwell*, 18 Misc. 399, 43 N. Y. Supp. 720, decided in 1896, where the writer of the opinion has collated the more important cases up to that date upon the subject. Says the writer of the opinion, after reviewing the authorities: "The facts stated in the affidavit and stipulation read on the motion bring this case within the cases cited sustaining publications of legal notices. While the principal news published in the Daily Mercantile Review is of especial value to attorneys, bankers, brokers, commission merchants, and those engaged in the real-estate business, yet it is shown by the affidavit and stipulation that several columns are devoted to general advertising and to the publication of local and other news of general interest, and that it has a general circulation."

The paper in question has been established for a number of years, and is published weekly. As stated in an affidavit in the case, "Of late years it has made a specialty of the news of the courts, and of legal matters in general." It appears to have, according to the affidavit, a large and valuable subscription list, and to circulate among various classes of people throughout the county and state, as well as the United States. It has been recognized as a legal newspaper by the probate court of the county, the district court, and the Federal courts. Its printed matter consists principally of legal notices, information regarding courts, and a legal directory of the Douglas county bar. Some advertising of a miscellaneous character, literature of a general kind, commonly designated "plate matter," and what purports to be information of the actions of Congress, two addresses by lawyers, and a limited amount of general news of current events, are found in its columns, although

we are constrained to say that there is quite a dearth of the latter, as is shown by the exhibit, which has rendered it more difficult to reach a correct conclusion in this case. The principal distinguishing feature of a newspaper, in contemplation of the statute, in our opinion, is that it be a publication appearing at regular, or almost regular, intervals, at short periods of time, as daily or weekly, usually in sheet form, and containing news; that is, reports of happenings of recent occurrence, of a varied character, such as political, social, moral, religious, and other subjects of a similar nature, local or foreign, intended for the information of the general reader. It is the one quality of news which gives it its general interest, and secures for it a general circulation among people of different classes and callings, whom the statute seeks to reach by the requirement of notice by publication in a new-

paper. It should be noted, too, that, in a degree, the presence of advertisements not appealing to any particular class, trade, or profession constitutes a factor tending to bring a publication possessing the qualifications heretofore mentioned within the designation of a newspaper of general circulation. While some effort has been made by the legislature to define a newspaper, and limit the publication of legal notices to papers which are most likely to have a bona fide circulation among the general public where published, so far nothing of a permanent nature has been accomplished. In the absence of such legislation, we are disposed to the opinion, under the evidence presented, that the Omaha Mercury is a newspaper, within the meaning of the statute, and as defined by the authorities herein adverted to.

It follows that the ruling complained of is correct, and is affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

David W. OLIVER

v.

Mayor, etc., of JERSEY CITY *et al.*, *Pliffs.*
in Err.

(.....N. J.....)

*1. An officer legally elected and qualified, who enters upon the duties of his office, and afterwards is appointed to and accepts another office, but in good faith continues to publicly discharge the duties of the first, his term not having expired, and no successor having been appointed or elected in his stead, nor any adjudication made against his title,—is an officer *de facto*.

2. The official acts of an officer *de facto* are valid, as far as the rights of third persons and the public are concerned, unless the defects in the officer's title are notorious, and sufficient to overcome the apparent evidence to the contrary; but when they see a person occupying an important public office by virtue of an election by the people, and publicly exercising its duties within the period for which he was elected, they are entitled to consider him to be such officer, and will be protected in their rights if they do so.

3. When a person legally holding one office is elected or appointed to another, but is prohibited by a statute from holding both, upon accepting the second his *de jure* title to the first ends, and his successor may at once be appointed or elected; but, if the former occupant refuses to vacate the office, his successor will be compelled to take the necessary legal steps to oust him.

4. When an action is begun, the object of which is only to determine the validity of an act or thing done by an officer, and not

involving his integrity or want of good faith, the officer himself is not a necessary party to the suit.

(November 20, 1899.)

ERROR to the Supreme Court to review a judgment setting aside an ordinance of the board of street and water commissioners of Jersey City granting a railroad the right to cross a street at grade. *Reversed.*

The facts are stated in the opinion.

Messrs. W. D. Edwards and C. L. Corbin, for plaintiffs in error:

The prosecutor had no interest to warrant the writ.

State, Montgomery, Prosecutor. v. Trenton, 36 N. J. L. 79; *State, Traphagen, Prosecutor, v. Jersey City*, 52 N. J. L. 65, 18 Atl. 586; *State, Middleton, v. Robbins*, 54 N. J. L. 566, 25 Atl. 471; *Tallon v. Hoboken*, 60 N. J. L. 212, 37 Atl. 895; *H. B. Anthony Shoe Co. v. West Jersey R. Co.* 57 N. J. Eq. 607, 42 Atl. 279; *Smith v. Boston*, 7 Cush. 254; *People ex rel. Bristol v. Ingham County Supers.* 20 Mich. 95; *Chicago v. Union Bldg. Assn.* 102 Ill. 379, 40 Am. Rep. 598; *Hesing v. Scott*, 107 Ill. 600; *Brady v. Shinkle*, 40 Iowa, 576.

Commissioner Smith was a *de facto* member of the board of street and water commissioners.

Clark v. Ennis, 45 N. J. L. 69; *State ex rel. Dugan v. Farrier*, 47 N. J. L. 383, 1 Atl. 751; *State ex rel. Bumsted v. Govern*, 47 N. J. L. 368, 1 Atl. 835; *State v. Anderson*, 1 N. J. L. 318, 1 Am. Dec. 207; *State, Corigan, Prosecutor, v. Duryea*, 40 N. J. L. 206; *State, Flaucher, Prosecutor, v. Camden*, 56 N. J. L. 244, 28 Atl. 82; *Sheehan's Case*, 122 Mass. 445, 23 Am. Rep. 374; *Mechem, Pub. Off.* § 320; *Throop, Pub. Off.* § 631.

The acts of an officer *de facto* have the same validity as those of an officer *de jure*. *Throop, Pub. Off.* § 627; *Nofire v. United*

*Headnotes by NIXON, J.

NOTE.—As to validity of acts of *de facto* officer, see *Magenau v. Fremont* (Neb.) 9 L. R. A. 786; *State v. Lewis* (N. C.) 11 L. R. A. 105; *Cleveland v. McCanna* (N. D.) 41 L. R. A. 852. 48 L. R. A.

States, 164 U. S. 661, 41 L. ed. 590, 17 Sup. Ct. Rep. 212; *Hoagland v. Culvert*, 20 N. J. L. 387; *State, Garrabrant, Prosecutor, v. Meyers*, 29 N. J. L. 392; *State ex rel. Mitchell v. Tolan*, 33 N. J. L. 195; *State, Bloomfield Twp. Prosecutor, v. Pierson*, 47 N. J. L. 247; *Pence v. Frankfort*, 101 Ky. 534, 41 S. W. 1011.

The appointing power must determine *prima facie* the question of the validity of the incumbent's title.

State ex rel. Leal v. Jones, 19 Ind. 358, 81 Am. Dec. 403; *People ex rel. Kelly v. Brooklyn*, 77 N. Y. 503, 33 Am. Rep. 659; *State v. Parkhurst*, 9 N. J. L. 446, Appx.; *State ex rel. Clawson v. Thompson*, 20 N. J. L. 689; *Atty. Gen. ex rel. Moreland v. Detroit*, 112 Mich. 145, 37 L. R. A. 211, 70 N. W. 450; *Mechem, Pub. Off. § 330*; *Throop, Pub. Off. §§ 624, 631*; *State ex rel. Police Comrs. v. Pritchard*, 36 N. J. L. 101; *Clark v. Ennis*, 45 N. J. L. 69; *State, Markley, Prosecutor, v. Cape May Point*, 55 N. J. L. 104, 25 Atl. 259; *State ex rel. Mitchell v. Tolan*, 33 N. J. L. 195.

Messrs. **Charles D. Thompson and Richard V. Lindabury**, for defendant in error:

The prosecutor's interest is such that he will suffer a special private injury beyond that which will affect him in common with the remainder of the public.

Tallon v. Hoboken, 60 N. J. L. 212, 37 Atl. 895; *Higbee v. Camden & A. R. Co.* 19 N. J. Eq. 376; *Bechtel v. Carslake*, 11 N. J. Eq. 500; *McDonald v. Newark*, 42 N. J. Eq. 136, 7 Atl. 855; *Iveson v. Moore*, 1 Ld. Raym. 486; *Wilkes v. Hungerford Market Co.* 2 Bing. N. C. 281; *Aldrich v. Wetmore*, 52 Minn. 164, 53 N. W. 1072; *Wood, Nuisances*, § 840, p. 1275; *Crooke v. Anderson*, 23 Hun, 266; *Stetson v. Faxon*, 19 Pick. 147, 31 Am. Dec. 123; *Frink v. Laurence*, 20 Conn. 117, 50 Am. Dec. 274; *Platt v. Chicago, B. & Q. R. Co.* 74 Iowa, 127, 37 N. W. 107; *Brakken v. Minneapolis & St. L. R. Co.* 29 Minn. 41, 11 N. W. 124; *Benton v. Elizabeth*, 61 N. J. L. 411, 39 Atl. 683, 906.

The injury complained of directly affects the public, and the prosecutor is one of that portion of the public most immediately concerned. He has a standing, therefore, in the discretion of the supreme court, to prosecute the writ on this ground also.

State ex rel. Ferry v. Williams, 41 N. J. L. 332; *State, Middleton, v. Robbins*, 54 N. J. L. 566, 25 Atl. 471; *State v. Wood*, 23 N. J. L. 561; *State v. French*, 24 N. J. L. 736.

There was a vacancy in the board of street and water commissioners from the time Smith entered the United States army, and therefore the ordinance was not legally passed, for the want of the necessary four votes.

Smith had, before casting his vote, accepted an appointment to public office within the meaning of the act creating the street and water board.

Mechem, Pub. Off. § 1, p. 1; *People ex rel. Throop v. Langdon*, 40 Mich. 673; *Re Oaths of Attorneys & Counselors*, 20 Johns. 492; *Rouland v. New York*, 83 N. Y. 376; *United* 45 L. R. A.

States v. Hartwell, 6 Wall. 385, 18 L. ed. 830; *State ex rel. Clark v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488; *Wood's Case*, 2 Cow. 29, note; *Henly v. Lyme*, 5 Bing. 91; *Kerr v. Jones*, 19 Ind. 351; *State ex rel. Cornwell v. Allen*, 21 Ind. 517; *State v. De Gress*, 53 Tex. 387; *Re Martin*, 60 N. C. (Winst. L. pt. 1) p. 153; *State ex rel. McNeill v. Somers*, 96 N. C. 473, 2 S. E. 161; *King v. Harris*, 1 Barn. & Ad. 936; *Page v. Hardin*, 8 B. Mon. 648; *People ex rel. Henry v. Nostrand*, 46 N. Y. 381; *Nellis v. Clark*, 20 Wend. 26; *People v. Hayes*, 7 How. Pr. 248.

The effect of Smith's acceptance of the office of colonel was *ipso facto* to vacate his office of commissioner.

Mechem, Pub. Off. § 420; *Tiedeman, Mun. Corp. p. 133*; 1 Dill. Mun. Corp. p. 308; *Stubbs v. Lee*, 64 Me. 195, 18 Am. Rep. 251; *Magie v. Stoddard*, 25 Conn. 565, 68 Am. Dec. 375; *State ex rel. Metcalf v. Goff*, 15 R. I. 505, 9 Atl. 226; *People ex rel. Stephen v. Hanifan*, 96 Ill. 420; *State ex rel. Walker v. Bus*, 135 Mo. 325, 33 L. R. A. 616, 36 S. W. 636; *Kerr v. Jones*, 19 Ind. 351; *State ex rel. Cornwell v. Allen*, 21 Ind. 516; *People ex rel. Whiting v. Carrique*, 2 Hill, 93; *People ex rel. Kelly v. Brooklyn*, 77 N. Y. 503, 33 Am. Rep. 659; *Atty. Gen. ex rel. Moreland v. Detroit*, 112 Mich. 145, 37 L. R. A. 211, 70 N. W. 450; *State v. Parkhurst*, 9 N. J. L. 427, Appx.; *Bishop v. State ex rel. Griner*, 149 Ind. 223, 30 L. R. A. 278, 48 N. E. 1038; 19 Am. & Eng. Enc. Law, p. 562b; *Dailey v. State ex rel. Huffer*, 9 Blackf. 329; *Howard v. Shoemaker*, 35 Ind. 111; *People ex rel. Grogan v. Glass*, 19 App. Div. 454, 46 N. Y. Supp. 572; *Louisville v. Higdon*, 2 Met. (Ky.) 526; *Relender v. State ex rel. Utz*, 149 Ind. 283, 49 N. E. 30.

Smith was not a commissioner *de facto*. Smith's position in the board was precisely as if he had formally resigned on the 18th of July, or had never been appointed. Such being the case, something more was necessary to make him a *de facto* commissioner than mere attendance when away on furlough, at five out of sixteen meetings, and their voting under public protest.

Wilcox v. Smith, 5 Wend. 231, 21 Am. Dec. 213; *Hussey v. Smith*, 99 U. S. 20, 25 L. ed. 314; *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451; *State v. Newhouse*, 29 La. Ann. 824; *Biencourt v. Parker*, 27 Tex. 558; *Howard v. Shoemaker*, 35 Ind. 111.

Even if the acts of Smith could be upheld in favor of the public and third persons generally as those of a *de facto* officer they could not be upheld in this case, for the reason that the rule only supports such acts as affect the public and innocent third persons dealing with public officers in good faith.

Mechem, Pub. Off. § 328; 8 Am. & Eng. Enc. Law, 2d ed. pp. 820, 821; *King v. Bedford Level*, 6 East, 356; *Knowles v. Luce*, F. Moore, 109; *St. Luke's Church v. Mathews*, 4 Desauss. Eq. 578, 6 Am. Dec. 619; *State ex rel. Cosgrove v. Perkins*, 139 Mo. 106, 40 S. W. 650; *Williams v. Boynton*, 147 N. Y. 426, 42 N. E. 184; *Re Quinn*, 152 N. Y. 89, 46 N. E. 175; *Conway v. St. Louis*, 9 Mo. App. 488; *State ex rel. Van*

Amringe v. Taylor, 108 N. C. 196, 12 L. R. A. 202, 12 S. E. 1035; *Dabney v. Hudson*, 68 Miss. 292, 8 So. 545; *State ex rel. Dugan v. Farrier*, 47 N. J. L. 383, 1 Atl. 751; *State ex rel. Hugg v. Ivins*, 59 N. J. L. 139, 36 Atl. 685; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409.

Nixon, J., delivered the opinion of the court:

On September 19, 1898, the board of street and water commissioners of Jersey City passed "An Ordinance Granting to the Greenville and Hudson Railway Company Permission to Cross Communipaw Avenue with Its Tracks at Grade, and Regulating Such Crossing." The ordinance was vetoed by the mayor, but was passed again, notwithstanding the objections of the mayor, on the 3d of October, 1898. The defendant in error, a resident and taxpayer of Jersey City, was allowed a writ of certiorari, and a judgment of the supreme court was afterwards obtained setting aside the ordinance, and this writ of error brings that judgment before us for review.

While numerous reasons are assigned in the record, they all center around two propositions. First, whether the defendant in error has such an interest in the subject-matter of the writ as to give him a legal standing to prosecute it. The court below adjudged that he had, and we concur in the conclusion reached by that court, and find no occasion to add anything to the reasoning and authority by which it is supported. The second proposition relates to the validity of the ordinance itself. It is contended that the board of street and water commissioners has no power to authorize grade crossings. The court below sustained the right of the board, and in that conclusion, also, we agree. Such authority is given by 1 Gen. Stat. pp. 471, 472, §§ 50, 51.

But the ordinance is assailed principally upon the ground that it was not legally adopted. The board of street and water commissioners is the governing body of Jersey City, and it enacts all the local laws of that city respecting streets and water. It consists of five members, and the ordinances passed are subject to the mayor's approval, and, if vetoed by him, may be again passed, notwithstanding his objections, by four votes of the board. 1 Gen. Stat. p. 466. The ordinance in question was adopted at a regular meeting held September 19, 1898, there being four votes for and one against it. It was vetoed by the mayor on September 28, and finally passed, over his veto, on the 3d of October, 1898, receiving the same number of votes. But the contention is that one of them was not such as could give efficacy to the ordinance. It was cast by Robert G. Smith, who had been mustered into the United States service as colonel of the 4th regiment of New Jersey volunteers, on July 18, 1898. The statute creating the board of street and water commissioners provides (1 Gen. Stat. p. 465) that "no such commissioner shall accept or hold any other place of public trust or emolument

within the elective franchise, nor any appointment to public office, unless he shall first resign his said office, and if he shall so accept such other office without having resigned his office of such commissioner, upon his acceptance of such place or appointment, his office of commissioner shall thereupon become vacant." While there has not been furnished the best proof that Smith actually accepted the office of colonel, yet, in the absence of any rebuttal, we shall hold, as did the court below, that it is sufficient, and that he did accept such office. It is also insisted by the plaintiffs in error that Smith should be made a party in this proceeding; but we think that where an action is instituted, the object of which is only to determine the validity of the act or thing done by an officer, and not involving his personal integrity or want of good faith, the officer himself is not a necessary party. No allegation or proof of bad faith on the part of anyone appears in the record.

The question at issue is thus narrowed down to the efficacy of Smith's vote in the adoption of the ordinance. Without his vote, it could not have been passed over the veto, neither could it without every other vote it received, and it is not strictly accurate to say that his vote had any more potency than any other. After his appointment, Smith continued to discharge the duties of his office as commissioner, and was present and voted when the ordinance was adopted, as the official minutes show. It would therefore be a pure solecism to call the office vacant at that time, except in the strictly legal sense of having no occupant with a *de jure* title. The acts done by Smith in respect to the adoption of the ordinance were neither more nor less than he would have done had the 4th regiment never been organized. It is therefore manifest that the words of the statute (1 Gen. Stat. p. 465) already quoted, declaring that when a commissioner accepts another office his former office shall become "vacant," cannot mean, in a situation like this, that it is corporally vacant; for the person lawfully elected to fill it remained in possession discharging its duties. Mere words in a statute cannot alone make an office unoccupied which in fact is occupied. The legal meaning of the words, in such circumstances, is that the office has no occupant who holds by a good title in law, and that the appointing power may at once be exercised to fill it, or, if it is an elective office, the people may elect, and no adjudication is required to declare the vacancy, although the newly appointed or elected officer may find it necessary afterwards to resort to quo warranto proceedings to obtain actual possession of the office. Under the old rule of common law, upon accepting another and incompatible office, the first became vacant, and, if the occupant refused to abandon it, a writ of quo warranto to determine the question of incompatibility was the remedy; and where the common law has been superseded by statutes declaring a vacancy under like circumstances, and the occupant remains, a simi-

lar course must be pursued to obtain possession, or such other steps as the facts may warrant. There are familiar precedents in our own state which illustrate the rules here stated. In *Clark v. Ennis*, 45 N. J. L. 69, the court said: "It is clear, . . . both upon reason and authority, that a statute declaring an office vacant, for some act or omission of the incumbent after he enters upon his duties, does not execute itself." Also *State ex rel. Clawson v. Thompson*, 20 N. J. L. 689. Also *State v. Parkhurst*, 9 N. J. L. 427, Appx., with a difference only in the attitude of the parties. The governor having appointed Parkhurst in Ogden's absence, the new officer took possession, and Ogden became the prosecutor to regain possession. Had Ogden remained, the title of the case would have been *State v. Ogden*, with the same result. The same practice prevails in other states, and the rule is clearly stated in *State ex rel. Leal v. Jones*, 19 Ind. 356, 81 Am. Dec. 403, where it is said: "Where it appears, *prima facie*, that acts or events have occurred subjecting an office to a judicial declaration of being vacant, the authority authorized to fill such vacancy, supposing the office to be vacant, may proceed before procuring a judicial declaration of the vacancy, and appoint or elect, according to the forms of law, a person to fill such office: but if, when such person attempts to take possession of the office, he is resisted by the previous incumbent, he will be compelled to try the right, and oust the incumbent, or fail to oust him, in some mode prescribed by law."

Smith, then, being in the office under color of a legal title *ab origine*, and no other person claiming a right to it, was he a commissioner *de facto*? Lord Ellenborough, in 1805, in *King v. Bedford Level*, 6 East, 356, said: "An officer *de facto* is one who has the reputation of being an officer; he assumes to be, and yet is not, a good officer in point of law." This definition has never been questioned, and all those given by the text writers since are little more than variations of this one. Tested by this ancient or any modern definition, Smith must be held to have been such an officer when this ordinance was passed. He certainly had color of title and reputation; for the legal voters of Jersey City elected him in the spring of 1898 a member of the board for the term of three years, and he duly qualified as such, and entered upon his duties, with the full knowledge and acquiescence of the public. He had never resigned, the board had not been abolished, and his term had not expired. It has been argued, and the record shows, that he had been absent from several meetings of the board, but it cannot be held that a vacant chair in itself makes a vacant office. Such a rule would work bad results in most of our legislative or governing bodies. The question in a case like this is not whether a member has been frequently absent, but whether he was present and voted when the ordinance was adopted. He did not assert a right which any other person claimed, or perform any official duties that

anyone else pretended to have any right to perform in his stead, but only those duties which belonged to the office he was elected to fill, and which the law contemplated should be done, and the public expected him to do when they elected him; for the law creating the board provides that the judgment and wisdom of five commissioners should determine the questions that arise in the passage of ordinances concerning the streets. The board, also, recognized his membership. He participated in their proceedings. His name was called and vote recorded in the adoption of ordinances, and, if not present, his absence was duly noted in the official minutes. With all these facts and circumstances appearing in the record, and undisputed, we must hold that Smith was a commissioner *de facto*. This conclusion is in accord, we think, with the decisions in this state and elsewhere on this subject. In *State ex rel. Dugan v. Farrier*, 47 N. J. L. 383, 1 Atl. 751, Justice Dixon said: "One who assumes an office legally, and in good faith remains in it after his title has ended, is a *de facto* officer." The same doctrine was held in *State, Flaucher, Prosecutor, v. Camden*, 56 N. J. L. 244, 28 Atl. 82. In *State v. Anderson*, 1 N. J. L. 318, 1 Am. Dec. 207, it was held that a person in the office of sheriff, although ineligible, was nevertheless sheriff *de facto*, and his official acts valid. In *Clark v. Ennis*, 45 N. J. L. 69,—a case where the sheriff failed to give bond with sureties as required by law, and yet continued to discharge the duties of the office,—he was held to be an officer *de facto*, and his acts valid, although the law expressly declares that, if any sheriff shall neglect, refuse, or be unable to give such bond, "the office shall expire and be deemed to be vacant." In the *Case of Sheehan*, 122 Mass. 445, 23 Am. Rep. 374, one Mr. Hawkes, while holding the office of justice of the peace, was elected to the state legislature, and had qualified and entered upon his duties, but continued to act as justice, although the Constitution of Massachusetts provided that, upon accepting another office, that of justice should become vacant; but the court, by Chief Justice Gray, said: "If Mr. Hawkes, upon taking his seat in the house of representatives, ceased to be a justice *de jure*, he was, by color of the commission which he still assumed to hold and act under having the usual signs of judicial office,—sitting in the court, using its seal, and attended by his clerk,—and, no other person having been appointed in his stead, a justice of the peace *de facto*." Decisions of like import may be found in every state.

Smith being a commissioner *de facto* when he voted for the ordinance, it must, upon the application of well-settled legal principles, be held valid and effective as to the rights of the public and third persons. In *State ex rel. Mitchell v. Tolan*, 33 N. J. L. 195, Justice Depue said: "Premising that an officer *de facto* is one who exercises the duties of an office under a color of right, by virtue of an appointment or election to that office, as distinguished on the one hand from a mere usurper of an office, and on the other

from an officer *de jure*, the acts of an officer *de facto* are valid, as far as the rights of the public or third persons are concerned." In *Woodside v. Wagg*, 71 Me. 207, it was held that a person exercising the functions of a valid public office by color of right will be deemed to be an officer *de facto*, and his acts will protect third persons, although he has legally forfeited his office by the acceptance of an incompatible one. In *State v. Carroll*, 38 Conn. 449, it was said: "The *de facto* doctrine was introduced into the law as a matter of policy and necessity, to protect the interests of the public and of individuals, where those interests were involved in the official acts of persons exercising the duties of an office without being lawful officers. It was seen, as said in *Knowles v. Luce*, F. Moore, 109, that the public could not reasonably be compelled to inquire into the title of an officer, nor be compelled to show a title, and these became settled principles in the law." In *Wilcox v. Smith*, 5 Wend. 232, 21 Am. Dec. 213, the court said: "The principle is well settled that the acts of officers *de facto* are as valid and effectual when they concern the public or the rights of third persons as though they were officers *de jure*. The affairs of society could not be carried on upon any other principle." In *Petersilea v. Stone*, 119 Mass. 465, 20 Am. Rep. 335, Justice Devens said: "Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even as far as to see that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority, if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and, if they employ him as such, should not be subject to the danger of having his acts collaterally called in question."

But this legal protection is not afforded where the defects in the title of the officer are notorious, and such as to make those relying on his acts chargeable with such knowledge. What, then, may be considered notice sufficient to warn third persons and the public? The expiration of the term of an officer, and the appointment or election and qualification of his successor; the resignation of a public officer; the abolition of the office itself by an act of the legislature; the refusal of the board or legislative body of which the officer is a member to recognize him; or the judgment of a court against the title of the officer,—are such facts as third persons and the public are, as a general rule, required to take notice of. But in this case none of these facts existed, but just the contrary were known to every citizen of Jersey City. All knew that Smith had been legally elected; that he had not resigned; that his term had not expired; that no court had questioned his right to serve; that no one claimed a right to his seat; that the board had not been abolished; that the members recognized him as one of their number; and that he took part in their proceedings. All of these things were enough to confirm the belief of third per-

sons and the public in Smith's right to serve them. If it was publicly known that he was colonel of the 4th regiment, it was quite as publicly known on the 3d of October, when the ordinance was adopted, that the war with Spain had ended, and only the terms of a formal treaty of peace were being considered. Whether he had in fact accepted the office of colonel, and what the nice distinctions are between *de jure* and *de facto* officers, they could not be expected to know, nor were they bound to know, before accepting the benefits of any ordinance he might by his vote assist in passing. Another significant proof of the general acquiescence of the public in Smith's exercise of the office appears in the fact that the mayor of the city, whose veto, as printed in the record, manifests great hostility to the ordinance, well knew that the four votes that first passed it could pass it over his veto, and who had the power to fill a vacancy in the board, if he believed that any existed, had failed to make any attempt to appoint a successor, although he had been mustered into service in July. The mayor, as the chief representative of the public, had, so far as the record shows, acquiesced in his exercise of the office, and in his veto message does not claim that any illegal vote was cast for the ordinance. We find nothing to offset all this public reputation of Smith's right to the office, except a notice by the attorneys of the prosecutor of an intention to apply for an alternative writ of mandamus to compel the mayor of Jersey City to appoint someone as commissioner in Smith's place. By its terms, it only contemplated future action, and, when allowed, the hearing was fixed for the 17th of October, fourteen days after the adoption of the ordinance. This notice was served upon the mayor, and also upon the clerk of the board of commissioners. In any event, it was not notice to third persons and the public, and, if they heard of it at all, they would only know that some disputes had arisen as to Smith's title which might become the subject of future, and perhaps tedious, litigation, the result of which they could not anticipate. The board itself could not be required to stop business upon receipt of such a notice. It cannot be held that when a public legislative or governing body, about to act upon some important measure, receives a notice from the attorney of some person who is opposed to it that he intends to begin an action which, in its final result, may deprive a member of his seat, all further proceedings must be postponed until that suit is ended. Congress does not stop business until all its contested seats are settled, nor does any other legislative body. There are no facts in this case to justify us in relaxing the wise and ancient rule, so deeply rooted in public policy, that the acts of *de facto* officers, holding under color of a title originally lawful, when acting in good faith, will protect third persons and the public in their dealings with them, whether serving alone or as members of a governing or legislative body.

The ordinance in question is one of interest to all of the people of Jersey City, and they are the public whose rights are affected by its validity. The third persons whose rights are involved are the more than 400 residents and taxpayers in the neighborhood where it is to go into effect, who petitioned the board to pass it, claiming that it will be of benefit to them; and another third party, corporate, is the railway company, to which the right is granted to lay the tracks that will, it is alleged, greatly add to the convenience of a system of public traffic extending from Communipaw Cove to the Great Lakes.

The learned counsel for the prosecutor have invited our attention to many cases, but we fail to discover their applicability to the facts in the record before us. There can be no difference of opinion as to all such as hold that, when a person filling one office accepts another and incompatible one, his *de jure* title to the first ceases, and his success-

or may at once be appointed or elected; or that the acts of an officer whose term has ended, and his successor has qualified and taken possession in his stead, are void; or that the official acts of a city council, done after the term for which it was elected has expired, are illegal; also the acts of a board after it has been abolished by the legislature; or that the acts of one who has not, and never had, any color of title to the office are void. But this case rests entirely upon the question whether Smith, when he voted for the ordinance in dispute, was a commissioner *de facto*, and his acts, therefore, valid, as far as the rights of third parties and the public are concerned. We hold that he was such an officer, and that the ordinance is valid.

This conclusion results in a reversal of the judgment of the Supreme Court setting aside the ordinance.

NEW MEXICO SUPREME COURT.

Re B. G. WILSON.

(.....N. M.....)

"1. A territorial statute which imposes a license fee as a condition upon which coal oil may be sold in the territory is unconstitutional and void in so far as it applies to sales in original packages by the importer of coal oil produced and refined without the territory.

2. Section 2 of the act of the territorial legislature approved March 15, 1899 (Sess. Laws 1899, p. 101), construed to apply to sales of coal oil in the territory in original packages by the importer, and held to be, to that extent, unconstitutional and void.

(January 29, 1900.)

APPLICATION for a writ of habeas corpus to procure the release of petitioner from custody to which he had been committed for alleged violation of a statute forbidding the sale of coal oil without a license. *Petitioner discharged.*

Statement by PARKER, J.:

By an act approved March 15, 1899, the territorial legislature attempted to tax the sale of coal oil and its products; the pertinent provisions of said act being as follows: "Sec. 2. No corporation, either foreign or

*Headnotes by PARKER, J.

NOTE.—As to state tax or license laws as affecting interstate commerce, see *Rothermel v. Meyerle* (Pa.) 9 L. R. A. 386, and *note*; *American Fertilizing Co. v. North Carolina Bd. of Agri.* (C. C. E. D. N. C.) 11 L. R. A. 179, and *note*; *Re Spain* (C. C. E. D. N. C.) 14 L. R. A. 97, and *note*; *Com. v. Harmel* (Pa.) 27 L. R. A. 388; *South Bend v. Martin* (Ind.) 29 L. R. A. 531; *State v. Gorham* (N. C.) 25 L. R. A. 810; *State v. Wheelock* (Iowa) 30 L. R. A. 429; *Com. v. Myers* (Va.) 31 L. R. A. 379; 49 L. R. A.

domestic, engaged in the business of producing or refining petroleum or coal oil, or the products thereof, for illuminating purposes, shall have the right to sell said commodities within the territory of New Mexico, until a license has been issued by said territorial commerce commission [provided for in § 1 of the act], authorizing such corporation to engage in the business of selling and disposing of such products. No such license shall be issued in case of any foreign corporation until it shall have complied with the laws of the territory of New Mexico, authorizing it to do business in the territory, and then only upon written application therefor. For such license every such corporation shall pay the sum of five hundred dollars, to be paid ——. If any such corporation shall attempt to do business in this territory without having obtained such license, or, if having obtained the same, shall attempt to do business after revocation thereof, it and its agents shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding five thousand dollars, or, in case of a natural person, imprisoned for a period not to exceed two years in the territorial penitentiary, or by both such fine and imprisonment."

"Sec. 5. All corporations, copartnerships, or persons who purchase and sell more than three thousand dollars in value of such com-

Carrollton v. Bazette (Ill.) 81 D. R. A. 522; *State v. Scott* (Tenn.) 86 L. R. A. 461; *State v. Coop* (S. C.) 41 L. R. A. 501; *Laurens v. Elmore* (S. C.) 45 L. R. A. 249; and *Adkins v. Richmond* (Va.) 47 L. R. A. 588.

The cases in *Titusville v. Brennan* (Pa.) 14 L. R. A. 100, were reversed by the Supreme Court of the United States in *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829.

modities per annum, estimated at the market price thereof, shall be deemed wholesale dealers, and all others shall be deemed retail dealers. Said commission shall charge for a wholesale license the sum of twenty-five dollars, and for retail license the sum of one dollar. The corporations mentioned in sections two and three of this act shall be deemed producers and refiners, and any corporation, whether actually engaged in producing and refining said commodities or engaged in the distribution of said commodities as the agent under any contract or arrangement with the actual producer and refiner thereof, shall nevertheless be deemed such producer or refiner."

Thereafter the petitioner was charged with a violation of said § 2, and was by the judge of the second judicial district committed to answer said charge, whereupon petitioner sued out a writ of habeas corpus in this court, and the cause was heard upon the following agreed statement of facts: "(1) That the Continental Oil Company is a corporation created, organized, and existing under the laws of the state of Iowa, and doing business in the territory of New Mexico. (2) That the Continental Oil Company does not actually produce or refine petroleum or its products, but is engaged in distributing the same. Said company buys said commodities from the actual producers and refiners, and brings a portion thereof into the territory of New Mexico, and sells and disposes of the same to all persons desiring to purchase from it. (3) That portions of the coal oil so brought into the territory of New Mexico by the Continental Oil Company are shipped into said territory on orders received by it without said territory, from persons residing within said territory, in the original packages in which the same is put up by said Continental Oil Company for sale, and is delivered by said company to the purchaser in such original packages. (4) That other portions of the coal oil so brought into the territory of New Mexico by the Continental Oil Company are shipped to the various points within the territory where the said company has established distributing agencies, and is there stored in the tanks or otherwise, and delivered to purchasers in such quantities as may be desired, except that no delivery is made of less than five gallons. (5) That the petitioner, B. G. Wilson, is the agent of the said Continental Oil Company, and transacts the business of said company within the territory of New Mexico, as its agent. The said B. G. Wilson is a citizen of the United States, and resides in the territory of New Mexico. (6) That the defendant has, since the 15th day of March, 1899, continuously, as agent of the said Continental Oil Company, engaged in the business of selling within the county of Bernalillo, and territory of New Mexico, coal oil produced and refined and bought without the territory of New Mexico, as set forth in paragraphs 2, 3, and 4 of this statement, and no license has been issued to, or applied for by, the said Continental Oil Company or the said B. G. Wilson; nor has

the said Continental Oil Company or the said B. G. Wilson paid the fee of \$500 for such license, as required by § 2 of an act entitled 'An Act Relating to Sales of Coal Oil and Its Products,' approved March 15, 1899, but, on the contrary, the said Continental Oil Company and the said B. G. Wilson have refused to apply for any such license, and to pay the license fee prescribed by said act. (7) That no petroleum is, or ever has been, produced or refined within the territory of New Mexico by any person or corporation, and all coal oil sold within said territory is, and always has been, produced and refined beyond the limits thereof. (8) That all coal oil brought into the territory of New Mexico by the Continental Oil Company for sale is inspected by the territorial coal-oil inspector appointed by law for that purpose, and no coal oil is sold or offered for sale by the petitioner or by the Continental Oil Company except such as is suitable for illuminating purposes, in accordance with the requirements of the statutes of said territory. (9) That the Continental Oil Company has fully complied with the provisions of all laws of the territory relating to foreign corporations doing business within said territory except the provisions of the said act entitled, 'An Act Relating to Sales of Coal Oil and Its Products,' approved March 15, 1899, and has refused to comply with the provisions of said last-mentioned act on the ground that the same is unconstitutional and void."

Mr. Neill B. Field, for petitioner:

The regulation of the sale of coal oil in the manner attempted by this act is not a rightful subject of legislation within the meaning of the acts of Congress defining the legislative power in the territories.

Stoutenburgh v. Hennick, 429 U. S. 148, 32 L. ed. 637, 9 Sup. Ct. Rep. 256.

The power of Congress under the Constitution to regulate commerce is exclusive as to all matters not of purely local concern. No state or territory can, under any pretense, encroach upon that power.

Thurlow v. Com. 5 How. 573, 12 L. ed. 287; *Gibbons v. Ogden*, 9 Wheat. 225, 6 L. ed. 77; *Brown v. Maryland*, 12 Wheat. 446, 6 L. ed. 688; *Brown v. Houston*, 114 U. S. 630, 29 L. ed. 260, 5 Sup. Ct. Rep. 1091; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238.

This law attempts to lay a direct burden on interstate commerce.

Crutcher v. Kentucky, 141 U. S. 58, 35 L. ed. 652, 11 Sup. Ct. Rep. 851; *Robbins v. Shelby County Taming Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Lyng v. Michigan*, 135 U. S. 168, 34 L. ed. 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *Lebloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Asher*

v. *Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 191, 10 Sup. Ct. Rep. 881; *State Freight Tax Case*, 15 Wall. 232, *sub nom. Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 146; *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

This law necessarily discriminates against the introduction and sale within this territory of a product of other states.

Collins v. New Hampshire, 171 U. S. 32, 43 L. ed. 61, 18 Sup. Ct. Rep. 768; *Minnesota v. Barber*, 136 U. S. 320, 34 L. ed. 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Walling v. Michigan*, 116 U. S. 448, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Vance v. W. A. Vandervoort* Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674.

This case involves only incidentally, if at all, the power of the legislature to prescribe the terms upon which a foreign corporation may do business in the territory.

Hooper v. California, 155 U. S. 652, 39 L. ed. 298, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Western U. Tele. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Philadelphia & S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851.

The 8th section of the act is clearly not a rightful subject of legislation within the meaning of the congressional grant of legislative power to the territory.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 7; *Budd v. New York*, 143 U. S. 532, 36 L. ed. 251, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 456, 33 L. ed. 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 2; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 19, 18 Sup. Ct. Rep. 418; *Covington & L. R. A.*

Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198.

Mr. Edward L. Bartlett, for the Territory:

The commerce clause of the Constitution, giving power to Congress to regulate exclusively commerce between foreign nations, the several states, and Indian tribes, and therefore prohibiting states from passing such laws, does not, for the same reason, prohibit the passage of such laws by the legislature of a territory, which is a creature of Congress and to which has been delegated by that body the right and power to make laws upon all rightful subjects of legislation.

When Congress has failed to exercise its power and pass any laws upon a given subject, and the legislature does so, the act of the legislature of the territory must be considered the act of Congress upon the subject, until it is disapproved.

A citizen of a territory is not a citizen of a state within the meaning of the language of the Constitution.

Hepburn v. Ellzey, 2 Cranch, 445, 2 L. ed. 332; *Hoove v. Jamieson*, 166 U. S. 395, 41 L. ed. 1049, 17 Sup. Ct. Rep. 596; *United States ex rel. Champion v. Ames*, 95 Fed. Rep. 453; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256.

Similar license or occupation tax on the business of selling, where there is no discrimination in favor of domestic products, has been frequently upheld by the Federal courts.

Singer Mfg. Co. v. Wright, 33 Fed. Rep. 124; *State v. Long*, 95 N. C. 582, 59 Am. Rep. 265; *Osborne v. Mobile*, 16 Wall. 481, 21 L. ed. 473; *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382; *Hinson v. Lott*, 8 Wall. 149, 19 L. ed. 387; *Welton v. Missouri*, 91 U. S. 282, 23 L. ed. 350; *State v. Richards*, 32 W. Va. 348, 3 L. R. A. 705, 9 S. E. 245; *Pearson v. International Distillery*, 72 Iowa, 348, 34 N. W. 1; 11 Am. & Eng. Enc. Law, p. 550, and note.

A corporation is not a citizen within the meaning of the Constitution, and the state has the right to impose reasonable conditions on it to do business, and to discriminate between our own citizens and those corporations which are not citizens.

Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; *Ward v. Maryland*, 12 Wall. 430, 20 L. ed. 452; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 732, 28 L. ed. 1138, 5 Sup. Ct. Rep. 739; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 118, 34 L. ed. 396, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958.

This act is clearly within the police powers of the territory, in the enlarged sense in which that term is used.

Lake Shore & M. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; 11 Am. & Eng. Enc. Law, 548; *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. ed. 595; 25 Am. & Eng. Enc. Law, 484, 489; *Re Rahner*, 140 U. S. 545, *sub nom. Wilkerson v.*

Kahner, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

Parker, J., delivered the opinion of the court:

Upon the foregoing record, this court discharged the petitioner, and it now remains for the court to express its reasons for holding this statute unconstitutional and void.

The scope and effect of the commerce clause of the Constitution of the United States has been a much-mooted question before the courts, both state and Federal, ever since early in the century, and the number of cases involving this important provision have constantly increased down to the present time. Without attempting to review, or even cite, the numerous cases involving the question under consideration, we think there are certain principles, firmly established by the Supreme Court of the United States, which are decisive of this case, and which may be stated as follows: (1) Commerce between a state and territory is "commerce among the several states," within the meaning of the Constitution. *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256. (2) The right to conduct interstate commerce includes the right to sell in original packages the goods which are the subject of such commerce, free from state regulations. *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757. (3) A state statute imposing a license tax upon the conduct of interstate commerce is a regulation of such commerce and invalid. *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851. (4) A license may not be demanded of a foreign corporation or person engaged in interstate commerce for the privilege of conducting the same, nor may the same be prohibited notwithstanding a like tax may be exacted for domestic business covering the same articles, and notwithstanding such domestic business may be prohibited. *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273. (5) A state may tax or license a business wholly within the state, notwithstanding the person or corporation engaged in such business may also be, either incidentally or principally, engaged in interstate business, so long as the license or tax does not refer to, and is not imposed upon, the business which is inter-

state. *Osborne v. Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214. (6) But where a license tax is laid generally upon the conduct of business in all forms, and without distinction as to whether it is interstate or local, and where the tax which is laid upon local business cannot be separated from that which is on interstate business, the whole tax is in contravention of the Constitution, and void. *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Western U. Teleg. Co. v. Alabama State Bd. of Assessment*, 132 U. S. 473, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Leloup v. Port of Mobile*, 127 U. S. 640, 647, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Osborne v. Florida*, 164 U. S. 650, 655, 41 L. ed. 586, 587, 17 Sup. Ct. Rep. 214.

Applying the foregoing principles to the facts in this case, it seems clear that § 2 of the act of the territorial legislature under consideration is in contravention of the provisions of the Constitution, and void, so far as it applies to the business of the petitioner as agent of the Continental Oil Company. The petitioner, as such agent, is engaged in the business of buying coal oil, from the producers thereof, without the territory, and shipping the same into the territory for distribution and sale. Coal oil is a recognized article of commerce, and, as such, entitled to the protection of the commerce clause of the Constitution. The sales of the petitioner are largely in original packages, and, as such, not subject to a license tax. It is true that the act provides for a like license for the sale of oil produced within the territory, but this fact does not take the business of the petitioner, which is interstate, out of the protection of the Constitution. It is to be further observed that none of the exceptions, such as the right of inspection, the right to regulate sale in a particular way, as by auctioneers, peddlers, or hawkers, or the right to regulate sales of intoxicating liquors under the Wilson act (28 Stat. at L. 509), or the right to exercise any of the police powers which are conceded to the states, intervene in this case to modify the principles announced above. It appears, however, that some portion of the business of the petitioner consists of the sale of coal oil in the territory after the original packages in which the same is put up for sale have been broken, and as to this portion of his business he or his company might be properly taxed. But § 2 of the act cannot be interpreted or construed to apply to such business. The act provides, in § 5, for a license fee of \$25 from all persons whose sales amount to \$3,000 per annum, and who are termed "wholesale dealers," and a fee of \$1 from all other persons who are termed "retail dealers." It may be that the petitioner is subject to the payment of the wholesale or retail dealer's tax as prescribed by the act, but as to this it is unnecessary to express any opinion. It is clear, however,

that the license tax of \$500 applies to some character of business other and different from that of a wholesale or retail dealer in coal oil. There being no method furnished by § 2 of the act whereby the tax of \$500 can be apportioned between the local and interstate business of the petitioner, and it not being susceptible of construction so as to ap-

ply solely to local business, the same must be held to apply to the interstate business of the petitioner, and to be, consequently, unconstitutional and void, so far as it applies to the business in which the petitioner is shown to be engaged.

Mills, Ch. J., and **McFie**, J., concur.

NEW YORK COURT OF APPEALS.

Richard HUFFMIRE *et al.*, *Respts.*,

v.

City of BROOKLYN, *Appt.*

(162 N. Y. 584.)

1. The city of Brooklyn is the proper party defendant in an action for damages caused by a sewer constructed by the town of Flatbush before the town was merged in the city, since Laws 1894, chap. 356, limiting and defining the liability of the city for debts and obligations of the town, merely confines the area of taxation for such debts and obligations to the territory which would have been liable but for its annexation to the city.

2. The destruction of oysters by the casting of sewage upon them, though the sewer was constructed by a city, under legislative authority, is as clearly a taking of the property of the owner of the oyster bed, for which he has a constitutional right to compensation, as if there had been a physical removal and conversion of the oysters.

(May 1, 1900.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Trial Term for Kings County in favor of plaintiffs in an action brought to recover damages for injury to an oyster bed by sewage from the defendant city. *Affirmed.*

The facts are stated in the opinion.

Mr. William J. Carr, with **Mr. John Whalen**, for appellant:

The statute having authorized the construction of the sewer, and the discharge of its contents into the tide waters, no liability could attach to the town of Flatbush without proof of fault either in the method of construction or the maintenance of the sewer built under such legislative sanction.

Where a public work is undertaken under

NOTE.—As to liability of city for negligent construction of sewer, see *Nashville v. Comer* (Tenn.) 7 L. R. A. 465, and *note*; *Seymour v. Cummins* (Ind.) 5 L. R. A. 126, and *note*; and *Bulger v. Eden* (Me.) 9 L. R. A. 205.

As to liability of city for pollution of stream by sewage, see *Chapman v. Rochester* (N. Y.) 1 L. R. A. 296, and *note*.

As to liability for disease suffered in consequence of improper maintenance of sewer system, see *Hughes v. Auburn* (N. Y.) 46 L. R. A. 636.

As to liability for casting surface water upon lot by means of drain, see *Jordan v. Benwood* (W. Va.) 36 L. R. A. 519, and *footnote*. 48 L. R. A.

a legislative direction, and executed in a mode required by statute, no liability will arise from damages simply consequential to the work, unless negligence be shown.

Radcliff v. Brooklyn, 4 N. Y. 196, 53 Am. Dec. 357; *Bellinger v. New York C. R. Co.* 23 N. Y. 47; *Atwater v. Canandaigua*, 124 N. Y. 602, 27 N. E. 385; *Brunswick Gaslight Co. v. Brunswick*, 92 Me. 493, 43 Atl. 104; *Booth v. Rome, W. & O. Terminal R. Co.* 140 N. Y. 267, 24 L. R. A. 105, 35 N. E. 592; *Morton v. New York*, 140 N. Y. 207, 22 L. R. A. 241, 35 N. E. 490; *Hill v. New York*, 139 N. Y. 495, 34 N. E. 1090; *Cogswell v. New York, N. H. & H. R. R. Co.* 103 N. Y. 21, 57 Am. Rep. 701, 8 N. E. 537; *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592; *Washburn & M. Mfg. Co. v. Worcester*, 116 Mass. 458; *Morse v. Worcester*, 139 Mass. 380, 2 N. E. 694.

The plaintiffs deliberately exposed themselves unnecessarily to damage, and in fact their entire damage is due to their failure to take reasonable precautions to avoid the threatening damage.

They cannot charge the defendant with damages so occasioned.

Hamilton v. McPherson, 28 N. Y. 72, 84 Am. Dec. 330; *Thomas v. Bartow*, 48 N. Y. 193; *Dillon v. Anderson*, 43 N. Y. 231; *Cook v. Soule*, 56 N. Y. 420; *Heater v. Knox*, 63 N. Y. 561; *Parsons v. Sutton*, 66 N. Y. 92.

Mr. Frederick E. Crane, for respondents:

While an act of the legislature authorizing a public improvement may protect a municipality from liability for consequential injuries, it does not protect it from liability for the direct, actual, and physical taking of property.

Carll v. Northport, 11 App. Div. 121, 42 N. Y. Supp. 576; *Magee v. Brooklyn*, 18 App. Div. 22, 45 N. Y. Supp. 473; *Moody v. Saratoga Springs*, 17 App. Div. 207, 45 N. Y. Supp. 365; *Byrnes v. Cohoes*, 67 N. Y. 204; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321; *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *Moore v. Albany*, 98 N. Y. 407; *New York C. & H. R. R. Co. v. Rochester*, 127 N. Y. 591, 28 N. E. 416; *Hay v. Cohoes Co.* 2 N. Y. 159, 51 Am. Dec. 279.

The act of 1889, authorizing the town of Flatbush, through commissioners, to construct the sewer, did not authorize the taking or destruction of private property or property rights without just compensation.

Morton v. New York, 140 N. Y. 207, 22 L. R. A. 241, 35 N. E. 490; *Hill v. New York*, 139 N. Y. 495, 34 N. E. 1090.

The town of Flatbush having been wiped out of existence, the city of Brooklyn is the proper party defendant.

Dillon, Mun. Corp. 4th ed. § 186; *Armstrong County v. Clarion County*, 66 Pa. 218, 5 Am. Rep. 368.

Werner, J., delivered the opinion of the court:

This action was brought to recover damages to a bed of oysters planted by the plaintiffs in Mill creek, which is tide water bordering upon that portion of the city of Brooklyn formerly known as the town of Flatlands, Kings county, New York. These oysters were planted under a permit issued to the plaintiffs by the justice of the peace and the supervisor of said town of Flatlands, pursuant to the provisions of chapter 734, Laws 1868. This act, in substance, provides that any person who has been an inhabitant of the town for a period of six months prior to making application may upon complying with the provisions of the act, acquire the right to plant oysters under the public waters within said town, and have "the exclusive property in the oysters so planted, and the exclusive use of said oyster beds." The first permit received by the plaintiffs was issued in December, 1892. The rental or license fee was \$10 a year. This permit was renewed from year to year until 1892, when the plaintiffs omitted to procure a formal renewal thereof, but continued to plant and gather oysters as before. On the 9th of February, 1893, the plaintiffs paid \$20, which included the rental for 1892, and renewed their permit until December, 1893. The damage to plaintiffs' oyster bed was caused by the discharge of sewage thereon from one of defendant's sewers. The history of this sewer, and its relation to this controversy, is as follows: By chapter 161, Laws 1889, the legislature authorized the town of Flatbush to build a sewer to empty into the waters of Jamaica Bay, of which Mill creek is a part. This sewer was constructed so that its outlet was about 300 feet from plaintiffs' oyster bed, and was first used in January, 1893. Soon after it was in operation, the plaintiffs discovered that their oysters were covered with and ruined by tar and "sludge acid;" substances which were being discharged from the mouth of said sewer. The town of Flatbush constructed the sewer in question; but by chapter 356, Laws 1894, said town was annexed to and became a part of the city of Brooklyn, being designated as the Twenty-Ninth ward thereof. Section 4 of said act provides that the city of Brooklyn shall not be or become liable to pay "any debt, liability, or obligation of the town of Flatbush . . . contracted or incurred prior to the time this act shall take effect, . . . but the property in such town . . . as now constituted . . . shall remain liable for the said debts, liabilities, and obligations, and the moneys to meet the same, principal and interest, as they accrue, 48 L. R. A.

shall be raised by taxation upon the property of said town." The act further provides that the taxes levied for these purposes, when collected by the city of Brooklyn, shall be paid over to the county treasurer or other proper officers charged with the duty of paying such indebtedness, and exempts the territory above described from certain general city taxes.

The first question presented for our consideration, although not seriously urged upon the argument, is whether the city of Brooklyn is the proper defendant in such a case as this. As this action was not brought until after the town of Flatbush had become merged in the city of Brooklyn, the latter is undoubtedly the proper party defendant in any case which might have been brought against the former before such merger. Where a municipal corporation is legislated out of existence, and its territory annexed to another, the latter, unless the legislature otherwise provides, is entitled to the property and liable for the debts of the former. Dillon, Mun. Corp. 4th ed. § 186. The provisions of chapter 356, Laws 1894, limiting and defining the liability of the defendant for debts and obligations of the town of Flatbush prior to its annexation to the city of Brooklyn, were simply intended to confine the area of taxation for such debts and obligations to the territory which would have been liable but for such annexation. This is made clear by other provisions of the same act exempting the territory annexed from the payment of certain taxes levied for the exclusive benefit of the city of Brooklyn as it was constituted prior to 1874. Any other construction of the annexation act referred to would leave remediless those having lawful claims against the former town of Flatbush. That town no longer exists. By the act of 1894 it became a part of the city of Brooklyn, and the latter is now the only legal entity which can be brought into a court of justice upon claims against the former. We therefore address ourselves to the principal question, which arises upon defendant's contention that it is not liable in any event. It seeks to shield itself from liability herein by the application of the rule that in the construction or operation of a public work under legislative authority or direction a municipal corporation is not answerable for such a consequential injury as may result to others where there is no negligence in such construction or operation. We recognize the controlling force of this familiar and now well-settled principle. It is founded upon the transcendent power of the legislature, within constitutional limitations, to enact whatever it may deem essential to the public welfare. The question which most frequently arises in cases where this rule is invoked is whether the injury complained of is purely consequential, or is so direct as to amount to a taking of property which entitles the party injured to compensation under the Constitution. That is the precise question here presented. The plaintiffs contend that the casting of noxious and destructive substances upon the

oyster bed was not a consequential, but a direct, injury. The defendant insists that the discharge of the sewer in question into the waters of Mill creek is simply the consequential result of obedience to the legislative mandate, and that, in the absence of negligence on the part of the municipal authorities in the construction and operation of said sewer, the defendant is not liable. Applying the rule which the defendant invokes in all its force and breadth, we think this case falls directly within the constitutional inhibition against the taking of property without compensation. The plaintiffs were lawfully in possession of a piece of land under water upon which they had planted a bed of oysters. They held their title under legislative authority, which was as ample and unquestioned as that under which defendant's sewer was constructed. Although this land was under public waters, it was as much the private property of the plaintiffs as though it had been a tract of farm land held under a lease from the town of Flatlands under legislative authority. The act of the defendant in pouring its sewage upon this land was not consequential. It was as direct as though it had been discharged upon a piece of land owned or rented by the plaintiffs, and used for farming or gardening purposes. In the latter case a municipal corporation could not successfully defend its trespass because it was acting under legislative authority, or because its sewage had been carried to the lands of the person complaining over the lands of others. The fact that plaintiffs' land was under public water, and that defendant's sewage was discharged upon it, after passing through 300 feet of public water, the land under which was not in the possession or control of the plaintiffs, does not differentiate this case in principle from the illustrative case of a discharge of sewage upon surface lands. In either case the injury is so direct as to amount to an invasion of a private right, which no legislative sanction or direction can justify or excuse. These views are, we think, sustained by abundant authority. Early in the history of this court the distinction was clearly pointed out between direct and consequential injury to private lands in the prosecution of public work performed under legislative direction. The case of *Radcliff v. Brooklyn*, 4 N. Y. 205, 53 Am. Dec. 364, was one in which the plaintiffs were held not entitled to recover for injuries to their lands occasioned by a change of grade in the street adjoining the same. None of their lands had been taken or invaded. In speaking of the rule applicable to such cases, Judge Bronson said: "Private property cannot be taken for public use without making just compensation to the owner, and a law which authorizes the taking without providing for compensation must be unconstitutional and void. But laws which authorize the opening and improving of streets and highways, or the construction of other works of a public nature, have never been held void, because they omitted to provide compensation for those who,

though their property was not taken, suffered indirect or consequential damages." In *Bellinger v. New York C. R. Co.* 23 N. Y. 47, the defendant, under legislative authority, constructed a railroad embankment in such a manner as to cause a stream to overflow the lands of the plaintiff. Judge Denio, in discussing the right of the railroad company to do the act complained of, said: "This is, of course, to be understood as limited to cases in which the legislature has the constitutional power to act. If, therefore, a corporation or an officer should be authorized by a statute to take the property of individuals for any purpose, however public or generally beneficial, without compensation, or, for a private use, making compensation, the pretended authority would be wholly void, and, of course, could afford no protection to anyone. But this limitation has no application to cases where property is not taken, but only subjected to damages consequential upon some act done by the state or pursuant to its authority." In *Atwater v. Canandaigua*, 124 N. Y. 602, 27 N. E. 385, cited by defendant, and arising out of a state of facts similar to those in the *Bellinger Case*, 23 N. Y. 47, the distinction above adverted to was again recognized by this court in the following language: "In the present case the action of the defendants in the performance of the work was confined within the limits where they had the right to execute it, and the effect upon property beyond those bounds, resulting in damages, was the consequence of such performance of the work, and not the direct act of its execution by them. In that respect this case is distinguishable from that of *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258. There the defendant was held liable because, by casting stone upon the premises, he committed a trespass; and the fact that he was engaged in the performance of a public work, and the fragment of rock was in the process of blasting thrown upon the land of another, was no justification. Here the injury to the plaintiff's premises was not done directly by any act of the defendants, but it was the consequence following and traceable to the work as the cause. In the one case the act of the party was, and in the other not, a direct invasion of the premises of the plaintiff."

But even more directly in point are *Noonan v. Albany*, 79 N. Y. 476, 35 Am. Rep. 540, and *New York C. & H. R. Co. v. Rochester*, 127 N. Y. 591, 28 N. E. 416. In the first of these cases it was held: "A municipal corporation has no greater right than an individual to collect the surface water from its lands or streets into an artificial channel, and discharge it upon the lands of another; nor has it any immunity from legal responsibility for creating or maintaining nuisances." In the other case it was decided that "a municipality may not empty its sewers upon private property without acquiring the right so to do." The same doctrine was held to apply in *Seifert v. Brooklyn*, 101 N. Y. 143, 54 Am. Rep. 669, 4 N. E. 324, which was an action brought to recover

damages alleged to have been caused to plaintiff's premises by defendant's negligence in the construction of a sewer. There Chief Judge Ruger stated the rule, which is applicable here, as follows: "It is a principle of the fundamental law of the state that the property of individuals cannot be taken for public use except upon the condition that just compensation be made therefor; and any statute conferring power upon a municipal body, the exercise of which results in the appropriation, destruction, or physical injury of private property by such body, is inoperative, and ineffectual to protect it from liability for the resultant damages, unless some adequate provision is contained in the statute for making such compensation."

Where, however, the acts done are of such a nature as to constitute a positive invasion of the individual rights guaranteed by the Constitution, legislative sanction is ineffectual as a protection to the persons or corporation performing such acts from responsibility for their consequences." The foregoing authorities sufficiently illustrate the underlying principle which must control the decision of this case. Briefly recapitulated, it is that when, in the exercise of authority conferred upon them by the legislature, municipal corporations perform acts as a result of which some indirect or consequential injury is sustained by an individual, the latter has no right of action for such injury. Such injuries are *damnum absque injuria*. But when a municipal corporation takes the property of an individual it must pay for it.

We have not lost sight of defendant's contention that the deposit of sewage on the plaintiffs' land was not a taking of their property. We are of the opinion that any direct invasion of a man's land is a taking of his property within the meaning of the Constitution. The destruction of plaintiffs' oysters by the casting of sewage upon them was as clearly a taking of their property as the physical removal and conversion of the same would have been.

The judgment of the court below should be affirmed, with costs.

Parker, Ch. J., and Gray, Bartlett, Martin, and Vann, JJ., concur. Cullen, J., did not sit.

Georgiana HICKS, *Respt.*,
v.

BRITISH AMERICA ASSURANCE COMPANY, *Appt.*

(162 N. Y. 284.)

1. The rights of one whose property is destroyed by fire after an oral con-

tract to insure it, but before a policy therefor is issued, are subject to the provisions of the standard policy prescribed by law, and he can recover only by compliance with the conditions required by such policy, including that as to furnishing proofs of loss within a specified time.

2. The value of property destroyed by fire after an oral contract to insure it, but before the issuance of a policy thereon, cannot be recovered as damages for breach of the agreement to issue the policy, where the failure to deliver the policy did not cause any damage to the insured, since the oral agreement constituted a binding contract of insurance which could be enforced against the insurer except for the failure of the insured to comply with the conditions contained in the standard policy of insurance, which were by law made a part of the contract.

3. The denial by a local insurance agent that any contract of insurance has been made, when in fact there has been an oral agreement to insure which is binding, will not waive the condition as to proofs of loss which is by law made a part of the contract because contained in the standard policy of insurance, where that policy also provides that no such agent shall have power to waive any condition therein except in writing.

4. A denial in an answer by an insurance company, of all allegations in the complaint, will not have the effect of ratifying an unauthorized denial by a local agent of the existence of any contract of insurance, so as to waive a condition as to proofs of loss, when the agent's denial was by the terms of the policy ineffectual to constitute such waiver because not in writing.

(Landon, Werner, and Haight, JJ., dissent.)

(March 27, 1900.)

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of the Monroe County Circuit in plaintiff's favor in an action brought to recover an amount alleged to be due under a fire-insurance contract. *Reversed.*

The facts are stated in the opinion.

Mr. A. H. Sawyer, for appellant:

Hobart, the agent of the defendant, had no power to make a parol contract of insurance binding upon defendant. The most that he could do was to make a parol preliminary contract to issue a policy with the usual terms and conditions in such policy.

Angell v. Hartford F. Ins. Co. 59 N. Y. 171, 17 Am. Rep. 322; *Ellis v. Albany City F. Ins. Co.* 60 N. Y. 402, 10 Am. Rep. 495; *Van Loan v. Farmers' Mut. F. Ins. Assn.* 90 N. Y. 280; *Hubbell v. Pacific Mut. Ins. Co.* 100 N. Y. 41, 2 N. E. 470; *Lipman v. Niagara F. Ins. Co.* 121 N. Y. 454, 8 L. R. A. 719, 24 N. E. 699; *Karlsen v. Sun Fire*

Luhrs v. Luhrs (N. Y.) 9 L. R. A. 534; *Wainer v. Milford Mut. F. Ins. Co.* (Mass.) 11 L. R. A. 598; *Michigan Pipe Co. v. Michigan F. & M. Ins. Co.* (Mich.) 20 L. R. A. 277; *Dailey v. Preferred Masonic Mut. Accl. Assn.* (Mich.) 26 L. R. A. 171; and *New York L. Ins. Co. v. Babcock* (Ga.) 42 L. R. A. 88.

NOTE.—As to validity of oral contract of insurance, see *Newark Mach. Co. v. Kenton Ins. Co.* (Ohio) 22 L. R. A. 768, and *note*.

As to time when contract of insurance is consummated, see *Harnickell v. New York L. Ins. Co.* (N. Y.) 2 L. R. A. 150; *Lorscher v. Supreme Lodge, K. of H.* (Mich.) 2 L. R. A. 206; 48 L. R. A.

Office, 122 N. Y. 545, 25 N. E. 921; *De Grove v. Metropolitan Ins. Co.* 61 N. Y. 594, 19 Am. Rep. 305.

Service of an immediate notice of the loss in writing, and of proofs within sixty days, were conditions precedent without which no recovery could be had unless such conditions were waived.

Quinlan v. Providence Washington Ins. Co. 133 N. Y. 356, 31 N. E. 31; *Sergeant v. London & L. & G. Ins. Co.* 85 Hun, 31, 32 N. Y. Supp. 594.

Agents of insurance companies authorized to issue and deliver policies, collect premiums, etc., have no power to waive proofs of loss, or to bind the company in any manner in relation to claims against said companies for losses.

Bush v. Westchester F. Ins. Co. 63 N. Y. 531; *Van Allen v. Farmers' Joint Stock Ins. Co.* 64 N. Y. 469; *Blossom v. Lycoming F. Ins. Co.* 64 N. Y. 162; *Quinlan v. Providence Washington Ins. Co.* 133 N. Y. 356, 31 N. E. 31; *Smith v. Niagara F. Ins. Co.* 60 Vt. 682, 1 L. R. A. 216, 15 Atl. 353.

The fact that a policy of insurance containing restrictions upon the authority of the agent had not been issued to, or was not in the possession of, the insured, and that he was ignorant of the conditions contained therein, does not relieve him from the obligation of such restrictions.

Quinlan v. Providence Washington Ins. Co. 133 N. Y. 356, 31 N. E. 31; *De Grove v. Metropolitan Ins. Co.* 61 N. Y. 594, 19 Am. Rep. 305.

It cannot be held that the authority of an agent to receive proposals for insurance and countersign and deliver policies, extends to adjusting losses, or waiving the stipulated proofs of loss, and binding the company to pay without them.

Bush v. Westchester F. Ins. Co. 63 N. Y. 531; *Van Allen v. Farmers' Joint Stock Ins. Co.* 64 N. Y. 469; *Smith v. Niagara F. Ins. Co.* 60 Vt. 682, 1 L. R. A. 216, 15 Atl. 353; *Quinlan v. Providence Washington Ins. Co.* 133 N. Y. 356, 31 N. E. 31.

Mr. John A. Barhite, for respondent: Hobart, the agent of the defendant, had authority to make a contract to issue a policy, and such contract was binding upon the defendant.

The contract of insurance is like any other contract, and governed by the same rules; and if one party denies the contract, or refuses to perform, the other may take him at his word, and bring his action for damages.

McMaster v. State, 108 N. Y. 542, 15 N. E. 417; *Ziehen v. Smith*, 148 N. Y. 558, 42 N. E. 1080; *Ellis v. Albany City F. Ins. Co.* 50 N. Y. 402, 10 Am. Rep. 495; *Angell v. Hartford F. Ins. Co.* 59 N. Y. 171, 17 Am. Rep. 322; *Van Loan v. Farmers' Mut. F. Ins. Asso.* 90 N. Y. 280; *Manchester v. Guardian Assur. Co.* 151 N. Y. 88, 45 N. E. 381; *Hubbell v. Pacific Mut. Ins. Co.* 100 N. Y. 41, 2 N. E. 470; *De Grove v. Metropolitan Ins. Co.* 61 N. Y. 594, 19 Am. Rep. 305; *Ruggles v. American Cent. Ins. Co.* 114 N. Y. 415, 21 N. E. 1000; *Quinlan v. Providence Wash-*
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ington Ins. Co. 133 N. Y. 356, 31 N. E. 31; *Relief F. Ins. Co. v. Shaw*, 94 U. S. 574, 24 L. ed. 291.

A complaint setting up a contract to insure against fire, and to issue a policy in accordance with such contract, and alleging a breach of such contract, and claiming damages for the breach, sets up a legal cause of action.

Humphry v. Hartford F. Ins. Co. 15 Blatchf. 35, Fed. Cas. No. 6,874.

If a person asks an individual who has authority to complete a contract, to complete that contract, and is met by a refusal, must the person ask some other individual who has the same or a greater authority to complete the contract, to do so, before an action for the breach can be maintained?

The agent was only asked to do what he had the authority to do, and his refusal constituted the breach which authorized this action without further preliminaries.

Shaw v. Republic L. Ins. Co. 69 N. Y. 286; *Young v. Hunter*, 6 N. Y. 203; *Robinson v. Frank*, 107 N. Y. 655, 14 N. E. 413; *Taylor v. Merchants' F. Ins. Co.* 9 How. 390, 13 L. ed. 187; *May, Ins. § 469*; *Porter, Ins. Am. notes by Henry Darrach*, 1889, *194; *Richards, Ins.* (1892) § 51; *Boyd v. Cedar Rapids Ins. Co.* 70 Iowa, 325, 30 N. W. 585; *Grattan v. Metropolitan L. Ins. Co.* 80 N. Y. 281, 36 Am. Rep. 617.

Hobart was the agent of the company, and had charge of its business.

He had made an authorized contract which he refused to complete; he had knowledge of all the facts; notice to him was notice to the company; a demand upon him was a demand upon the company, and his refusal was the refusal of the company.

Cragie v. Hadley, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; *Post v. Etna Ins. Co.* 43 Barb. 351; *Ellis v. Albany City F. Ins. Co.* 50 N. Y. 402, 10 Am. Rep. 495; *Bochen v. Williamsburgh City Ins. Co.* 35 N. Y. 131, 90 Am. Dec. 787; *Van Schoick v. Niagara F. Ins. Co.* 68 N. Y. 434; *Church v. LaFayette F. Ins. Co.* 66 N. Y. 222.

The principal must dissent within a reasonable time after knowledge of the act on the part of the agent, or an assent will be presumed.

Stillecoll v. Mutual L. Ins. Co. 72 N. Y. 385; *Hyatt v. Clark*, 118 N. Y. 563, 23 N. E. 891; *Southern L. Ins. Co. v. McCain*, 96 U. S. 84, 24 L. ed. 653.

Hobart had the power to accept risks, to agree upon and settle the terms of insurance, and to issue policies. This made him a general agent for the defendant.

Carroll v. Charter Oak Ins. Co. 40 Barb. 292; *Post v. Etna Ins. Co.* 43 Barb. 351; *Pitney v. Glen's Falls Ins. Co.* 65 N. Y. 6; *Ruggles v. American Cent. Ins. Co.* 114 N. Y. 415, 21 N. E. 1000.

Parker, Ch. J., delivered the opinion of the court:

We are agreed that the verdict of the jury establishes that on the 30th day of December, 1893, defendant's agent Hobart had a conversation with Col. Hicks, plaintiff's as-

signor, the legal effect of which was to create a contract of present insurance in the sum of \$2,500 upon property of Col. Hicks, which was consumed by fire two days later. The agreement that the contract was one of present insurance accords with the allegations of the complaint, the theory of the counsel as shown by their method of trial and the charge of the court. That position cannot be attacked from any source, for either that which was said operated to create a contract of present insurance, or else no contract was ever made binding upon the defendant. The evidence tended to show a contract to insure, and nothing else. It is not pretended that a contract of any kind between these parties was made after the conversation of December 30th. The jury have found that the defendant's agent said to Hicks, after a general discussion on the subject of insuring the property, "You are insured from noon on the 30th day of December, 1893, to noon of December 30, 1894." The legal effect of this answer to the application for insurance made by Col. Hicks was to create a complete, binding agreement for insurance for the period named, upon which he was entitled to recover for the damages sustained by the fire, had he made performance on his part. *Ruggles v. American Cent. Ins. Co.* 114 N. Y. 415, 21 N. E. 1000. This contract of insurance, although verbal, embraced within it the provisions of the standard policy of fire insurance, which the legislature in its wisdom formulated for the protection of both insured and insurer. It is usual for the company to issue a policy of insurance evidencing the contract between the parties; but the policy accomplishes nothing more than that, for, when the contract is entered into between the agent and the owner, whether the binder be verbal or in writing, it includes within it the standard form of policy, and the contract is a completed one. *Ruggles's Case*, 114 N. Y. 415, 21 N. E. 1000; *Lipman v. Niagara F. Ins. Co.* 121 N. Y. 454, 8 L. R. A. 719, 24 N. E. 699; *Karelsen v. Sun Fire Office*, 122 N. Y. 545, 25 N. E. 921; *Underwood v. Greenwich Ins. Co.* 161 N. Y. 413, 55 N. E. 936. In the three cases last cited the binder had been reduced to writing, but there is no distinction whatever in principle between those cases and the one at bar, for in each there is a binding contract to insure, and necessarily according to the only form of insurance contract authorized by the laws of this state. The law reads into the contract the standard policy, whether it be referred to in terms or not. In *Lipman's Case*, 121 N. Y. 454, 8 L. R. A. 719, 24 N. E. 699, Judge Andrews, in speaking of the construction to be put upon the binding slip, issued in that case, said: "The construction is, we think, the same as though it had expressed that the present insurance was under the terms of the usual policy of the company to be thereafter delivered." And in *Karelsen's Case* the court said: "While the binding slip contained none of the conditions usually found in insurance policies, the contract evidenced by it was the ordinary policy of insurance is-

sued by the company. So that, in any construction of the contract, it must be regarded as 'though it had expressed that the present insurance was under the terms of the usual policy of the company to be thereafter delivered.'" So that all this plaintiff had to do, in order to recover in this action, aside from showing a loss by fire, and compliance on her part with the condition of the contract, was to prove the making of the contract. This was accomplished by proving the conversation between her assignor and the agent, for the conversation disclosed the sum for which the property was to be insured, the amount of premiums, and the period of insurance, and the statute provided for all of the other conditions of the contract of insurance. Neither party to it had the right to add to or take from the requirements of the legislature in that regard. The making of the contract the plaintiff proved to the satisfaction of the jury, and she did not attempt to prove anything more. This the trial court, as well as the counsel, understood, and the case was tried upon that theory. It has been discovered in this court, however, that the judgment against the defendant cannot be sustained if this action be now treated in accordance with the theory that induced its commencement, and upon which it was tried, namely, that the plaintiff's assignor made a valid contract of insurance with the defendant, by virtue of which this plaintiff, as assignee, is entitled to recover to the extent provided for by the policy for the damages sustained by her through the destruction by fire of the building insured. The error which calls for a reversal of the judgment, if this be treated as an action on the contract, lies in the trial court's charge to the jury, in effect, that, as matter of law, it was not necessary for the insured to present to the defendant proofs of loss in accordance with the requirements of the standard policy. To avoid this result, it is proposed in the dissenting opinion not only to set at naught the many decisions of this court holding that on an appeal a case must be disposed of upon the theory upon which it was tried (*Snider v. Snider*, 160 N. Y. 151, 54 N. E. 676; *Stephens v. Meriden Britannia Co.* 160 N. Y. 178, 54 N. E. 791; *People ex rel. Warschauer v. Dalton*, 159 N. Y. 235, 53 N. E. 1113; *Drucker v. Manhattan E. Co.* 106 N. Y. 157, 60 Am. Rep. 437, 12 N. E. 568; *Baird v. New York*, 96 N. Y. 567), but also to decide that, growing out of this contract, the plaintiff had another cause of action, the maintenance of which did not require the service of proofs of loss. Hence it is claimed that, by treating the case as having been tried upon that theory, the court may avoid reversing the judgment, for in such a case it would have been unnecessary to charge that the service of proofs of loss was essential to recovery. This newly-discovered cause of action is said to spring out of the promise, made at the time the contract was entered into, that the defendant would deliver to the insured evidence of the contract in the shape of a policy of insurance. The contract was completed

at the moment the agent said, "You are insured from noon on the 30th day of December, 1893, to noon on the 30th day of December, 1894" (*Ruggles v. American Cent. Ins. Co.* 114 N. Y. 415, 21 N. E. 1000); and it is agreed by every member of this court that the defendant is liable to the plaintiff on the contract thus made in the full amount of the policy, if the damage was sustained in the manner referred to in the policy, and plaintiff performed the conditions imposed upon him by it.

But it is said that he may recover either on the contract, or, instead, if he elects, on the ground that the defendant failed to deliver to him written evidence of the contract; i. e., a policy of insurance. If the case were one where the written evidence of the contract had to come into the possession of the plaintiff before recovery could be had thereon, then it is true that an action in equity might be brought, praying for a delivery of the policy that the defendant withheld, and further demanding that, upon the policy delivered in pursuance of the decree, the plaintiff should have judgment in the amount specified in the policy for her damages by fire; and even then the plaintiff would have to abide by the terms of the policy, delivery of which the judgment should decree. But that is not this case at all. To enable her to recover, it was not necessary for this plaintiff to have physical possession of the policy which the agent promised to give her assignor. *Ruggles's Case, supra*. Her action was not founded upon a policy, but upon the contract of insurance made upon the 30th day of December, which, as both parties agreed, was to begin at noon on that day, no matter when the policy, which the parties intended should furnish evidence of the contract, should be delivered. The action was brought, tried, and decided upon that theory; and no one disputes that the judgment could in this court stand upon that theory, had the trial court charged the jury correctly in relation to the necessity of serving proofs of loss. It is apparent, therefore, that the plaintiff sustained no damage by reason of the defendant's failure to furnish her assignor with written evidence of the contract. Had the promise been kept, the plaintiff might not have been obliged to call her assignor to prove the contract, thus subjecting him, as it turned out, to be confronted with impeaching testimony; but neither the plaintiff nor her assignor was otherwise damaged, for he found no difficulty in proving a contract to the satisfaction of the jury. The possession of the promised policy, therefore, would have been a convenience possibly, but nothing more. Plainly, therefore, it is not true that the plaintiff suffered damage in the amount of the contract of insurance by reason of the failure of the defendant to deliver a policy reciting the terms of the contract entered into, and hence the judgment cannot be affirmed on the ground that the plaintiff sustained damages in the sum of \$2,500, because the defendant omitted to deliver a policy. Nor do I think that a sound public policy

would sanction the creation of such a precedent even if a legal principle could be found upon which to rest it.

The legislature of the state of New York has prescribed a standard form of policy for the protection of both insurer and insured. It contains provisions specially protecting the insured from harsh methods by insurance companies. On the other hand, it provides that which experience has shown to be necessary in order to protect insurance companies from being victimized through fraud; and among the conditions which the legislature, in its wisdom, has caused to be incorporated into the standard policy is one making it necessary that the insurer shall have immediate notice of the facts and circumstances of the fire; another, that within sixty days the owner shall present proofs of loss, duly verified, in which shall be stated the circumstances of the fire, and the value of the property destroyed, and various other things which it is deemed important that insurance companies should know before being called upon to adjust a loss; still another provides that no local agent shall have the power to waive any of these written conditions, except by a writing. It is unnecessary to present the reasons which induced the legislature to require these conditions precedent to a recovery upon a policy of insurance. It is sufficient for our purpose that the legislature declared that it should be so, and we should see to it that the general trend of our decisions is towards the enforcement of the legislative command, instead of its nullification. This plaintiff had the right, as it is conceded on all hands, to recover on the contract of insurance which her assignor made with the defendant's agent, whether a policy was subsequently delivered to him or not; but, as the standard policy was necessarily a part of the contract, he should be required to comply with the conditions of that policy, and give notice of the facts and circumstances of the fire, and present proofs of loss duly verified. The view taken by some of my brethren, however, is that it was unnecessary to give notice of the fire and present proofs of loss within sixty days, or at any other time, because, it is said, such an action need not be treated as on a contract of insurance, but on a contract to give a policy, which has not been carried out, and, therefore, prior to beginning suit, which may be done at any time within six years instead of one year, as provided in the standard policy, the insured has nothing whatever to do when he sustains a loss by fire but lie by until, as in this case, several months have passed, or, in some other case, until years have gone by, without giving the company notice of the fire or any proofs of loss whatever. He may then bring a suit, claiming that two days, or less, or more, before the fire, the defendant's local agent, without receiving any premium, agreed to, but did not, issue a policy, for which defendant is liable to plaintiff in the amount of the sum for which it was agreed that the policy should issue. If such a procedure should be sanctioned by this court,

then might an insurance company be mulcted in damages without having had an opportunity to investigate promptly the origin of the fire and the value of the thing destroyed, and thus would the door be opened wide for the perpetration of fraud.

It is said that, if the foregoing argument seems not to be defective upon its mere reading, it is, nevertheless, so, because it leaves out of consideration the decisions of this court in *Ellis v. Albany City F. Ins. Co.* 50 N. Y. 402, 10 Am. Rep. 495; *Angell v. Hartford F. Ins. Co.* 59 N. Y. 171, 17 Am. Rep. 322; *Van Loan v. Farmers' Mut. F. Ins. Asso.* 90 N. Y. 280. But the situation which those cases were designed to meet no longer exists. During the period of time in which they and others were decided, and down to the year 1886, each insurance company was at liberty to insert such provisions in the policy of insurance issued by it as it deemed best. The result was that there was no uniformity in policies of insurance, and, when loss by fire occurred prior to a delivery of the policy, it became necessary for the assured to secure possession of the policy, either by its voluntary delivery to him by the officers of the company, or in pursuance of a decree in a suit in equity for specific performance. Thereon he could found a judgment for the damages sustained by the fire, or he was allowed to recover the damages sustained for a breach of the contract, which was treated as a contract for the delivery of a policy. The last one of the cases cited was decided in 1882. Four years later the legislature, by chapter 488 of the Laws of 1886, enacted and provided for a uniform policy of fire insurance, to be made and issued in this state by all insurance companies taking fire risks on property within this state, to be known and designated as the "standard fire insurance policy of the state of New York." Upon the passage of this important legislation the policy of insurance was no longer of special moment, except as evidence that a contract to insure had been made; for it was no longer competent for the parties to incorporate into the policy any provisions whatever outside of those embraced within the terms of the standard policy, and thereafter the contract to insure was, by common consent of the profession and the courts, scientifically treated as a contract of insurance, and not, as formerly, a contract to issue a policy, as an examination of the authorities in this court from the *Ruggles's Case* down will show.

It is suggested that an affirmance of the judgment might also be placed on the ground that, while the action was brought upon the contract of insurance, it was made to appear upon the trial that the defendant, by its conduct, waived service of proofs of loss, and hence that it was not error for the court to charge, in effect, that the plaintiff could recover without showing that she had complied with the terms of the contract in that respect. If the defendant had, by its conduct, rendered unnecessary the service of proofs of loss, the contention would, of course, be well founded. But it had to do

something in order to lose the benefit of the stipulations in its contract. At the outset it should be said that the defendant or its officers never did anything whatever until after this action was commenced. Neither the plaintiff nor her assignor, so far as this record discloses, ever addressed any letter or other communication to the defendant or any of its officers prior to the commencement of this action. What, then, is the alleged waiver founded upon? Why, upon the action of the local agent who made the contract of insurance in denying that he ever made such a contract,—an unstable and worthless foundation, surely, in view of the fact that under the standard policy an agent is without power to waive any of the conditions, as this court has time and again held. *Van Allen v. Farmers' Joint Stock Ins. Co.* 64 N. Y. 469; *Quinlan v. Providence Washington Ins. Co.* 133 N. Y. 356, 31 N. E. 31; *Bush v. Westchester F. Ins. Co.* 63 N. Y. 531; *De Grove v. Metropolitan Ins. Co.* 61 N. Y. 594, 19 Am. Rep. 305. While it is conceded that the local agent had no power in such a case to waive the condition regarding proofs of loss, yet it is contended that he did in fact waive it by omitting to deliver the policy when called for by the owner of the building after the fire, and by denying that he had ever made a contract to insure. Stating the contention in other words, it is that, if the agent had tried to waive the conditions of the policy, and had promised to do so, he could not have accomplished it; but that, by omitting either to do or to say a particular thing, he did waive the condition, which is to say that an express waiver would not be effectual, but an implied one would. As the statement of the proposition seems to furnish the answer to it, I pass on to such of the defendant's acts as are relied upon to constitute a waiver. It is not pretended that prior to the commencement of this action the plaintiff or her assignor ever notified the defendant company that she claimed that the company had insured the burned building, so there is nothing before action brought upon which to base a claim that the defendant waived proofs of loss. But it is said that when the suit was brought, and the defendant, by its answer, denied the allegations of the complaint, it in some way made good the attempted waiver of the agent, although it was absolutely void before. The answer is that, if the plaintiff had not a complete cause of action against the defendant when the summons was served, no obstacles have been removed from her path by the denials in the defendant's answer of the allegations of her complaint. If a party has not a good cause of action before commencing suit, it is safe to say that he will not get one by an answer of the defendant which contents itself with denying the existence of the facts alleged in the complaint. It is plain, therefore, that the plaintiff is without a basis for a recovery upon this cause of action if a new trial be granted, because neither she nor her father, the assignor, have presented to the defendant any proofs of loss, nor was service of

proofs of loss waived by the defendant; and, while such a result may or may not be in the interest of justice, in this particular case there can be no doubt that the measure of injustice done, if any, will be far less than would necessarily ensue from a decision putting a premium upon insurance obtained without a policy, by making it possible to recover for the damages sustained through a fire by an action commenced at any time before the six-years' statute of limitations shall have run, and that, too, without giving the company notice of the fire, or serving it with proofs of the loss; thereby preventing it from being able to inquire about the facts and circumstances attending the fire until months or years after the happening of it. This would in many cases effectually prevent the company from acquiring any information whatever. It follows, if the views expressed be sound, that the action is upon a contract of insurance, and not one for damages resulting from a failure to deliver a policy, and hence that proofs of loss were necessary, in the absence of a waiver thereof by the defendant, of which there is no proof; and the failure to so charge was error calling for a reversal of the judgment. *The judgment should be reversed.*

Gray, O'Brien, and Cullen, JJ., concur.

Landon, J., dissenting:

We have no jurisdiction to inquire whether there was any evidence tending to support the verdict, but must limit our review to the alleged errors of law, which, if found to be well assigned, may possibly have misled the jury. The complaint may be construed as seeking either a recovery of damages for the breach of a contract to issue a policy of insurance, or to enforce its delivery, and to recover thereon as if actually delivered. Two questions of law are presented by the defendant's exceptions; one respecting the omission to serve proofs of loss, and the other the exclusion of evidence. The following facts were established by the verdict: On the 30th of December, 1893, George C. Hicks, the plaintiff's assignor, was the owner of a malt house in the village of Seneca Falls, upon which was other insurance. He applied on the evening of that day to Melmouth Hobart, who was the local agent of several insurance companies, including the defendant. He was authorized by the defendant to make agreements for policies of insurance and to issue policies therefor of the form of the standard policy of the state of New York. He was furnished by the defendant with blanks for the purpose, which he was authorized to fill, and, by countersigning and delivering, to make completed obligations of the defendant. Hobart agreed to issue to Hicks two policies of insurance upon the malt house, each for \$2,500, one by the defendant and the other by a Westchester company, each for one year from noon of that day, for the premium of \$31.25 for each policy. Hicks offered to pay the premiums then, but Hobart said that he need not do so until he should deliver him the policies,

which he would not do that evening, as he wished to see a policy issued upon the malt house by the agent of the other companies, in order to make his description of the property identical with that in the other policies, but would attend to the matter the next day. He then said to Hicks, "You are insured from noon on the 30th day of December, 1893, to noon on the 30th day of December, 1894." The next day was Sunday, and Monday following was a holiday, and Hobart did not make out the policies. Early in the morning of Tuesday, January 2, 1894, the malt house was destroyed by fire. The loss was great enough to equal the amount of all the other insurance and that here in question. The day after the fire Hicks tendered to Hobart the premiums, and demanded the policies. Hobart refused to take the tender, and also refused to issue the policies. Hicks also demanded blank proofs of loss. Hobart refused to give him any, saying that he would not say whether he would receive the money for the premium or refuse it; that he had no blank proofs of loss; that he could do nothing about the matter; that he had written to his companies, and that, upon getting notice from them, he would let Hicks know; that he could give no definite answer in reference to the policies until he heard from his companies. Hicks then said, "We may take it as conclusive that you will not receive the money," and Hobart made no reply. No further communication took place. No proofs of loss were served. This action was brought seven months after the fire. The oral contract was complete in all its details, and Hicks was entitled to the policy. *Ellis v. Albany City F. Ins. Co.* 50 N. Y. 402, 10 Am. Rep. 495; *Angell v. Hartford F. Ins. Co.* 59 N. Y. 171, 17 Am. Rep. 322; *Van Loan v. Farmers' Mut. F. Ins. Asso.* 90 N. Y. 281; *Ruggles v. American Cent. Ins. Co.* 114 N. Y. 415, 21 N. E. 1000.

The standard policy of the state of New York, which was the form of policy the defendant agreed to issue, requires the insured to furnish the insurer proofs of loss within sixty days of the fire. The court charged the jury: "I charge you, as a matter of law, if you find from the evidence that a contract was made to issue a policy, and when Mr. Hicks called upon the agent, and tendered him \$62.50, and demanded his insurance policy, the agent refused to give it to him, or to pay the loss, upon the ground that the company was not liable, because it had not agreed to issue a policy, then that was a waiver of proofs of loss on the part of the insurance company." To this the counsel for the defendant excepted, whereupon the court said that, "if the agent claimed that the contract was not made, it was not necessary for the plaintiff or Mr. Hicks to furnish any proofs of loss." To this the defendant excepted, and asked the court to charge the jury that Hobart, as the local agent of the defendant, had no power to waive the condition of the contract of insurance requiring proofs of loss. The court refused, and defendant's counsel excepted. The standard policy provides that no agent

of the company shall have power to waive any provision or condition of the policy, except such as by the terms of the policy may be the subject of agreement indorsed upon or added to it, and in every such case the waiver must be in writing indorsed upon or annexed to the policy. Treating the case as if under the policy, Hobart had no power to waive the proofs of loss. *Van Allen v. Farmers' Joint Stock Ins. Co.* 64 N. Y. 469; *Quinlan v. Providence-Washington Ins. Co.* 133 N. Y. 356, 31 N. E. 31; *Bush v. Westchester F. Ins. Co.* 63 N. Y. 531. It does not follow, however, that this is a reversible error. If the action were solely to enforce the delivery of the policy, and to recover thereon as if actually delivered, then service of proofs of loss would be necessary, since in such case the rights of the insured would depend upon his performance of the conditions expressed in the policy as precedent to his right of recovery. *De Grove v. Metropolitan Ins. Co.* 61 N. Y. 594, 19 Am. Rep. 305. The same would be true if the action were to recover upon an agreement for temporary insurance intermediate the application for it and the decision of the insurance company whether it will issue a policy, as in the cases of "binding slips." *Lipman v. Niagara F. Ins. Co.* 121 N. Y. 454, 8 L. R. A. 719, 24 N. E. 699; *Karelsen v. Sun Fire Office*, 122 N. Y. 545, 25 N. E. 921. In the two cases last cited the insurance company did not repudiate the binding slip, but claimed to have canceled the contract according to its terms. Recovery was sought in each case under the contract, and not because the agreement to make it was repudiated. In the case of a binding slip the insured has his written contract; in the case of an oral contract he must show his right to one. In the one case the contract speaks for itself, and the action is upon the contract, which for the time being is the policy. In the other case the action may be upon the oral contract; but when the making of the contract is denied, and performance by the company therefore refused, the action may be for damages for the breach of the contract to deliver the policy as of the date orally agreed upon. The right to the policy is not affected by the fire. *Franklin F. Ins. Co. v. Colt*, 20 Wall. 560, 22 L. ed. 423; *Lightbody v. North American Ins. Co.* 23 Wend. 18.

We may regard this action as one for the recovery of damages consequent upon the breach by the defendant of its contract to issue and deliver the policy, which, if delivered, would have enabled the plaintiff, by complying with its conditions, to secure indemnity for his loss. If the defendant repudiated the contract to issue the policy, it repudiated its conditions, and therefore cannot, without showing that it retracted its repudiation, insist upon the subsequent performance by the insured of any one of them as a condition precedent to his recovery of the damages accruing to him then or thereafter by the completed breach itself. The defendant did not retract the repudiation of the contract, but, by its answer, repeated and confirmed it. *Shaw v. Republic L. Ins.* 48 L. R. A.

Co. 69 N. Y. 286; *Knickerbocker L. Ins. Co. v. Pendleton*, 112 U. S. 696, 28 L. ed. 866, 5 Sup. Ct. Rep. 314; *Meyer v. Knickerbocker L. Ins. Co.* 73 N. Y. 516, 29 Am. Rep. 200; *Robinson v. Frank*, 107 N. Y. 655, 14 N. E. 413; *Tayloc v. Merchants' F. Ins. Co.* 9 How. 390, 13 L. ed. 187; *Post v. Aetna Ins. Co.* 43 Barb. 351. It would be a useless act for the plaintiff to serve proofs of loss in order to charge the defendant with liability under a contract which it repudiated altogether, and to hold otherwise would be to absolve the offender and punish its victim. As the plaintiff did not commence this action until after seven months from the fire, no question arises whether the action for full damages could accrue upon the breach earlier than under the contract. If we treat the case as if the policy had been issued, it was not within Hobart's power thereafter to waive proofs of loss, because his power was limited to the making of the contract and delivery of the policy, and did not extend to a subsequent waiver of the conditions which the policy imposed upon Hicks. But, as his power was complete over the making of the contract and delivery of the policy, it embraced as its necessary incident power to repudiate the oral contract, and thereupon to refuse delivery of the policy; and hence his repudiation and refusal, if made, were the acts of the defendant. In *Ellis v. Albany City F. Ins. Co.* 50 N. Y. 402, 10 Am. Rep. 495, the court not only so held, but also considered the suggestion, renewed in this case, that such a rule would enable the agent to perpetrate a fraud upon the company by making preliminary contracts, when the company only intended to be bound by writing, and answered it by saying that that was no reason for depriving third persons of the benefit of contracts entered into with the agent. We cannot review the finding that the defendant, through Hobart, did repudiate the contract and refuse to issue the policy. The charge of the court placed the waiver of the proofs of loss and the lack of necessity to furnish them upon the same finding of facts by the jury. The court was wrong as to the waiver of the proofs if plaintiff had no right of recovery except under the policy; but upon the same facts the court was right in saying, if the agent claimed that no contract was made, they were not necessary. As the jury found the facts which made the service of proofs of loss unnecessary, what was said as to waiver was unimportant, and not reversible error.

It is said that the plaintiff sustained no damages by the defendant's breach of its contract to deliver the policy, because she had her remedy upon the oral contract to insure. It could be said with equal force that she had no remedy upon the oral contract to insure because she had her remedy for damages. Obviously, she could stand upon all the causes of action which the facts pleaded permitted, and finally avail herself of the one proved. The form of the policy is fixed by statute, but that simply affects ease of proof, and not the remedy upon the proofs. It was a disputed question of fact

upon the trial whether in the interview between Hobart and Hicks, when the oral contract was made, Hobart agreed to place one policy in the defendant company. Hicks affirmed it, and Hobart denied it, and testified that the name of the defendant was not mentioned. The offer of his further testimony to the effect that he had received instructions from the defendant not to insure the plaintiff was excluded by the court upon plaintiff's objection. The evidence was offered in corroboration of Hobart's testimony, the defendant's theory being that, having received such instruction, the presumption followed that Hobart obeyed it, and that the defendant was entitled to cast this presumption into the scale. Hobart did not communicate the instruction to Hicks, and thus it could not affect him, unless the circumstance, in its nature, tended to support Hobart, or to discredit Hicks. That Hobart received the instruction was immaterial unless he obeyed it. That is not proved by the instruction itself, nor does it tend to prove it. It may be conceded, as the learned counsel for the appellant insists, with the support of authority, that the presumption is that every man, in his private and official character, does his duty; but this presumption is a shield from attack upon the charge of violation of duty, not a weapon of offense. If his company should sue Hobart for disobedience to its instructions, he could rely upon this presumption until the contrary should be proved; but, if he should sue his company for some promised reward of obedience, the presumption would not avail him; much less can it be used as affirmative evidence against a third person dealing at arm's length against both principal and agent. In *Fitzgerald v. Dressler*, 7 C. B. N. S. 374, A, through a broker, sold seed to C, who, through the same broker, sold the seed, at an advanced price, to D. D was to pay C before C was to pay A. D sent his clerk to the broker for the delivery order, and the broker took the clerk to A, who gave the order to the clerk on his promise that D would pay A. A sued D. The court held that there was no presumption that the clerk told D that he had made the promise. The case, in principle, is like the one before us. The judgment should be affirmed, with costs.

Haight, J., concurs.

Werner, J., dissenting:

It seems to me that we cannot hold that an action may not be brought for the breach of an agreement to insure without distinctly overruling *Ellis v. Albany City F. Ins. Co.* 50 N. Y. 402, 10 Am. Rep. 495; *Angell v. Hartford F. Ins. Co.* 59 N. Y. 171, 17 Am. Rep. 322; *Van Loan v. Farmers' Mut. F. Ins. Asso.* 90 N. Y. 281; and *Post v. Aetna Ins. Co.* 43 Barb. 351. I do not think that the evidence wholly justifies the statement that the action was clearly tried upon the theory of an executed contract of insurance. It is true that the complaint, and the evidence given in support thereof, were undoubtedly 48 L. R. A.

appropriate to such an action; but it does not follow that they were, therefore, not appropriate to an action for damages arising out of the alleged breach of the contract to insure. It frequently happens that the same pleadings and proofs will support different causes of actions which are governed by inconsistent legal principles. I am prepared to agree with Chief Judge Parker, in holding that under the law providing for the standard policy it is the logical rule to decide that every contract for insurance made with an authorized agent, whether the same be oral or written, constitutes a valid contract of insurance, which requires nothing to complete it except the written evidence of its terms and conditions. The cases of *Lipman v. Niagara F. Ins. Co.* 121 N. Y. 454, 8 L. R. A. 719, 24 N. E. 699; *Karelsen v. Sun Fire Office*, 122 N. Y. 545, 25 N. E. 921, and *Underwood v. Greenwich Ins. Co.* 161 N. Y. 413, 55 N. E. 936, cited by him, clearly demonstrate that this is the more recent view of our court. But that is very different from deciding that, when a plaintiff claims that a contract for insurance has been made and broken, and a defendant insurance company denies that any such contract was ever made, a plaintiff can recover only upon the theory of an executed and completed contract. Such a rule would result in exempting insurance companies from the application of one of the most familiar principles of the law of contracts. It is a rule of universal application that when a party to a contract refuses to execute it the other party thereto may treat it as rescinded, and sue for the breach. *Beach, Mod. Law. Cont. § 788.* In such a case as this the difference in the character of the action is one of form, rather than of substance, because the recovery in either case would be the same. But let us assume that it is now the established law that a party claiming under an oral or a written memorandum for insurance must recover, if at all, upon the terms and conditions of a completed policy, which are to be read into his tentative contract. It is conceded that Hobart was the duly-authorized agent of the defendant for the purpose of issuing policies of insurance. He was provided with blanks for that purpose, which needed only to be countersigned by him to make them executed and binding contracts. The right to issue policies included the right to refuse to issue them. Hobart's agreement to issue a policy was the act of the company. Whose act was Hobart's refusal to issue a policy after he had bound the company by his agreement to issue one? To my mind there is no escape from the conclusion that, if he acted for the company in making the agreement, he acted in the same capacity in breaking it. There was a dispute of testimony as to whether he ever made such an agreement with plaintiff's assignor. This presented a question of fact which the jury have settled in favor of the plaintiff. If, then, we treat this as an action upon the policy, and hold the defendant responsible for the acts of Hobart, what is the effect of such acts? The answer seems obvious. If the defendant, through its prop-

er officers, had issued a policy of insurance, and after a loss under the same had denied its liability on the ground that it never made any such contract, it would be a distinct waiver of the right to demand proofs of loss. *Shaw v. Republic L. Ins. Co.* 69 N. Y. 286; *Stokes v. Mackay*, 147 N. Y. 223, 41 N. E. 496; *People v. Empire Mut. L. Ins. Co.* 92 N. Y. 105; *May, Ins.* § 460; *Porter, Ins. Am. notes by Darrach*, 1889, *194; *Richards, Ins.* § 81; *Grattan v. Metropolitan L. Ins. Co.* 80 N. Y. 281, 36 Am. Rep. 617; *Payn v. Mutual Relief Soc.* 2 How. Pr. N. S. 220; *Knickerbocker L. Ins. Co. v. Pendleton*, 112 U. S. 696, 28 L. ed. 866, 5 Sup. Ct. Rep. 314; *Brink v. Hanover F. Ins. Co.* 80 N. Y. 113. Is the result any different because these things were done by an agent? As we have seen this agent had authority to issue, and therefore to refuse to issue, policies. His agreement to issue a policy was the act of his principal. His refusal to issue a policy after he had agreed to do so falls within the same category. Under these circumstances the refusal of the agent has the same effect as though it had actually been made by the principal. Indeed, for the purposes of the particular act, he was the principal. *Goodwin v. Massachusetts Mut. L. Ins. Co.* 73 N.

Y. 490, 491. But it is suggested that the policy provides that no agent shall have power to waive any of the conditions thereof. This is undoubtedly true after a policy has been issued, and the limited power of the agent are spent. But in the case before us the acts of the agent were within the scope of his authority, for, until the policy was actually issued, he was the *alter ego* of the defendant. At every instant within the period covered by the negotiations between Hobart and the plaintiff's assignor the former was acting within the scope of his authority. As the case stands, it is just as though the defendant itself had refused to issue a policy after it had agreed to do so. Under these circumstances the plaintiff and her assignor were not required to present proofs of loss, because they had been absolved from this duty by the acts of the defendant. If these views are adopted, it follows that the charge of the trial court was substantially correct wherein it stated that it was not necessary for the plaintiff to serve proofs of loss, and by the same rule it would seem to follow that the instructions relating to the waiver by Hobart were harmless, because they were immaterial.

OREGON SUPREME COURT.

Thomas USBORNE, *Appt.*,

v.

George R. STEPHENSON *et al.*, *Respts.*

(.....Or.....)

1. The practice of withdrawing a juror for the purpose of postponing or continuing the trial of a civil case does not prevail in Oregon.
2. The only cause for withdrawal of a juror in a civil case, if that practice can be resorted to for any reason, is surprise on the trial, and a motion therefor cannot be based upon matters happening long prior to the trial, which had been considered on motion for a continuance before the jury was impaneled.
3. The question of care and diligence in respect to the disposal of goods received on consignment, which had been retained for almost a year, when they were consumed by fire, may be submitted to the jury, where there is evidence of their value in the market.

(November 20, 1899.)

NOTE.—*Withdrawal of juror.*

- I. Power to withdraw juror.
 - a. In civil cases.
 - b. In criminal cases.
- II. Effect of withdrawal of juror in civil cases.
 - a. English cases.
 1. In general.
 2. As to costs.
 - b. American cases.
- III. Effect of withdrawal of juror in criminal cases.

I. Power to withdraw juror.

a. In civil cases.

In civil cases the court has the power, with-
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APPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County in favor of defendants in an action brought to recover back money advanced to consignors, and for insurance, storage, and interest on a consignment of hops. *Affirmed.*

Statement by **Bean, J.:**

The plaintiff is a hop factor in the city of London, and the defendants are hop growers in this state. In September, 1893, the defendant consigned to plaintiff, for sale on commission, 98 bales of hops, of the aggregate weight of 17,392 pounds, upon which he made an advance of \$1,550. The hops were received in London about the 24th day of November, 1893, by plaintiff, who retained them in his possession until September 13, 1894, when, as he alleges, they were destroyed by fire, whereby he became entitled to and collected insurance to the amount of \$1,714.32, which, after being placed to de-

out consent of the parties, to withdraw a juror. Instead of granting a nonsuit; and this will continue the case. The effect is different in the English practice, which usually treats the withdrawal of a juror as an end of the case.

In *USBORNE v. STEPHENSON* it is held that the practice of withdrawing a juror for the purpose of postponing or continuing the trial of a civil case does not prevail in Oregon. The court says: "Whatever authorities there are on the subject, all agree that the practice can be resorted to only when a party finds himself taken by surprise on the trial, and when further proceeding therewith would be productive of great hardship or manifest injustice to him;" and therefore holds that, as the same matters were presented in a motion for continuance be-

defendants' credit, left a balance for freight, insurance, money advanced, expenses, and interest of \$834.40, to recover which this action was brought. The defendants, by their answer, denied any knowledge or information sufficient to form a belief as to whether the hops were destroyed by fire, or that plaintiff collected any insurance money thereon, and denied owing the balance alleged to be due, and, for a further and separate defense, averred, in substance, that, owing to plaintiff's negligence in not selling the hops before the alleged fire, they were damaged in the sum of \$4,099.54, for which they prayed judgment and that such sum be set off and counterclaimed against any sum found due the plaintiff. The cause was brought to an issue by the filing of a reply on the 25th of February, 1896, and on the 25th of May an order was made setting the

trial for the 24th of June. On the day set for the trial, but before the jury was called, the plaintiff moved for a continuance on account of the absence of material testimony; basing his motion upon an affidavit of his counsel to the effect that he could not safely proceed to trial without the depositions of several residents of London. The motion being denied, a jury was impaneled and sworn; but, before any evidence had been given, the plaintiff filed a motion for permission to withdraw a juror, based upon an affidavit of his counsel substantially the same as the one filed in support of the motion for a continuance, except that it contained a statement to the effect that the cause had been set down for hearing in violation of a verbal understanding and agreement with counsel for defendants, which, however, was denied by a counter affidavit. This motion was like-

fore trial, the withdrawal of a juror for the same reason was properly refused. This case states that it has never been the practice in England, in civil cases, or in this country, except in New York, but this seems to be a mistake, as will be shown from the cases cited in this note.

In civil cases it is generally held that a juror may be withdrawn where it is necessary to prevent the defeat of justice. *Wolcott v. Studebaker*, 34 Fed. Rep. 8; *Schofield v. Settler*, 31 Ill. 515; *Miller v. Metzger*, 16 Ill. 390; *Morrison v. Hedenberg*, 138 Ill. 22, 27 N. E. 440; *Van Syckle v. Perry*, 3 Robt. 621; *Glendening v. Canary*, 5 Daly, 489, Aff'd 64 N. Y. 634; *Messenger v. Fourth Nat. Bank*, 6 Daly, 190, Affirming 48 How. Pr. 542; *People v. Marks*, 10 How. Pr. 261; *St. John v. Duncan*, 2 N. Y. Month. L. Bull. 20; *Planer v. Smith*, 40 Wis. 31; *Stodhart v. Johnson*, 3 T. R. 637; *Bentley v. Dawes*, 10 Exch. 347, 23 L. J. Exch. N. S. 279, 18 Jur. 837; *Thomas v. Lewis*, 5 Dowl. P. C. 395, W. & D. 67, 1 Jur. 104; *Norburn v. Hilliam*, L. R. 5 C. P. 129, 39 L. J. C. P. N. S. 183, 22 L. T. N. S. 67, 18 Week. Rep. 602; *Harries v. Thomas*, 2 Mees. & W. 32; *Thomas v. Leonard*, 5 Ill. 556; *Moscatti v. Lawson*, 1 Rob. & M. 454, 1 Harr. & W. 572; *Sheldon v. Bahner*, 4 Pa. Co. Ct. 16; *People ex rel. Perkins v. New York Common Pleas Judges*, 8 Cow. 127.

So, where both parties consent in a civil case a juror may be withdrawn. *Burdon v. Flower*, 7 Dowl. P. C. 786; *Benedict v. Consens*, 4 Cal. 381; *Cook v. Ritter*, 4 E. D. Smith, 253; *Everett v. Youella*, 3 Barn. & Ad. 349; *Sanderson v. Nestor*, Ryan & M. 402; *Hammond v. Thorpe*, 2 Dowl. P. C. 721, 1 Crompt. M. & R. 64, 4 Tyr. 538; *Seely v. Powers*, 3 Dowl. P. C. 372; *Gibbs v. Ralph*, 14 Mees. & W. 804, 15 L. J. Exch. N. S. 7; *Bohmann v. Chicago*, 15 Ill. App. 48; *Thomas v. Exeter Flying Post Co.* 56 L. J. Q. B. N. S. 313, L. R. 18 Q. B. Div. 822, 56 L. T. N. S. 361, 35 Week. Rep. 594.

And in *Chedwick v. Hughes*, Carth. 464, it is said that in civil cases a juror may be withdrawn.

And in *Strong v. District of Columbia*, 8 MacArth. 499, under a Maryland statute it was held that a juror might be withdrawn.

But in *Schechter v. Denver*, L. & G. R. Co. 8 Colo. App. 26, 44 Pac. 761, which was a civil case, the court refused to permit a juror to be withdrawn.

The court has the discretion to discharge a juror whenever it comes to the knowledge of the court that one who has inadvertently been sworn cannot render a legal verdict in the case. *Thomas v. Leonard*, 5 Ill. 556.

And the court on the trial of civil cases, upon being satisfied that any real ground of surprise exists, such as the unexpected absence of witnesses who had been in attendance, or that have been kept out of the way, the sickness of a juror, party or counsel, or any other accident occasioned by substantial misapprehension or disappointment, which would render its further progress unjust or unfair to either party, may, in the exercise of a sound discretion, direct the withdrawal of a juror or discharge the jury, and postpone the trial. *Glendening v. Canary*, 5 Daly, 489, Affirmed in 64 N. Y. 636.

In *Cook v. Ritter*, 4 E. D. Smith, 253, it was said: "There may be doubt as to the right of the justice to order jurors to be withdrawn, and others substituted after the jury are impaneled and sworn. It does not appear that the trial had commenced, other than by calling and swearing the jury, nor does it appear by the return that the defendant at the time made any objection to it. Under such circumstances I think he must be considered as assenting to the change of jurors, and as having waived his right to object thereto."

In a civil action, courts may, in the exercise of a sound discretion, allow a juror to be withdrawn, and still retain the cause upon the calendar for trial, instead of nonsuiling the plaintiff for a defect in his proof as in case of mistake or surprise on his part in the preparation of his cause for trial; and this even where the defendant has not wilfully misled the plaintiff. *People ex rel. Perkins v. New York Common Pleas Judges*, 8 Cow. 127. In this case the court said: "The question is, whether a court may allow a juror to be withdrawn, thus saving the plaintiff from the consequences of a fatal defect in his testimony. If such a discretion exists as to any civil case, we are satisfied it existed and was properly applied in this. The modern books are very barren of authority upon the question as to civil causes, though jurors have been withdrawn, and the practice has been sanctioned in criminal cases. The older authorities do not agree. In *Chedwick v. Hughes*, Carth. 465, Holt, Ch. J., says it was the opinion of all the judges of England, upon debate between them, that in civil cases this cannot be done without consent of all parties; nor without the defendant's consent in criminal cases not capital. The authority of that dictum is rendered rather questionable, by what appears in *Foster*, 86, 37; and as to criminal cases not capital, we have a very respectable authority in *United States v. Coolidge*, 2 Gall. 364, Fed. Cas. No. 14,858, that the court may, in their discretion, allow a juror to be

of Lord Coke, that a jury sworn and charged in any criminal case could not be discharged without giving a verdict. To escape the effect of this rule and yet apparently observe it to the letter, the courts resorted to the fiction of directing the clerk to call a juror out of the box, when it appeared that the prosecution was taken by surprise on the trial, whereupon the prosecution objected or was supposed to object, to proceeding with the eleven jurors, and the trial went over for the term. 2 Hawk. P. C. 619; 2 Hale, P. C. 294; *Wedderbourn's Case*, Fost. C. L. 22; *People v. Olcott*, 2 Johns. Cas. 301; *United States v. Coolidge*, 2 Gall. 264, Fed. Cas. No. 14,858. It was nothing more, however, than a means of obtaining a continuance or postponement of the trial after the jury had been impaneled and sworn. At first it was thought this could be done only

by the court ordering the discharge of one of the jurors, and then holding that, as the case could not be tried before the remaining eleven, it must be continued. But after the doctrine of Lord Coke had been repudiated, and it became the settled rule that it was within the power of the court, in a proper case, to discharge the jury after it had been impaneled and sworn, and continue the cause, the device of withdrawing a juror seems to have become practically obsolete, and but little, if any, reference to it as a substantive practice is to be thereafter found in the books. That it ever prevailed at common law in civil cases is very doubtful. No case has come under our observation in which it was resorted to in England. Indeed, the only reference we have been able to find to the question in the early authorities is a note to *Chedwick v. Hughes*, Carthew,

consented to withdraw a juror. Upon consideration it was refused, and it was held that there was a difference between the scavengers' case which may be compared to cases of a civil nature, and the barratry case where the punishment may be infamous, as the pillory. It was said that it had never been done in perjury or forgery.

The power to withdraw a juror in a criminal prosecution for a conspiracy was upheld in *People v. Olcott*, 2 Johns. Cas. 301. In this case, *Rex v. Jeffa*, 2 Strange, 984, was distinguished and commented on, by saying that in that case on the charge of barratry the court refused "to permit a juror to be withdrawn on the motion of the prosecutor, after he had gone into proof and found himself deficient, because the punishment annexed to that offense might be infamous; but he said it might be and had been done in other cases of misdemeanors. This . . . case controls an improper exercise of the power of the court, but does not deny its existence. It perhaps admits too much: for to allow the prosecutor in any case to withdraw a juror because he finds himself not fully prepared in his proofs is an unreasonable indulgence unless it should be made to appear that some part of the testimony was wanting through the contrivance or agency of the defendant."

II. Effect of withdrawal of juror in civil cases.

a. English cases.

1. In general.

Chitty's General Practice, p. 817, § 23, says that when a considerable time has elapsed, and the jury cannot agree upon their verdict, the practice is for the counsel of the respective parties to agree to withdraw a juror, "i. e., to require one of the twelve to leave the jury box, by which means the proceedings on the trial are in effect determined without any verdict or other proceeding. This arrangement usually takes place at the recommendation of the judge at any time pending the action, when the action is doubtful, or it is on any ground unfit that it should proceed further. In this case each party pays his own costs, and a defendant, by consenting to withdraw a juror, waives any supposed right he may have to claim his costs from the attorney for the plaintiff, on the ground of the action having been brought without the consent of the latter. However, although it is in general understood and expected that there are not to be any further proceedings, yet in point of law the plaintiff may commence a fresh action; and therefore a defend-

ant's counsel should require a written engagement, signed by the plaintiff or his attorney, in consideration of the defendant's consenting to withdraw a juror, that the plaintiff will not institute any further proceedings in relation to the subject-matter of that suit."

Discharging a jury by consent does not terminate the suit, but is the same in this respect as withdrawing a juror. And where the plaintiff, instead of going on with such suit, brought a new action for a cause admitted to be the same, the court stayed the proceedings, but would not grant the defendant his costs of the latter suit. *Everett v. Youells*, 3 Barn. & Ad. 349.

And the withdrawal of a juror in a civil action by consent of the parties is no bar to a future suit on the same cause of action. *Sanderson v. Nestor, Ryan & M.* 402. In this case a similar action had been brought in Ireland by the same plaintiff against the same defendant, and by consent of the parties a juror was withdrawn. It was contended that this was an agreement between the parties to terminate the dispute.

Withdrawing a juror does not necessarily put an end to the suit; whether it does so or not depends upon the arrangement between the parties in the particular instance. *Bentley v. Dawes*, 10 Exch. 347, 23 L. J. Exch. N. S. 279. 18 Jur. 837; *s. p. Harries v. Thomas*, 2 Mees. & W. 32, 6 L. J. Exch. N. S. 58.

In the latter case the court said: "I entirely agree with Mr. Williams that the mere withdrawal of a juror does not of necessity put an end to the cause. A juror may be withdrawn merely for the accommodation of both parties. It being found convenient not to try the cause, although the jury having been sworn, the record cannot be withdrawn. It depends entirely on the circumstances under which the agreement is come to: if it appears that it was the intention of the parties to put an end to the cause, for obtaining a particular advantage, or avoiding a particular loss, the court will give effect to it, or, under some circumstances, even preclude the plaintiff from bringing another action. . . . But we think, on the whole circumstances before us, the agreement of the parties was to put an end to the cause, each receiving a benefit by going before the arbitrator for settlement of their pecuniary account. The defendant is therefore entitled to have the rule made absolute, but the parties may still, if they please, go before the arbitrator again on the terms suggested on the former occasion."

At the trial of a cause the parties agreed that a juror should be withdrawn, and that

464, in which it is stated that Lord Chief Justice Holt, in a case of perjury tried before him, said that it was the opinion of all the judges of England, upon debate between them, that in civil cases a juror cannot be withdrawn but by consent of all parties. And while the authority of this note underwent a critical examination in the subsequent case of *Sir John Wedderbourn*, Fost. C. L. 28, from which its authority is rendered rather questionable, it seems to be the only reference to the practice in civil cases. It was early ruled, however, in this country, by the courts of New York, after some hesitation, that a court may allow a juror to be withdrawn in a civil case, when necessary to save the plaintiff from the consequence of a fatal mistake in his testimony. *People ex rel. Perkins v. New York Common Pleas Judges*, 8 Cow. 127. And we believe it is

still regarded as a proper practice in that state, and is open to either party. Bishop, Code Pr. § 428; *Dillon v. Cookcroft*, 90 N. Y. 649; *Messenger v. Fourth Nat. Bank*, 48 How. Pr. 542. But, so far as we have been able to ascertain, it does not prevail elsewhere in this country; the same result being accomplished by a direct application to the court for a postponement of the trial. 4 Enc. Pl. & Pr. 863. We are therefore of the opinion that the motion was properly denied on the ground that no such practice prevails in this state. But, however that may be, whatever authorities there are on the subject, all agree that the practice can be resorted to only when a party finds himself taken by surprise on the trial, and when further proceeding therewith would be productive of great hardship or manifest injustice to him. Mr. Bishop, in the section of

the judge, instead of trying the issues, should examine the subject-matter of the dispute, and say what ought to be done by both parties or either party. A juror was accordingly withdrawn, and the judge undertook the matter, and was about to carry out the rest of the arrangement when the defendant refused to be bound by it. It was held that the effect of such refusal was to set aside the arrangement, and to give the court therefore power to order the cause to be tried notwithstanding there had been such withdrawal of a juror with the consent of both parties and without fraud on the part of the defendant. *Norburn v. Hilliam*, L. R. 5 C. P. 129, 39 L. J. C. P. N. S. 183, 22 L. T. N. S. 67, 18 Week. Rep. 602. In this case the court said: "It is clear, beyond all question, that the withdrawal of a juror by consent not only puts an end to the proceedings in the cause, but also puts an end to the whole matter, so as to prevent its being litigated in a subsequent action; for, if either party should attempt it, the court would stay the proceedings in that or in any fresh action brought for the same cause. That is the effect which is given to the withdrawal of a juror, because such was the intention of the parties. But that is no stronger than a consent to a non-suit on terms. There, if one party afterwards renounces the terms agreed on, under circumstances such as are disclosed here, it would be the bounden duty of the court not to allow the proceedings to be terminated, and one party to get the advantage of the arrangement without performing the stipulations on his part."

The withdrawal of a juror upon terms is not necessarily the final determination of the action; and if there be a substantial breach by one of the parties of the terms upon which the juror was withdrawn, the court before whom the case came for trial has jurisdiction to retry the action. *Thomas v. Exeter Flying Post Co.* L. R. 18 Q. B. Div. 822, 56 L. J. Q. B. N. S. 313, 56 L. T. N. S. 361, 35 Week. Rep. 594. This was a libel case, and the plaintiff agreed that a juror should be withdrawn, and the defendant agreed that he should apologize in court and publish such proceedings in his paper, which he did; but in another part of his paper he repeated the libel. The plaintiff had the case reinstated and retried, and obtained a verdict. The court said: "No doubt most persons would say that the effect of withdrawing a juror was that the cause thereby came to an end; and, popularly speaking, that is a very fair description of the result of such an agreement; in all ordinary cases the juror is withdrawn with the intention that the cause shall, and it does, come to an end. *Gibbs v. Ralph*, 14 48 L. R. A.

Mees. & W. 804, 15 L. J. Exch. N. S. 7, is the only case where similar general language is used without qualification, and it is abundantly clear, both upon principle and from the decisions in *Burdon v. Flower*, 7 Dowl. P. C. 786, and *Norburn v. Hilliam*, L. R. 5 C. P. 129, 39 L. J. C. P. N. S. 183, 22 L. T. N. S. 67, 18 Week. Rep. 602, that the withdrawal of a juror is not a legal determination of the cause, but is only a determination in this sense, that, unless something very special happens, the court will hold the parties to their understanding, and will stay any further proceedings in the action."

But in *Gibbs v. Ralph*, 14 *Mees. & W.* 804, 15 L. J. Exch. N. S. 7, it was held that if a juror is withdrawn under the advice of counsel, and a second action is brought for the same cause, the court will stay the proceedings notwithstanding the belief of the attorneys on each side that such withdrawal would not operate as a termination of the suit. In this case the court said: "The counsel on both sides were, of course, aware of the consequences of that proceeding, and the understanding of the attorneys as to its effect is quite immaterial."

The court also said: "All that the case of *Sanderson v. Nestor*, *Ryan & M.* 402, decides is, that if a second action be brought for the same cause, and the defendant, instead of applying to the court to stay the proceedings, chooses to allow the action to proceed, he cannot avail himself of the withdrawal of a juror as a defense at the trial."

2. As to costs.

If the defendant pay money into court, and the plaintiff proceed to trial when a juror is withdrawn, the plaintiff is not entitled to the costs up to the time of paying money into court. *Stodhart v. Johnson*, 3 T. R. 657.

And where judgment passed for the plaintiff on a demurrer to one plea, and the cause was taken down for trial upon another, and a juror was then withdrawn by consent, it was held that the plaintiff could not then obtain the costs of the demurrer. *Burdon v. Flower*, 7 Dowl. P. C. 786.

Where a juror is withdrawn and the cause referred, but no award made, and the cause being taken down again, the plaintiff succeeds, he is not entitled to the costs of the first attempt at trial. *Thomas v. Lewis*, 5 Dowl. P. C. 305, *W. W. & D.* 67, 1 Jur. 104.

And where the defendant consented to the withdrawal of a juror and the payment of his own costs, it was held that he could not thereafter claim from the plaintiff's attorney those

his work on Code Practice already cited, in speaking of the New York practice, says: "Instead of submitting to a nonsuit, the plaintiff, if he finds himself taken by surprise on the trial,—as by the absence of a witness who has been in attendance, or by the unexpected presentation of evidence by his adversary which he is not prepared to meet, or by any accident which might render the further progress of the trial disastrous and unfair to him,—may ask the court to withdraw a juror. The result of this application, if granted, will be to produce a

mistrial; and the court may thus continue the pending action, and set the trial over to a future day, when the plaintiff may come properly prepared to try the case afresh." Within this rule, the plaintiff's motion was likewise properly denied, because it is not based upon anything occurring at the trial, but upon matters happening long prior thereto, and which could be, and were, properly submitted to the court in support of the motion for a continuance made before the jury was impaneled.

It is also claimed that the court erred in

costs which he so consented to pay. *Hammond v. Thorpe*, 2 Dowl. P. C. 721, 1 Crompt. M. & R. 64, 4 Tyr. 838. In this case the plaintiff's attorney brought an action, having induced the plaintiff, who was an illiterate person, to sign a paper, not knowing its contents, authorizing an action to be brought.

On a question of costs, where a jury on a previous trial had been discharged, the court said: "I cannot, however, see any difference in reason between the withdrawing a juror by agreement and the discharge of the jury by the judge. In either case it is done because the jury cannot agree." *Seely v. Powers*, 3 Dowl. P. C. 372.

Where the defendant paid part of the demand into court, and issue was joined as to the rest, and notice of trial had, which was continued, and the plaintiff neither entered his cause nor countermanded his notice of trial, but took the money out of court, and now moved to have his costs taxed up to the time of payment into court, and that defendant have his costs subsequent to that, and that the balance should be paid over to the party to whom it should be found due, it was said: "The practice seems fully settled by the cases cited on the part of the plaintiff; and it is now further certified to us by the master, that that continues to be the practice." *Seamoer v. Bridge*, 8 T. R. 408. In this case the defendant's attorney contended "that the rule was not so general as was contended for; that where the plaintiff did not actually proceed to trial he might have his costs taxed up to the time of the defendant's paying money into court; for it is otherwise if a juror be withdrawn. Now the present case falls within the reason of that; for here the defendant is entitled to judgment as in case of a nonsuit."

b. American cases.

The usual effect of the withdrawal of a juror is a continuance of the case. But to this there appears to be some exception.

Certain depositions on objection of the defendant were rejected by the court, and thereupon at the instance of the plaintiff the court withdrew a juror, and afterwards on the papers being destroyed by fire the plaintiff had leave to file a new complaint. On the subsequent trial defendant contended that the withdrawal of a juror was equivalent to a nonsuit, and that a new and different complaint had been substituted without notice. It was held: "The withdrawal of the juror was made to operate as a continuance by the court. Such must, then, have been the design of it, and otherwise unexplained, it must be presumed to have been done by consent or without objection. Under any circumstances, it is no ground for reversal." *Benedict v. Cozens*, 4 Cal. 381.

And under *Md. act 1785*, chap. 80, providing that courts of law shall have full power to allow amendments before verdict, and that if amendment is made after the jury is sworn a juror shall be withdrawn, it is error to refuse

a continuance. *Strong v. District of Columbia*, 3 MacArth. 499. In this case the court said: "In our opinion the requirement in this section, that, 'a juror shall be withdrawn' where amendment is made after the jury is sworn, is mandatory, and the party against whom the amendment is made has an absolute right to a continuance in the case referred to which the court is not at liberty to refuse."

Where, after a jury was impaneled, upon motion of plaintiffs, leave was given to withdraw a juror, and a juror being withdrawn and the jury discharged, the court ordered that the case be continued and that plaintiffs pay the costs of the term, and it was assigned for error that the court allowed a juror to be withdrawn without rendering a judgment for previous costs. It was held, on the objection that after the jury was impaneled the court at the instance of the plaintiff gave leave to withdraw a juror without consulting the plaintiff, that the practical effect of withdrawing a juror in our practice is not that it shall operate as a nonsuit, but merely to carry the case over to another term. *Schofield v. Settley*, 31 Ill. 515. In this case the court said: "This practice has crept in gradually, ameliorating the more rigid mode of proceeding by the rules of the common law. It is considered necessary for the due administration of justice that courts should possess this power, to be used in their discretion."

And where the court allowed the plaintiff on the trial to amend his declaration, and directed a juror to be withdrawn, and continued the case, it was held that the continuance was at the instance of the plaintiff in error, that it was necessary for that purpose that the jury be discharged, that a discretion is necessary to the administration of justice, and that when it is properly exercised no one can complain. *Müller v. Metzger*, 16 Ill. 390. In this case the court said: "The power to discharge a jury must of necessity reside in the court, otherwise there would often be a total failure of justice. A material witness may be taken ill, a party by fraud may get his adversary's witness beyond the reach of the court, a juror may be taken sick and die, and many other occurrences incident to human affairs may arise, where the court must exercise such power; and it has often been done, even in criminal cases."

And where a continuance was asked to examine a map on file in the auditor's office, and to compare the same with one on file on the trial, and it was admitted that if the maps tallied the plaintiff could recover, and the court entered a verdict for plaintiff and refused to allow the withdrawal of a juror, but gave the defendant time to move for a new trial in case he could show the maps differed, which he failed to do, it was held that the withdrawal of a juror where a party is surprised after going into trial is usually, if not uniformly, a matter resting in the sound discretion of the trial court, and that a refusal to permit a juror to be withdrawn cannot usually be as-

instructing the jury as to the law of negligence, and submitting to them the question as to whether the plaintiff had exercised due care and diligence in selling and disposing of the hops consigned to him by the defendants, on the ground that there was no evidence to support such an instruction. The evidence on the part of the defendants tended to show that, at the time the hops were received by the plaintiff in London, they were worth in that market from 24 to 25 cents a pound, notwithstanding which he retained them in

his possession for almost a year, when they were consumed by fire; and this was, in our opinion, sufficient, in the absence of any explanation whatever, to carry the case to the jury upon the question of negligence, and was sufficient upon which to base an instruction.

This disposes of the questions made on the appeal, and, there being no error in the record, we have no alternative but to *affirm the judgment*.

signed for error. *Morrison v. Hedenberg*, 138 Ill. 22, 27 N. E. 460. The court said: "But in this case, the only purpose for which counsel desired to have a juror withdrawn and the case continued was, to enable him to make investigations as to the genuineness of the Wooley map, and by the order of the court under which the verdict was rendered he was allowed nearly one month for that purpose.

He was therefore accorded all the relief that the withdrawal of a juror would have given him, and consequently has no ground of complaint in that respect."

In *Van Syckel v. Perry*, 3 Robt. 621, where on a trial it appeared that part of a cargo sued for had been paid for, and that one of the plaintiffs had assigned his interest in one half the claim and was an improper party, and a motion was made for a nonsuit, and, in order to defeat that motion, plaintiff moved to amend the complaint, the court declined to grant a nonsuit, but intimated that plaintiff's counsel might withdraw a juror and apply for such amendment at special term. A juror was accordingly withdrawn and the case went over, and thereafter the amendment was refused on the ground that it was a new and separate cause of action and was barred by limitation.

And where a party is surprised by the evidence given on the trial by his adversary's witnesses, and is not prepared with the evidence to rebut, his proper course is to apply for an adjournment in order to procure it or for leave to withdraw a juror, and if he neglects to do so, and allows the case to go to the jury on the evidence taken, the court will not grant him a new trial on the ground that the evidence was a surprise to him, and that the witnesses whose testimony was needed to rebut it were kept away from the trial by the contrivance of persons acting in the interest of his adversary. *Messenger v. Fourth Nat. Bank*, 6 Daly, 190, affirming 48 How. Pr. 542.

A plaintiff has no right to be surprised by evidence within the issues. If, however, he is, he must find out his surprise at the trial, and he can then apply to the court for leave to withdraw a juror, or submit to a nonsuit. *People v. Marks*, 10 How. Pr. 261.

"The plaintiff began suit for damages for malicious prosecution of bankruptcy proceedings instituted by defendants without alleging that they were taken against him without probable cause and with malice. On the trial of the action, it was held that the complaint was not sufficient, and that the plaintiff be allowed to withdraw a juror on the payment of costs, and amend the complaint by inserting 'without probable cause and malice.'" *St. John v. Duncan*, 2 N. Y. Month. L. Bull. 20.

The power of the circuit court, in a proper case, to permit a juror to be withdrawn, or to order a nonsuit, is undoubted; but there is no necessary connection between the two processes. The withdrawal of a juror operates to continue the cause, and does not of itself entitle the defendant to a judgment of any kind. If a nonsuit be properly granted the withdrawal of a

juror as preliminary thereto is entirely superfluous and harmless. But if judgment of nonsuit be rendered merely because a juror has been withdrawn, such judgment is founded upon a misapprehension of the legal effect of withdrawing a juror, and is erroneous. *Planer v. Smith*, 40 Wis. 31. In this case the court said: "The judgment before us is erroneous because it was evidently rendered on the theory that judgment must necessarily follow the withdrawal of a juror. But were any judgment proper, it should only be a judgment of nonsuit, which, of course, would be no bar to another action for the same cause."

Where defendant moved to exclude all the evidence, and plaintiff's counsel, instead of asking leave to withdraw a juror, asked leave to introduce further testimony, which was denied, and defendant pressed his motion and to discharge the jury, which was allowed, it was held that "while such a practice is wholly without precedent, so far as our knowledge of practice goes, yet it is not difficult to prescribe as to its legal effect." Such a motion can be regarded only as an expressed consent, on the part of the defendant, to the withdrawal of a juror by the plaintiff, and that the cause might stand continued to another term, and when allowed by the court no other effect could legally be attributed to it. The defendant having so consented, the court could not properly even give judgment as in case of nonsuit." *Bohmann v. Chicago*, 15 Ill. App. 48. The court said: "It was held in *Chandler v. Bicknell*, 5 Cow. 30, that where the plaintiff is allowed to withdraw a juror, against the consent of the defendant, the latter was entitled to move for judgment as in case of nonsuit. That, however, is not allowed under our practice. In *Schofield v. Settle*, 31 Ill. 515, the court says: 'The practical effect of withdrawing a juror, in our practice, is not that it shall operate as a nonsuit, but merely to carry the cause over to another term.'"

Where a party to a suit is surprised by an unlooked-for construction of one of the rules of the court upon which he has relied in making out his case, the jury will be withdrawn and the cause continued. *Sheldon v. Bahner*, 4 Pa. Co. Ct. 16.

But in *Wolcott v. Studebaker*, 34 Fed. Rep. 8, where the court was about to direct the verdict for the defendant, and the plaintiff asked then for a nonsuit, it was held: "It is not our practice to grant what is technically known as a nonsuit. The proper practice would be for the plaintiff to ask to withdraw a juror and discontinue the case." In this case the court said: "There is a statutory provision of this state [Illinois] to the effect that every person desiring to suffer a nonsuit shall be debarred from doing so unless he do so before the jury retires from the bar. As I am advised, it was the practice of Judge Drummond, applying by way of analogy this statute to such a case, and it is the practice of Judge Blodgett, to allow the plaintiff before the jury retires to

withdraw a juror and discontinue. So I shall permit the plaintiff to take that course."

In *Schechter v. Denver, L. & G. R. Co.* 8 Colo. App. 25, 44 Pac. 761, in an action for injury to property from a railroad, plaintiff's counsel asked leave to withdraw a juror, and submit to nonsuit. Both requests were denied by the court, who then withdrew the case from the jury and ordered a judgment of nonsuit entered. It was held that under Colo. Civ. Code, § 166, providing that an involuntary nonsuit may be granted upon motion of the defendant, the court may *sua sponte*, or on motion of either party, grant a nonsuit in every case where there is such a failure of evidence that a verdict if found would be set aside. The court said: "But, in our view, it is not necessary to authoritatively decide whether or not a court can order a nonsuit of its own motion, as in this case the request of both parties was tantamount to a motion, and must be so regarded."

III. Effect of withdrawal of juror in criminal cases.

The withdrawal of a juror is held, with but few exceptions, not to be a bar to a further trial. But where the discretion of the court is apparently abused by allowing the prosecuting attorney more time to look for further evidence, it is held to be a bar.

In *Kinloch's Case*, *Fost. C. L.* 16, 22, 1 Wils. 157, after a plea of not guilty of treason, the defendants desired to plead to the jurisdiction and a juror was withdrawn, and the jury were discharged upon the motion of the prisoner's counsel, and at the prisoner's request and with the consent of the attorney general. The court overruled the plea, and ordered that the prisoners should plead over to the treason, and they pleaded not guilty, and the same jury was sworn and charged and both defendants found guilty. A motion in arrest of judgment on the ground that the last trial was a nullity on account of the jury having been sworn and charged in the previous proceedings, was overruled.

And where a trial for murder had been commenced and part of the witnesses examined, and it was discovered that an alien was upon the jury, and the prosecuting attorney moved that the juror be withdrawn and a new juror be sworn in his place, it was held to be regular, under *Ill. Rev. Laws*, 381, *Gale's Stat.* 397, § 11, providing that in case of the death, sickness, or nonattendance of any grand or petit juror, after he shall have been sworn upon the jury, or where any such juror as aforesaid, after being sworn as aforesaid, shall, for any reasonable cause, be dismissed or discharged, it shall be lawful for the court to cause others, if necessary, to be summoned, and sworn in his or their stead. *Stone v. People*, 3 Ill. 326.

And where one of the jurors was withdrawn from the panel without the defendant's consent, and the jury were discharged in a prosecution for highway robbery, and the defendant was remanded to prison, it was held that a judgment on a subsequent verdict for guilty could not be arrested on the ground that a jury sworn and charged in a criminal case cannot be discharged. *Com. v. Bowden*, 9 Mass. 494. In this case the court said: "The ancient strictness of the law upon this subject has very much abated in the English courts; nor would it be consistent with the genius of our government or laws to use compulsory means to effect an agreement among jurors. The practice of withdrawing a juror, where there existed no prospect of a verdict, has frequently been adopted at criminal trials in this court, and the exception taken in this case cannot prevail." 48 L. R. A.

So, where two were indicted for conspiracy to defraud, and one was acquitted, and the jury being unable to agree on a verdict as to the other, the court, without consent of the prisoner, ordered a juror to withdraw, and the rest being called, and only eleven answering, they were discharged, it was held that the court may, in their discretion, in a criminal case, discharge a jury who are unable to agree on a verdict, and against the consent of the defendant, who may be brought to trial a second time for the same offense. *People v. Olcott*, 2 Johns. Cas. 301.

And in an indictment for a misdemeanor, where it was discovered after the trial had begun that one of the jurors was biased, and evidence of this fact was received over the objection of the defendant, and the court ordered the juror to be withdrawn and the case continued without the consent of the defendant, it was held that this did not prevent a second trial. *United States v. Morris*, 1 Curt. C. C. 23, Fed. Cas. No. 15,815. In this case the court said: "The rule of the common law, as shown by the authorities cited by the defendant's counsel, is, that neither party has a right of challenge after the jury is sworn for cause then existing. But it by no means follows that it is not in the power of the court, at the suggestion of one of the parties, or upon its own motion, to interpose and withdraw from the panel a juror utterly unfit, in the apprehension of every honest man, to remain there."

In *Com. v. Purchase*, 2 Pick. 521, 13 Am. Dec. 452, where the jury in a capital case failed to agree, and the prisoner was put upon his trial before another jury, reference was made to *Com. v. Bowden*, 9 Mass. 494, where the jury failed to agree, and a juror was withdrawn without the consent of the prisoner and the case committed to another jury which convicted, and the court said: "The precedent, however, has been followed in many instances since, in trials not capital; and in one case at Plymouth, in a trial for capital arson, the jury were discharged of the case under similar circumstances, and on another trial at the succeeding term a conviction of the burning of a dwelling house, but not in the night-time, took place and judgment followed. In this latter case no question was made as to the regularity of the second trial."

And where a defendant in a prosecution for felony is taken ill on the trial, and the court is satisfied, by the opinion of physicians or otherwise, that he is too ill to be present in open court at every stage of the trial, the cause should be either temporarily continued to await his convalescence, or a juror should be withdrawn and the cause continued for the term. *Brown v. State*, 38 Tex. 482.

But in some cases the withdrawal of a juror has been held to operate as a discharge of the defendant.

As in *State v. Ephraim*, 19 N. C. (2 Dev. & B. L.) 162, where it was held that the withdrawal of a juror and the discharge of the jury against the consent of the defendant in a capital case entitled the defendant to his discharge. In this case after the trial the jury came into court and declared that they were not likely to agree, and two of the jurors stated that they were unwell, and the court ordered a juror to be withdrawn and the jury to be discharged. The court said that if the record showed that the jurors were so sick as to render it dangerous to health it would have been different; but it was not shown that the discharge was necessary in this case.

In *State v. Morrison*, 20 N. C. (3 Dev. & B. L.) 115, the court said that in the case of *State v. Ephraim*, 19 N. C. (2 Dev. & B. L.) 162, "we held that a jury charged in a case of capi-

tal felony cannot be discharged before rendering a verdict, but for evident, urgent, overruling necessity, arising from some matter occurring during the trial, which was beyond human foresight and control. But in the trial of issues on indictments for misdemeanors the rule is different."

And after a prisoner has pleaded to an indictment and the jury sworn and evidence offered, if the public prosecutor without the prisoner's consent withdraw a juror because he is unprepared with his evidence, the prisoner cannot afterwards be tried on the same indictment, and if he is, it is a good cause for arresting the judgment. *People v. Barrett*, 2 Cal. 304. Reversing 2 Cal. 100. In this case the court said: "Without denying the right of courts to withdraw a juror in criminal causes, and put the defendant on his trial a second time, it is evident this power should not be lightly used, but confined as much as may be to cases of very urgent necessity, where, by the act of God, or by some sudden and unforeseen accident, it is impossible to proceed without manifest injustice to the public, or the defendant himself. We do not mean, at present, to define all, or any, of the cases in which this practice may be pursued, but we all agree that a defendant ought, in no case, to be put on a second trial for the same offense, where a juror has been discharged on no other ground than because the public prosecutor found himself unable to proceed for the want of sufficient testimony to convict, and where this inability was the consequence of his not taking the necessary measures to obtain it. To discharge a juror

under such circumstances would be liable to great abuse and oppression."

In conclusion, it may be said that the weight of authority now is that a juror may be withdrawn and the case tried before another jury either in criminal or civil cases. But if a juror is withdrawn in a felony case by an abuse of discretion of the trial judge, there is some risk of its being held to be bar to a further prosecution. Whilst it is within the discretion of the court, the practice is in reality a relic of antiquity, the supposition being that the only way to get rid of a jury is to call them by name and if eleven only respond the trial must stop; therefore when one juror was taken out of the box and the jury were called, and the court suddenly discovered that they had only eleven jurors, the trial ceased. The ordinary practice throughout this country is that when a party is suddenly taken by surprise during the trial by his witnesses testifying directly opposite to what he has reason to believe they will say, and knows that he can prove the facts alleged by other witnesses, or when, by an unexpected ruling on pleadings a just claim is prejudiced, the court on a proper application by affidavit for continuance on account of want of evidence or of its own motion in matters on pleadings usually makes an order that "swearing of the jury is set aside and the case continued" instead of going through the formula of taking one of the jurors out of the jury box. While this is in effect the usual practice, the courts have a right to withdraw a juror and continue the case. I. T.

NORTH CAROLINA SUPREME COURT.

James CANSLER

v.

G. N. PENLAND, *Appt.*

(125 N. C. 578.)

1. A contract by which a sheriff and tax collector turns over the tax list to another person, with an agreement to give him a certain commission for collecting the taxes for certain years, is illegal and void on grounds of public policy, under Code, § 2084, which provides that the sheriff shall not "let to farm, in any manner, his county or any part of it."
2. The defense that a contract is invalid on grounds of public policy cannot be waived by failure to plead it.

(December 22, 1899.)

APPEAL by defendant from a judgment of the Superior Court for Macon County in favor of plaintiff in an action to recover the amount alleged to be due plaintiff under a contract by which defendant was to collect taxes which it was plaintiff's duty as county tax collector to do. *Reversed.*

The facts are stated in the opinion.

NOTE.—For public policy in respect to transfer of an officer's salary, see *Schwenk v. Wyckoff* (N. J.) 9 L. R. A. 221; *Bowery Nat. Bank v. Wilson* (N. Y.) 9 L. R. A. 706, and *note*; and *State v. Williamson* (Mo.) 21 L. R. A. 827.

For sale by postmaster of his furniture and fixtures, with agreement to resign his office and recommend appointment of the other party, see *Edwards v. Randle* (Ark.) 36 L. R. A. 174. 48 L. R. A.

Messrs. Simmons, Pou, & Ward, for appellant:

Such contracts are expressly forbidden by the laws of the state.

1 N. C. Code, § 2084.

Such contracts are in violation of common law, and are void because violations of public policy.

Basket v. Moss, 115 N. C. 448, 20 S. E. 733.

It is not too late to make this defense for the first time in the supreme court.

Oswangan v. Winchester Repeating Arms Co. 103 U. S. 261, 26 L. ed. 539.

Messrs. Shepherd & Busbee for appellee.

Faircloth, Ch. J., delivered the opinion of the court:

This is an action for an alleged balance due the plaintiff by the defendant on the following facts: The plaintiff was sheriff and tax collector of Macon county, and the tax list was in his hands for collection for the years 1891 and 1892. Plaintiff and defendant contracted with each other that the defendant was to collect the taxes for those years, and to receive a commission of 2½ per cent for making collections, and the tax list was turned over to the defendant by the plaintiff. This action was commenced in 1894. The matter was referred, and the result was a judgment in favor of the plaintiff for \$93.02, with interest and costs. Appeal by the defendant.

In this court the defendant contends that the contract was illegal and void, and that the plaintiff cannot maintain his action. This question has not heretofore been presented to this court, and the defendant's counsel disclaims any insinuation that the contract was corruptly made, or that the parties intended to violate the law. We agree with counsel that the contract was illegal and void, on the grounds of public policy. Code, § 2084, says: "No sheriff shall let to farm, in any manner, his county, or any part of it, under pain," etc.; meaning his office. There is no question of fraudulent purpose in the case. The question is one of policy and safety to the public interests, and that is highly important. There can be no doubt that a sheriff may employ a deputy or other private person to assist him, but he cannot delegate his authority to another, as that would tend to injure the public service. The public has an interest in the proper performance of their duties by public officers, and would be prejudiced by agreements tending to impair an officer's efficiency, or in any way interfere with or disturb the due execution of the duties of the office. The office of sheriff and tax collector is one of public confidence and fidelity to a public trust, and cannot be a matter of bargain and sale. It requires good faith and duty. Under the present contract, the duty, the power, and the control of the tax collector's office are placed in the hands of the defendant. True, the sheriff's bond is liable for the amount of collectible taxes, but the public trust and confidence are not secured by his bond. As to the validity of contracts, the law makes no distinction between acts *mala in se* and acts *mala prohibita* or wrong simply because they are prohibited by statute. When a statute intends to prohibit an act, it must be held that its violation is illegal, without regard to the reason of the inhibition, or the morality or immorality of the act; and that is so, without regard to the ignorance of the parties as to the prohibiting statute. The law would be false to itself if it allowed a contract to be enforced in the courts against the intent and express provisions of the law. The above principles were recognized and expressed in *Puckett v. Alexander*, 102 N. C. 95, 3 L. R. A. 43, 8 S. E. 767, where a graduated physician had not been licensed, but practiced, and undertook to collect under a contract, in violation of Code, §§ 3122, 3132. It was held that the contract was void in its inception.

The plaintiff's counsel in this court then took the position that, if the contract was illegal and unenforceable, the defendant had waived it by not pleading the illegality, and by submitting to an account on the merits of the controversy. That is true generally, under the Code practice, but there are some matters that the party cannot waive, and the authorities are against the proposition in such cases. In *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 268, 26 L. ed. 539, the contract under consideration was held illegal and void, because it was against

public policy, which was not pleaded, and the plaintiff insisted on the waiver. *Coppell v. Hall*, 7 Wall. 542, 19 L. ed. 244, is incorporated in the case. The court said there can be no waiver in such cases. "The defense is allowed, not for the sake of the defendant, but of the law itself. . . . It will not enforce what it has forbidden and denounced. . . . Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Whenever the contamination reaches, it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation." When an action is instituted in a court which has no jurisdiction of the subject-matter, the court will not proceed to do a vain thing, but will stop, without waiting for a plea denying its authority to proceed. So, under our Constitution and statutes, no personal contract of a married woman will be enforced against her (with a few exceptions), if the court can discover in any part of the record that she is married, although her coverture is not pleaded. *Green v. Ballard*, 116 N. C. 141, 21 S. E. 192; *Weathers v. Borders*, 124 N. C. 610, 32 S. E. 881. The principle is that, when the court discovers that it is invoked to aid in enforcing an illegal transaction, the court *ex mero motu* will withdraw its hand. The common law was provident in respect to public interests. It would not allow the sale of an office to be the foundation of an action, because it was against public policy. *Parsons v. Thompson*, 1 H. Bl. 322; *Blackford v. Preston*, 8 T. R. 89. Such a sale was and is invalid, because the law could not know in advance whether the grantee or bargainee would be competent to discharge the trust in the public interest. *Reynel's Case*, 9 Coke, 95a. For the above reasons, we feel it to be our duty to declare that the judgment of the superior court was erroneous.

Reversed.

Clark, J.: 1 concur in the result.

Rehearing denied.

John SLAUGHTER

v.

N. O'BERRY, Appt.

(.....N. C.....)

1. Doubt as to the constitutionality of

NOTE.—As to necessity that ordinance for public improvement be reasonable, see *Hawes v. Chicago* (Ill.) 30 L. R. A. 225

As to necessity that ordinances in general be reasonable, see *People v. Armstrong* (Mich.) 2 L. R. A. 721, and some cases in note; *Re Ah You* (Cal.) 11 L. R. A. 408; *Olyria v. Mann* (Wash.) 12 L. R. A. 150; *Pittsburgh, C. & St. L. R. Co. v. Crown Point* (Ind.) 35 L. R. A. 684; and *People ex rel. Akin v. Kip* (Ill.) 41 L. R. A. 775.

an ordinance relating to the construction of a public improvement will be resolved in favor of the property rights of individuals as against the power of the city to invade them.

2. An ordinance which provides that a city shall do the work and furnish the materials for making a sewer connection up to within 3 feet of the building to be connected is void as an unreasonable invasion of the rights of property owners, although the city may properly specify the materials to be used, and provide that the work shall be done only by some person licensed by the city to make such connections, and that the work shall be done under the supervision of the city inspector.

(March 13, 1900.)

A PPEAL by defendant from a judgment of the Superior Court for Wayne County in favor of plaintiff in a mandamus proceeding to compel defendant to permit plaintiff to make connections with a public sewer. *Affirmed.*

The facts are stated in the opinion.

Mr. A. C. Davis for appellant.

Mr. W. C. Munroe, for appellee:

A municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted by express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.

Dill. Mun. Corp. 2d ed. § 89 (55); *State v. Webber*, 107 N. C. 965, 12 S. E. 598.

Municipal corporations cannot, under the claim of exercising the police power, substantially prohibit a lawful trade unless it is so conducted as to be injurious or dangerous to public health.

State v. Taft, 118 N. C. 1193, 32 L. R. A. 122, 23 S. E. 970; *Rosenbaum v. Neuborn*, 118 N. C. 83, 32 L. R. A. 123, 24 S. E. 1.

Furches, J., delivered the opinion of the court:

The plaintiff is a citizen and the owner of a house and lot in the city of Goldsboro, and Goldsboro is an incorporated city and the owner of a public sewerage system. The defendant, O'Berry, is the chairman of the sewerage committee of said city, with power to grant privileges of connection with said city sewerage, upon specified terms, mentioned in the ordinances of said city. Among the specified requirements of the city ordinances are the following: That no connection shall be made, but by some person elected and licensed by the city to make such connection; that said work shall then be done under the supervision and direction of the city inspector, and that the city shall furnish the materials and do the work of making such connection to within 3 feet of the building to be so connected with said sewerage; that the application for such connection shall be in writing, setting forth the location of the building to be connected, and the purposes for which the sewerage is to be

used, and a survey and plan of said sewerage, containing an estimate of the cost of said connection; and that the applicant shall deposit a sufficient amount of money with the city to defray the expenses of such connection. The plaintiff has been elected and licensed to make such connections, and has made his application in writing, and furnished a survey of the premises, with estimates of cost of said connection, but declined to make the deposit required by the ordinance, and asked the privilege of furnishing his own material and of doing his own work in making the connection, under the direction and supervision of the city inspector. This application of the plaintiff was refused for the reason that he had not made the deposit required by the ordinance, and because he proposed to furnish his own material and do his own work in making the connection. These are the substantial facts as we understand them, and present the question of consideration, and determination.

The city being the owner of a public sewerage, it has the right, and it is its duty, to protect the same from improper uses and connections. But this should be done in a reasonable manner, and so as not to affect private rights further than is necessary for that purpose. Where it becomes necessary to invade private property, it must be done with the consent of the owner, or under the doctrine of eminent domain, when the owner would be entitled to compensation. Neither can the city, in the exercise of its corporate powers, interfere with the rights of the owner over his property, nor with his personal rights, where it is not necessary to do so for the public benefit. From a consideration of these principles, it seems to us that the city had the right to say what is a proper connection with its sewerage; that it had a right to require that this connection should be made by its authorized agent, and under the direction and supervision of its city inspector; and that only suitable material should be used in making such connection. But with these, it seems to us, its rightful powers ceased. The plans and specifications for this connection had been made and approved. The connection was a proper one to be made, or the plans and specifications filed by the plaintiff would not have been approved. The plaintiff was a licensed officer of the city to do such work, under the direction and supervision of the city inspector. So the question comes down to this: Should the plaintiff be allowed to furnish his own material, subject to the inspection and approval of the city inspector, and to do his own work on his own premises, or shall he be compelled to hire the city to furnish this material and to do his work? We see no reason why he should be required to do so. We can see no benefit the city is to derive from such a requirement, unless it be a profit on the material or the work to be done, or to furnish a job for some favorite of the corporate authorities. We do not say this is so, but we say that, if it is not then we see no reason for such requirement,

L. R. A.

and no public benefit to be derived from such requirement. And, if it is not required for the public good, it is an unnecessary invasion of the personal and property rights of the plaintiff, *ultra vires*, and unlawful. Too much stress should not be put upon the fact that the plaintiff is a licensed officer to make the connection,—“to tap the main.” That fact supplies only one of the points made in this case, and therefore enters into its consideration. But, had he not been such licensed officer, it seems to us that it would have been only necessary for the plaintiff to have gotten someone licensed by the city to do such work,—to make the connection with the main,—and the other work, such as supplying the material, digging the trench, and covering the pipe, he might have been allowed to do himself, as the city was in no way interested in that. Where a city has the power to erect a public improvement, and to control, manage, and protect the same, the line of demarcation is so small and so delicately drawn between such power and the rights of the individual citizens of the corporation, that it is difficult to run and mark it so as to give the corporation its proper powers without infringing upon individual rights and property rights. But, as delicate as this duty is, it seems to us that in this case the line of demarcation is plainly apparent. But, if it was in doubt, it would have to be resolved against the defendants, and in favor of the plaintiff's individual rights. 1 Dill. Mun. Corp. ¶ 89; *State v. Webber*, 107 N. C. 962, 12 S. E. 598; *Edgerton v. Goldsboro Water Co.* (N. C.) 35 S. E. 243.

We are therefore of the opinion that the city had the right to require that this connection should be made by its licensed officer; that materials furnished should be proper for such work, and subject to the inspection and approval of the city inspector; and that the work of putting them in should be done under the supervision of the city inspector. But we are also of the opinion that the city had no right to compel the plaintiff to buy the material from it, nor had it the right to compel the plaintiff to pay it to do the work we have specified and pointed out above in this opinion.

The plaintiff was entitled to the mandamus, and the judgment of the court below is affirmed.

J. B. EDGERTON

v.

GOLDSBORO WATER COMPANY *et al.*,
Appts.

(.....N. C.....)

The cost of providing water for a city. although expressly authorized by charter. is not a “necessary expense” of the city, within the meaning of Const. art. 7, § 7, which prohibits indebtedness or taxation of a city

for anything except necessary expenses, without a majority vote of the qualified voters.

(Clark, J., dissents.)

(March 6, 1900.)

A PPEAL by defendant water company from a judgment of the Superior Court for Wayne County in favor of plaintiff in a proceeding brought to enjoin defendant city from paying to the defendant water company the rentals for water supplies. *Modified and affirmed.*

The facts are stated in the opinions.

Messrs. W. C. Munroe and I. F. Dortch, for appellants:

The state Constitution, art. 8, § 4, provides that “it shall be the duty of the legislature to provide for the organization of cities, towns, and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessment, and in contracting debts by such municipal corporations.”

The grant of such a power carries with it, by necessary implication, the power to endow cities with the usual and necessary incidents of an incorporated city.

Wilson v. Charlotte, 74 N. C. 757.

The legislature has incorporated the city of Goldsboro, and required its authorities to provide water and to take all necessary steps to prevent and extinguish fires.

This exercise of the power by the legislature was within the discretion of the legislature, and not reviewable by the courts.

Harriss v. Wright, 121 N. C. 181, 28 S. E. 269.

Furnishing water for the use of its inhabitants being a power usually incident to cities, the legislature had the right to require the city authorities to furnish water, and the cost became a necessary expense of this city.

Wilson v. Charlotte, 74 N. C. 758.

If it was a necessary expense to furnish water, it was not necessary to submit the question to a vote of the people.

Brodnax v. Groom, 64 N. C. 249; *Shaver v. Salisbury Comrs.* 68 N. C. 292; *Wilson v. Charlotte*, 74 N. C. 754; *Evans v. Cumberland County Comrs.* 80 N. C. 154; *Vaughn v. Forsyth County Comrs.* 117 N. C. 429, 23 S. E. 354.

Furnishing water was a necessary expense.

Smith v. Newbern, 70 N. C. 18, 16 Am. Rep. 766; *Tucker v. Raleigh*, 75 N. C. 267.

This principle became a part of the contract, and no subsequent decision could annul it.

Thompson v. Lee County, 3 Wall. 331, 18 L. ed. 178; *Kenosha v. Lamson*, 9 Wall. 477, 19 L. ed. 725; *Olcott v. Fond du Lac County Suprs.* 16 Wall. 678, 21 L. ed. 382.

Messrs. Allen & Dortch and Aycock & Daniels for appellee.

NOTE.—As to purposes for which money may be raised and expended by municipal corporations, see *Daggett v. Colgan* (Cal.) 14 L. R. A. 474, and note; *Jacksonville Electric Light Co.* 48 L. R. A.

v. Jacksonville (Fla.) 30 L. R. A. 540; *San Print. & Pub. Assn. v. New York* (N. Y.) 37 L. R. A. 788; and *Mayo v. Washington* (N. C.) 40 L. R. A. 163.

Furchee, J., delivered the opinion of the court:

The plaintiff is a citizen and taxpayer of the city of Goldsboro, and brings this action to enjoin and restrain the city authorities from paying the defendant the Goldsboro Water Company \$1,395, this being the semi-annual rental for water supplies furnished the city of Goldsboro by said water company, which the plaintiff alleges that the defendant city of Goldsboro is about to do. The plaintiff alleges that this money was collected by the levy of taxes upon the citizens and property of said city, and can only be used and paid out for the lawful necessary expenses of the city government; that the furnishing of water to the city by the water company is not a necessary expense of the city government, and that the same was wrongfully and unlawfully levied and collected, and that it would be unlawful to pay the same to the defendant water company; that defendant city was never authorized by any special act of the legislature to levy any such tax, or to collect the same, or to submit a proposition to the voters of said city, and that in fact no such proposition has ever been submitted or voted upon by said city. It is admitted by defendants that said money was levied and collected as a tax on defendant city; that there has been no act of the legislature authorizing a submission of the question to the vote of the people, and that no such vote has been taken. And it is not denied but what the city was about to make the payment, as alleged by the plaintiff. But the defendants allege and say that the charter of the city of Goldsboro provides (Priv. Laws 1899, chap. 171, § 27) "that among the powers hereby conferred on the board of aldermen, they shall provide water, provide for repairing the streets," etc.; that this made it their duty to provide a supply of water for the city, and made water a legislative necessity, and did away with the requirement of article 7, § 7, of the Constitution; that, so understanding the law, the city contracted with the assignor of the defendant water company to furnish the city of Goldsboro a supply of water (as specified in said contract) for the public use of the city and for the private use of its citizens, the citizens paying a stipulated price for the use of the water; that under the terms of the contract the city was to pay the water company \$2,790 per year in semiannual instalments, and the payment of the money sought to be enjoined is one of the semiannual payments; that upon these facts the court below granted the injunction, and the defendants appealed.

This presents a constitutional question,—the power of the defendant city to levy, collect, and pay out money. But it seems to us that it has been substantially decided by the recent adjudications of this court. A city has no right to levy and collect a tax unless it has legislative power to do so. It has no powers except those given by legislative authority, in express terms or by necessary implication, in aid of express powers. 1 Dillon, Mun. Corp. § 89, quoted 48 L. R. A.

with approval in *State v. Webber*, 107 N. C. 962, 12 S. E. 598. But it is contended by defendant that, as the charter of Goldsboro provides that it "shall have power to provide water for the city," this is an express legislative power, and, the power being conferred, the courts will not undertake to direct or supervise the manner in which this shall be done. It must be conceded that, if the first proposition be true, it had the power to levy and collect the taxes, the second proposition is necessarily true, and the courts cannot and will not undertake to supervise their action as to the manner of its execution, unless a manifest abuse of power be shown. It has been held by this court that, where a town levied a tax in aid of the common schools of the town, under and within the provisions of an act of the legislature not passed according to the requirements of the Constitution, such levy is void, for the reason that the act had not been passed as provided by article 2, § 14, of the Constitution; common schools not being one of the necessary expenses incident to the corporate government. *Rodman v. Washington*, 122 N. C. 39, 30 S. E. 118. The court has also held that an electric-light plant was not a necessary expense incident to the government of a town, and that an attempt to establish one by the city, to be paid for and supported by taxation without having the required constitutional legislation, was *ultra vires*, and void. *Mayo v. Washington Comrs.* 122 N. C. 5, 40 L. R. A. 163, 29 S. E. 343. It has been held by this court that a waterworks plant was not a necessary incident to the administration of the city government, and that an effort to levy and collect a tax out of the city for that purpose, without having the required legislative power to do so, was unconstitutional, and void. *Charlotte v. Shepard*, 120 N. C. 411, 27 S. E. 109, and this opinion was cited with approval in *Mayo v. Washington Comrs.* 122 N. C. 5, 40 L. R. A. 163, 29 S. E. 343. From these authorities it must be held that it is not one of the necessary expenses of a city or town government to furnish the city or town with a supply of water. And we do not understand the defendants to seriously contend that this is not generally so, although they cite *Tucker v. Raleigh*, 75 N. C. 271, *Smith v. Newbern*, 70 N. C. 14, 16 Am. Rep. 766, and *Smith v. Goldsboro*, 121 N. C. 352, 28 S. E. 479. But it does not seem to us that these cases sustain the contention that the water contracted for in this case was a necessity to the town government. In *Tucker v. Raleigh*, it appeared that a part of the little account sued on was for cleaning and repairing public wells. This is covered by the case of *Spaulding v. Peabody*, 153 Mass. 129, 10 L. R. A. 397, 26 N. E. 421, cited with approval in *Mayo v. Washington Comrs.* 122 N. C. 5, 40 L. R. A. 163, 29 S. E. 343, as being allowed by reason of ancient custom. The cases of *Tucker v. Raleigh* and *Smith v. Goldsboro* are cited, discussed, and disposed of in *Mayo v. Washington Comrs.* In *Smith v. Newbern*, 70 N. C. 14, 16 Am. Rep. 766, it

is incidentally stated, in the argument of the case, that the city would have the right to bore an artesian well. If it had held that a city might have such a well, we do not think it would sustain the defendants' contention in this case. But that was not the point in that case, and was in no respect necessary to its decision, and it could, at most, be regarded as no more than an *obiter*. But it was contended with earnestness by the defendants that, because the charter said it should be the duty of the city authorities to supply the city with water, this made it a necessary expense. We cannot give our assent to this proposition. To put the most favorable construction upon this language, it can only mean that they should do so in a lawful way. To put the meaning upon this provision of the charter that defendants contend for would be to destroy the provisions of article 7, § 7, of the Constitution, which provides that "no county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." If the legislature had the power to make a thing necessary by saying that it should be done, or even saying that it was necessary, this wise provision of the Constitution would be utterly destroyed. It seems to us that this proposition is so self-evident that it needs no authority to support it. But we think it is sustained by *State v. Webber*, 107 N. C. 962, 12 S. E. 598. In that case it was attempted to make the owners of certain houses guilty of keeping houses of ill fame, whether they occupied them or not. The court held this could not be done; that saying they were the keepers of such houses did not make them so. See *State v. Clay*, 118 N. C. 1234, 24 S. E. 492; *State v. Thomas*, 118 N. C. 1221, 24 S. E. 535. The money sought to be enjoined has been collected, but it is still in the possession and control of the city of Goldsboro. But, if it has been illegally levied and collected, the wrongful paying it out may be enjoined. *Stanly County Comrs. v. Snuggs*, 121 N. C. 394, 39 L. R. A. 439, 28 S. E. 539. If the authority of the city to levy and collect this tax was doubtful (which, to us, does not seem to be so), that doubt would have to be resolved against the defendants. 1 Dillon, Mun. Corp. § 91, and note 2. We are therefore of the opinion that the levy and collection of this money was *ultra vires*, and unconstitutional; that to pay it out to the waterworks company, as it is proposed to do, would be unconstitutional and unlawful, for this reason the injunction should be continued as to the payment of this money to the defendant water company for water furnished the city of Goldsboro.

Holding as we do, as to the question of power, we do not find it necessary to consider the question as to the quality of the water. The injunction, modified in accordance with the opinion, is continued.

Modified and affirmed.

48 L. R. A.

Clark, J., dissenting:

Without calling in question our decisions that waterworks are not a municipal necessity, I think that water for public sanitation and protection of public buildings is such necessity, and that, when the legislature of the state has required the town to procure water, to the above extent at least, it is a necessary purpose. The courts have nothing to do with the wisdom, policy, or necessity of statutes which require an exercise of the police power. *Chicago, B. & Q. R. Co. v. State ex rel. Omaha* (Neb.) 43 Am. St. Rep. 557, 572, and notes (47 Neb. 549, 41 L. R. A. 481, 66 N. W. 624); *Morris v. Columbus* (Ga.) 66 Am. St. Rep. 243, and notes (102 Ga. 792, 42 L. R. A. 175, 30 S. E. 850).

STATE of North Carolina
v.

Sherwood HIGGS, Appt.

(.....N. C.....)

1. The jurisdiction of the mayor over violation of an ordinance will not be defeated by the fact that a provision in the ordinance attempts to make his jurisdiction exclusive, if the laws give him at least a co-ordinate jurisdiction.
2. An ordinance is not void for uncertainty by reason of a provision giving the mayor discretion to impose a fine of \$50 or imprisonment for thirty days upon conviction, where the statute makes the violation of the ordinance a misdemeanor, and the Constitution of the state makes exactly the same provision as to the punishment for misdemeanors.
3. An ordinance making it a penal offense to maintain a sign suspended or projecting over a sidewalk is not included in charter power to open streets and keep streets and sidewalks free and clear from obstructions, and is unreasonable, oppressive, and void as applied to a sign which does not impede, delay, obstruct, or in any way endanger the use of the sidewalk.

(Clark, J., dissents.)

(March 27, 1900.)

A PPEAL by defendant from a judgment of the Superior Court for Wake County convicting him of violating an ordinance forbidding the suspension of signs over sidewalks. *Reversed.*

The facts are stated in the opinion.

Messrs. R. O. Burton and A. Jones, for appellant:

It is necessary to the validity of an ordinance that it have a penalty.

State v. Cainan, 94 N. C. 883; *Horr & B. Mun. Pol. Ord. §§ 77 et seq.*; *Dillon, Mun. Corp.* 336.

The municipality cannot make a violation of its ordinances a crime: it is merely a civil

NOTE.—For power of municipal corporation as to encroachments on streets by signboards, etc., or things overhanging streets, see note to *Hagerstown v. Witmer* (Md.) 39 L. R. A. on pages 661, 667.

matter, punishable by a pecuniary penalty, and the statute so intends.

State v. Webber, 107 N. C. 962, 12 S. E. 598; *State v. Earnhardt*, 107 N. C. 789, 12 S. E. 426; *State v. Stevens*, 114 N. C. 873, 19 S. E. 861; Raleigh Charter, Priv. Laws 1899, chap. 153, §§ 9, 11, 12, 21, 33, 35, 80; *Louisburg Comrs. v. Harris*, 52 N. C. (7 Jones, L.) 281; *Horr & B. Mun. Pol. Ord.* §§ 147, 150, 155, 158, 168, 169, 170, 170a; *Dillon, Mun. Corp.* 353, 429, 432.

If the general assembly attempted to confer the power of imprisonment upon the town board, it was a delegation of legislative power which is unconstitutional and void.

Cooley, Const. Lim. 139 *et seq.*; *Louisburg Comrs. v. Harris*, 52 N. C. (7 Jones, L.) 281.

If the ordinance has a penalty, it is void for uncertainty. It leaves to the mayor the discretion as to the amount of punishment, —whether he shall impose a fine of \$50 or imprison for thirty days. This leaves the matter in just as much uncertainty as if the penalty were not less than \$50.

State v. Cainan, 94 N. C. 883; *State v. Crenshaw*, 94 N. C. 877; *State v. Worth*, 95 N. C. 615.

The board of aldermen has no power under its charter absolutely to prohibit signs. The power is not conferred and it is inconsistent with the abutter's property interests in the street.

Howard v. Robbins, 1 Lans. 63; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *State v. Edens*, 85 N. C. 522; *Hawkins v. Sanders*, 45 Mich. 491, 8 N. W. 98; *Clark v. Lake St. Clair & N. U. River Ice Co.* 24 Mich. 508; *People v. Carpenter*, 1 Mich. 287; *Hisey v. Mexico*, 61 Mo. App. 248; *Goldstraw v. Duckworth*, L. R. 5 Q. B. Div. 275; *Cushing v. Boston*, 128 Mass. 330, 35 Am. Rep. 383; *White v. Northwestern N. C. R. Co.* 113 N. C. 610, 22 L. R. A. 627, 18 S. E. 330.

In ascertaining what are the reasonable uses of the streets and highways which belong to the abutter, it is proper to consider the uses that others are allowed to make of them.

O'Linda v. Lothrop, 21 Pick. 292; *Underwood v. Carncy*, 1 Cush. 285.

A sign is an important part of a merchant's business: the right to have a sign is a valuable property right. Any ordinance which declares that it shall not project at all is unreasonable, arbitrary, and void. The city may regulate, but cannot forbid *in toto*.

Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984; *Horr & B. Mun. Pol. Ord.* § 230; *Angell, Highways*, § 263; *State v. Taft*, 118 N. C. 1192, 32 L. R. A. 122, 23 S. E. 970; *State v. Thomas*, 118 N. C. 1221, 24 S. E. 535; 1 Dillon. Mun. Corp. 319-321, 327, 328; *People v. Carpenter*, 1 Mich. 287; *Hisey v. Mexico*, 61 Mo. App. 248.

If it is competent for the board to forbid all encroachments on the streets, it cannot discriminate. All projections beyond the street line should be forbidden, or none should be.

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Livingston v. Wolf, 136 Pa. 519, 20 Atl. 551; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *State v. Tenant*, 110 N. C. 609, 15 L. R. A. 423, 14 S. E. 387.

Messrs. Zeb. Vance Walser, Attorney General, and Watson & Gatling for appellee.

Furches, J., delivered the opinion of the court:

This is a prosecution commenced before the mayor of the city of Raleigh for an alleged violation of an ordinance of the city. The ordinance under which the defendant is indicted is as follows:

"Sec. 1. That no sign shall be suspended or projected over the sidewalks in the city of Raleigh.

"Sec. 2. That all signs that are now projected or that are suspended over the sidewalks of the city of Raleigh shall be removed, together with the rods and poles used for suspending or swinging said signs, by the 15th day of August, 1899.

"Sec. 3. Any person or firm violating the provisions of this ordinance or failing to comply with the provisions of the same, shall, upon conviction before the mayor, be fined fifty dollars, or imprisoned thirty days."

The legislature of 1899 (chapter 153, Priv. Acts) enacted a new charter for the city of Raleigh, and our attention is called to the following provisions therein for the purpose of showing the power of the city, which, the state contends, authorized the charge of the court and the verdict of the jury in finding the defendant guilty:

Sections of the charter:

"Sec. 33. That it shall be the duty of the aldermen to attend all the meetings of the board unless unavoidably prevented from doing so, and when convened, a majority of the board shall have power to make, and to provide for the execution of such ordinances, by-laws, rules, and regulations, and such fines, penalties, and forfeitures for their violation as may be authorized by this act, consistent with the laws of the land and necessary for the proper government of the city: provided, that no penalty prescribed by the board of aldermen for the violation of any of the provisions of this act, or of any ordinance, by-law, rule, or regulation made in pursuance hereof, shall exceed fifty dollars fine or thirty days' imprisonment."

"Sec. 80. That all penalties imposed under the provisions of this act or of any ordinance, by-law, or regulation of the city, unless herein otherwise provided, shall be recoverable in the name of the city of Raleigh before the mayor; and all such penalties incurred by any minor shall be recovered from the parent, guardian, or master, as the case may be, of such minor."

"Sec. 34. That among the powers conferred on the board of aldermen are these: . . . Ascertain the location, increase, reduce, and establish the width and grade, regulate the repairs, and keep clear the streets, sidewalks, and alleys of the city; extend, lay

out, open, establish the width and grade, keep clean, and maintain others; establish and regulate the public grounds, including Moore Square, Nash Square, and Pullen Park, have charge of, improve, adorn, and maintain the same, and protect the shade trees of the city."

"Sec. 38. That they may require and compel the abatement of all nuisances within the city, or within one mile of the city limits, at the expense of the person causing the same, or the owner or tenant of the ground whereon the same shall be. . . ."

Subsection 6 of § 79 provides: "(6) Any person . . . ; or who shall excavate, construct, build, use, keep, or maintain any cellar, basement, area, passage, entrance, or way under any sidewalk, or build, construct, keep, use, or maintain any veranda, piazza, platform, building, or stairway or other projection or construction upon or over any sidewalk in the city whereby the free and safe passage of persons may be hindered, delayed, obstructed, or in any way endangered, . . . without having first taken out a license therefor, . . . shall be guilty of a misdemeanor, and upon satisfactory proof before the mayor shall be adjudged to pay for every such offense a fine not exceeding fifty dollars, or be imprisoned not exceeding thirty days."

The sections in the charter are not produced *seriatim*, but as they are presented in the brief and argument of counsel who represented the state.

Upon the trial the state introduced the charter and the ordinances of the city, and the following evidence: "The state then introduced Chief of Police Mullins, who testified that a written notice from the mayor to take down his sign was served on defendant before the beginning of this proceeding, which notice was put in evidence. That the sign was not taken down, and is still up. On cross-examination, the witness stated that the sign was an electric sign, which spelled out Higgs's name by the passage of a current of electricity; that it was an ornament to the street, and did not interfere with passage or vision. It was at its lower end about 14 feet above the sidewalk, projected 4 or 4½ feet from building; was 12 to 14 feet long, about 18 inches wide, made of plank, and apparently a very heavy one; was fastened at the top to a bar of railroad iron, and at the bottom to a round bar of iron. The sign itself hung vertically, and he thought it was as practically secure as the house itself. Did not think there was any danger of falling or being blown down. Had never examined closely the fastenings to the bar of railroad iron. Witness identified the photograph of the sign, which was put in evidence, and which was taken before the lower swinging signs on the street were taken down. The sign which Higgs had swinging to the lower rod, as shown in the photograph, was taken down by him before this proceeding was started. The lower rod was also cut off at the end. Witness said it was still common for porticos or balconies, awnings and signs on awnings, and signs on

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the outer railing of balconies, and signs projecting a few inches over the sidewalks, to exist. There are many of them in the city. There are balconies in front of many buildings on Fayetteville street, projecting over sidewalk 3 to 4 feet. One over Yarboro House, Henry Building (with J. M. Broughton & Co.'s sign on outer railing; also Foller's, the tailor); one over A. B. Stronach's, with his sign on outer railing. Many awnings in the city which cover the entire sidewalk, some of wood, some of cloth,—some signs on cloth, as Berwanger's stretching clear across sidewalk; and some on wood, as W. B. Mann's at edge or side of awning, and extending over street. Some other signs were allowed to set on sidewalk, as of Watts, the barber. A great many signs on the door-facing, which project a few inches over the sidewalk, as R. B. Raney's Raleigh Savings Bank's, Boylan, Pearce, & Co.'s, W. E. Jones's, a member of the board of aldermen, Cross & Linehan's. Jones & Powell have steps leading from Fayetteville street down into their cellar. On each side of cellar is an iron railing, and till recently they had suspended on the railing an ice and coal sign. W. H. King & Co.'s drug store projects above some distance over sidewalk, and sign is painted on it, as shown from the photograph. Y. M. C. A. building has steps in street. W. Z. Blake, street commissioner, was introduced by the state, and testified that he measured that morning the distance from the front wall of Higgs's store to center of street. It was 49½ feet. The state then introduced the charter of the city of Raleigh, as contained in chapter 153 of the Private Acts of 1899, and thereupon rested its case. The defendant's counsel contended that the ordinance was void; that on the evidence he was the owner to the center of the street, subject to the easement of the public, and had the right to make the customary and proper use of his property; that he was discriminated against, and that the ordinance was unreasonable and arbitrary and oppressive; that the board of aldermen had no power to adopt it, especially in its form and to the extent they claimed; and that it was an attempt to create a criminal offense, which they had no power to do. His honor charged the jury that if they believed the evidence they should find the defendant guilty. Verdict guilty. Defendant excepted, and appealed from the judgment pronounced.

There were exceptions taken on the argument to the jurisdiction of the mayor of the city to try the case, if the defendant was guilty of a criminal offense, for the reason that he was given exclusive jurisdiction. It was also contended that the ordinance was void for uncertainty, for the reason that it gave the mayor the discretion to fine the defendant, upon conviction, \$50, or to imprison him for thirty days. We do not think either of these objections can be sustained. Article 4, § 14, Const., expressly provides for the establishment of such courts for the trial of misdemeanors in cities and towns; and the charter of the city of Raleigh (§ 79,

subsec. 6) expressly constitutes the mayor a court for the trial of misdemeanors committed within the city, when the punishment does not exceed a fine of \$50 or imprisonment for thirty days. It would therefore seem that the mayor had jurisdiction, unless the ordinance is void, for the reason that it gives the mayor exclusive jurisdiction, and takes from justices of the peace their constitutional rights. But, without discussing that question, we are of the opinion that it is not presented in this case, as it must be conceded that the mayor has a co-ordinate jurisdiction, if not the exclusive jurisdiction, and that is all that is necessary to be established to give him jurisdiction of this offense, if it be an offense. Section 3918 of the Code gives to mayors the jurisdiction of justices of the peace; therefore he had jurisdiction outside of the charter.

Neither do we think the ordinance is void for uncertainty in its penalty or punishment. The ordinance of the city limits the punishment to \$50 fine or thirty days' imprisonment; and § 3820 of the Code makes the violation of a city ordinance a misdemeanor, and limits the punishment to a fine not to exceed \$50, or imprisonment not to exceed thirty days. This is the exact language of the Constitution, and therefore cannot be unconstitutional, as applied to misdemeanors. It seems to us that it must follow that the ordinance is not void for uncertainty, and, if not void for uncertainty, its violation was a misdemeanor, unless it was void for other reasons than for uncertainty in its punishment. But, if it was void for any reason, it was not unlawful to refuse to obey it, and its violation was no criminal offense.

But the ordinance may not be void (and we do not say that it is) when properly construed, and the defendant still not be guilty; and it seems to us that it has not been properly construed in the trial of this case. Whether the legislature could in express terms authorize the city to require the defendant to take down this sign by the passage of an ordinance, or be guilty of a criminal offense, we very much doubt. But it is not necessary that we should pass upon that question, as we do not consider that it has attempted to give the city authorities that power. And we therefore consider the question from that view of the case, as it must be admitted that they had no such right unless it is given them in the charter of the city.

A municipal corporation is a creature of the legislature, and only has such powers as are expressly given it, or such as are incident to the powers expressly given, and necessary to the execution of the express powers. It seems to be conceded that they had no express power to pass an ordinance requiring the defendant to take down this sign. And we do not mean to say by this that the city authorities undertook to pass a personal ordinance requiring the defendant to take down his sign, but to say they had no express authority to pass a general ordinance requiring all such signs as his (if

there are others) to be taken down, the violation of which would be *per se* a misdemeanor.

But the state contends that the city had express authority to open and grade streets, and clear and keep clear the streets and sidewalks of all obstructions; that the city is the owner of the streets and sidewalks, *cujus est solum ejus est usque ad celum*, and that the city authorities have the absolute right to remove any permanent fixture upon or over the streets or sidewalks; that they have the same rights of property over the sidewalks of the city that a private citizen has over his land; and, having this right, they have the right, by the exercise of their arbitrary power, to require the defendant to take down his sign. The fallacies of these contentions are that the mayor and aldermen of the city of Raleigh do not own the streets and sidewalks; that, while the fee may be in the city, it is held in trust for the use and benefit of the public. And the mayor and aldermen are but the agents of the city to look after the condition of the streets and sidewalks for the use and benefit of the public, and they have no power arbitrarily to do anything which interferes with the right of the citizen that the public has not and cannot have any interest in. But the defendant, besides his general interest which he has in common with the public generally, is an abutting owner to this street and sidewalk, and in this way has a special property,—an easement in his frontage upon the street. *White v. Northwestern N. C. R. Co.* 113 N. C. 612, 22 L. R. A. 627, 18 S. E. 330; *Moose v. Carson*, 104 N. C. 431, 7 L. R. A. 548, 10 S. E. 689; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984. This seemed to be conceded as a general proposition. But the state undertook to distinguish this case, and take it out of the general rule, by alleging that the city of Raleigh was the owner in fee of the street, and for this purpose has inserted in its brief the acts and ordinances locating the city of Raleigh. And, while they might have been introduced on the trial (*Dillon, Mun. Corp.* § 83), they were not introduced, and we must be governed by the record. But lest it might be inferred that, had they been introduced in evidence, our judgment would have been for the state, we think it best to consider the case as if they had been introduced.

Had they been introduced, we are unable to see that this would have affected the status of the parties, or would have in any way affected the conclusion at which we have arrived. We have assumed that the city was the owner in fee, and sold to the defendant, or those under whom he claims, the lot he now occupies, abutting on Fayetteville street, and, by this sale and purchase, the defendant acquired the rights of an abutting landowner,—an easement which is more than that of the general public, but subject to the lawful government of the city, so far as it is necessary for the use and benefit of the public. The case of *Moose v. Carson*, 104 N. C. 431, 7 L. R. A. 548, 10 S. E. 689, cited by the state to sustain its contention, we

think sustains the position taken by the court. Then, was it necessary for the public benefit—for the public convenience, the public safety—that this sign should be removed? If it was, then the city authorities, under their granted powers, would have the right to remove it. This power would then be one of the powers incident to their express powers granted to them over streets and sidewalks of the city for the benefit of the public, while, on the other hand, the defendant had the right of an abutting owner,—an easement; the right to use his frontage for the benefit of his property, as he pleased, in such a way as not to interfere with the rights of the general public, in safety using the sidewalk for the purpose of traveling the same on foot, and for passing and repassing. And if his sign in no way impeded, or tended to impede, such travel, or in no way endangered the safety of such pedestrians in passing over the sidewalks, as they were wont to do, then the city had no right to require him to take it down, and it was no offense in the defendant to refuse to do so, and he would not be guilty of any criminal offense. It is only the violation of a legal ordinance that is a criminal offense. It is only to valid and lawful ordinances that § 3820 of the Code applies.

While we have been so far discussing this case upon general law and general principles, we do not believe that a fair and reasonable interpretation of the charter goes further, or was intended to go further, or to authorize the city fathers to do more, than we have said they could do. It provides in paragraph 6 of § 79 (after enumerating other things), "or other projection or construction upon or over any sidewalk in the city, whereby the free and safe passage of persons may be hindered, delayed, obstructed, or in any way endangered." Therefore, to our minds, it is manifest that this paragraph of the charter is qualified and restricted, and that the obstruction (if we may call it such) must be such as will hinder, delay, obstruct, or in some way endanger the use of the sidewalk (or, at least, tend to do so) to the use of pedestrians in passing and repassing upon it. According to the evidence in the case, no one of these conditions is present. The sign is 14 feet above the sidewalk, and, of course, cannot be an obstruction to pedestrians, and it is shown to be perfectly secure, and in no danger of falling.

But the state contends that the charter (§ 79, subsec. 6) authorizes the aldermen to condemn this sign, and to require its removal, and that they have done so, and that defendant was properly convicted. We do not think so. We are of the opinion, as we have said, that a fair and reasonable interpretation of the statute does not sustain the state's contention. But, if there are doubts as to its construction (and we do not think there are), they must be resolved against the power and against the state, as its right depends upon this power. 2 Dillon, Mun. Corp. § 91; *Slaughter v. O'Berry* (N. C.) 35 S. E. 241.

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The governing bodies of cities and towns are vested with what is known as "police powers," and they may do many things under and in exercise of this power. But still they must act within the scope of their delegated powers, or their acts are *ultra vires* and void. They cannot do what they are not authorized to do by their charter or by the general law of the land. If a thing within itself is not a nuisance, they cannot make it so by saying it is. If a sign hanging 4 feet from the wall of defendant's store building, firmly attached to the same, and 14 feet above the sidewalk, is not an obstruction to footmen on the sidewalk, the city authorities cannot make it so by saying it is. And if this sign is securely attached and fastened to the building by iron bars and fastenings, so that there is no danger of its falling, the city authorities cannot make it dangerous by saying it is. *State v. Webber*, 107 N. C. 962, 12 S. E. 598; *State v. Taft*, 118 N. C. 1190, 32 L. R. A. 122, 23 S. E. 970; 1 Dillon, Mun. Corp. § 87. The state must show the power, or the ordinance is void. Cooley, Const. Lim. 4th ed. 236. This question of overhanging signs has been elaborately and ably discussed in *Goldstraw v. Duckworth*, L. R. 5 Q. B. Div. 275, and very much the same views are taken in that case, as to such signs, as are taken in this opinion.

But it is said by the state, among many arguments it makes for the support of the judgment below, that to hold that the city had not the power to have this sign taken down would destroy all city government. We do not think so. But, if the law is so written, it must be so held, though it should have that effect. But it must be kept in mind that the power of the city government is not all that is to be considered in deciding this case. The rights of individual citizens are also to be considered, and they are of equal importance, and probably more in need of the protection of the courts than the mayor and board of aldermen of the city of Raleigh. The court holds that, upon the evidence in this case, the court below should have instructed the jury that, if they believed all the evidence, the defendant was not guilty. But if there had been evidence tending to show that the sign was an "obstruction" to footmen on the sidewalk, or tending to show that it was dangerous to the traveling public, it would have been the duty of the court to submit the question to the jury upon proper instructions. *Howard v. Robbins*, 1 Lans. 63; *People v. Carpenter*, 1 Mich. 287. And to this it is replied that this would be destructive of all city government to leave such questions to the jury. We do not think so: but, as we have said, if it is the law, it must be so held, let the results be as they may. But as between a jury, under the restraints of an oath and the instructions of a judge, we think the citizen's rights would be more likely to be protected than they would be by the uncontrolled authority of the city government. The boundary between the rights of the citizen and the powers of the mayor and alder-

men is not very plainly marked, and is easily invaded, unless great care is taken. But this line is there, though delicately marked, and it must be found and observed. *Slaughter v. O'Berry* (N. C.) 35 S. E. 241. While this is true as to many things, there are other rights and duties that the city authorities plainly have. It is plain that they have such powers as are expressly granted, unless they are void as being unconstitutional, or in violation of individual rights as established by the general law of the land. They also have such other powers as are incident to and necessary for them to have and exercise in order to carry out and enforce such express powers as are lawfully granted them. It is their duty to keep the streets and sidewalks in good condition, and to remove such obstructions from the sidewalks as are on them, and are manifestly calculated to "hinder, delay, or endanger," the ordinary use of said sidewalks. Such obstructions clearly fall within their power, and it is their duty to exercise it in a proper manner. But such things as do not appear to hinder, delay, or endanger the public, and do not in any way obstruct the sidewalks, they do not have absolute control over. And, to give them this right, they must allege and show that such signs or other such things are obstructions, or tend to obstruct, or that they are dangerous to the traveling public.

For these reasons, we do not say that the ordinance is absolutely void, because, if the state can show that the sign is dangerous to the public, the city authorities had the right, and it was their duty, to have it taken down, and in such event the defendant would be guilty of a violation of the criminal law of the state. But the state must allege and show this before he is liable.

There is error for which there must be a new trial.

Clark, J., dissenting:

No provision of the Constitution can be found that forbids, or even makes doubtful, the right of the people of this state, speaking through their representatives in the general assembly, to authorize the aldermen or commissioners of any town or city to forbid the swinging of signs across the sidewalks. Certainly none has been cited. The charter provides, in § 34, "that among the powers conferred on the board of aldermen are these: . . . Ascertain the location, increase, reduce, and establish the width and grade, regulate the repairs and keep clear the streets, sidewalks, and alleys of the city; extend, lay out, open, establish the width and grade, keep clean and maintain others; establish and regulate the public grounds, including Moore Square, Nash Square, and Pullen Park, have charge of, improve, adorn, and maintain the same, and protect the shade trees of the city." The title to the streets of a city is in the city, for the use of the public. The defendant, an abutting owner upon a street, has no more rights therein than anyone else. He has the right of ingress and egress to and from his store, but so has the public, unless he closes it.

He has no right to obstruct the view of the street by a sign, unless permitted by the city authorities. He has no more right to hang a sign in the street than the city has to suspend anything above his premises. He owns to the line of his lot, but no further. His easement in the street is simply that it shall not be closed up or perverted to other uses. *Moose v. Carson*, 104 N. C. 431, 7 L. R. A. 548, 10 S. E. 689; *White v. Northwestern N. C. R. Co.* 113 N. C. 610, 22 L. R. A. 627, 18 S. E. 330. Whatever has been done in the way of hanging signs across the sidewalks in the past has been by the tacit assent of the city authorities, revocable at will, whenever they deem such mode of swinging signs injurious to the appearance of the city. It would be strange if it were otherwise, seeing that in England, whence we derive our common law, for hundreds of years signs have not been allowed to project over the sidewalks, but are placed flat against the wall of each place of business. There is probably no town in the United Kingdom, however small, in which signs are allowed to hang across the sidewalk, and the same is true of the counties of western Europe generally. The same ordinance has been adopted by many cities in this country, and in a few years will doubtless become the general, if not the universal, rule. After most diligent research by counsel and the court, no decision has been found from any court, in any country, till now, which denies the power of the town council to pass an ordinance like that now called in question. The powers of a city government are not restricted to suppressing what is dangerous, but extend to adorning and beautifying the city (when they possess the funds), and to removing from the public streets that which mars their appearance, and equally that which is unpleasant to the eye as that which is disagreeable to the nose. This particular sign may be ornamental, and so may others, but, if the board of aldermen think the custom of hanging signs over the sidewalks injurious to the appearance of the streets, they could pass this ordinance, impartially ordering the removal of all signs hung across the sidewalks. Now that there is a spirit springing up in favor of beautifying our cities and towns, it is to be regretted that the cold shadow of a judicial inhibition should fall upon the movement in this state, to chill it.

Were a single act, like the hanging out of the defendant's sign, seized upon for its removal as dangerous, or because otherwise a nuisance, then an issue of fact would be raised for a jury. But when it is an ordinance, impartially ordering the removal of all swinging signs above the street or sidewalk, and the defendant's sign admittedly comes within the words of the ordinance, then it is not an issue of fact for the jury, but a question of the power to pass the ordinance. The people of Raleigh, acting through their duly elected board of aldermen, should certainly be able to decide whether they wish these signs removed or not, and, if the aldermen do not correctly

express public opinion, the next board of aldermen will permit the swinging signs to go back. Local self-government demands that much. The people of any town can decide such questions for themselves better than the courts. It is hardly to be conceived that any part of the functions of the supreme court of a state is to act as a supervisory board of public works, to pass upon, restrict, or veto the action of the board of aldermen of any town upon such matters as the present. Chief Justice Pearson, in *Brodna v. Groom*, 64 N. C. 250, expressed much common sense and a sound knowledge of the true functions of the court when he said: "This court is not capable of controlling the exercise of power on the part of the general assembly or of the county authorities, and it cannot assume to do so without putting itself in antagonism as well to the general assembly as to the county authorities and erecting a despotism of five men [italics in original], which is opposed to the fundamental principles of our government and the usages of all times past." What the learned chief justice said as to "county authorities" has, of course, the same application to city authorities. In that case the court held itself incompetent to control the action of the county authorities in building a bridge, or in supervising its location or cost, or passing upon the necessity for it, because building bridges belongs to the county commissioners, and not to the court. Here the regulation of the streets, and the removing of what therein impedes their use or impairs their appearance, is for the town authorities to decide, and they ought to decide it, subject to correction only by the people of the town at the ballot box, who are the best judges of what is proper and meet as to such matters for their own municipality. The defendant has no property rights in the streets more than anyone else who uses them. His land ends where his deed calls for, i. e., at the edge of the sidewalk next to his store. Whatever privileges he is allowed on the sidewalk, or in the air above it, more than belongs to all alike, is a mere tacit license from the town, revocable at its will. *Moose v. Carson*, 104 N. C. 431, 7 L. R. A. 548, 10 S. E. 689, holds that, where a town conveys land bounded by a street, it cannot afterwards convey away the street itself. *White v. Northwestern N. C. R. Co.* 113 N. C. 610, 22 L. R. A. 627, 18 S. E. 330, holds that the abutting proprietor has an equitable easement in the street to the extent that it shall not be perverted to other uses. *Goldstraw v. Duckworth*, L. R. 5 Q. B. Div. 275, is a very short opinion, construing that the language of a local statute to prevent nuisances upon the pavements of streets was not intended to prohibit projections, like balconies and the like, above the pavements. But neither these decisions, which are the reliance of the defendant, nor any others yet found from any court, sustain the contention that the town authorities do not possess the power to pass the plain unequivocal ordinance (which is here called in question), that "all signs suspended over the

sidewalks of the city of Raleigh shall be removed by August 15, 1899." No court till now has ever questioned such power, though it has been exercised for centuries in the home of the common law. On the contrary, in *Tate v. Greensboro*, 114 N. C. 392, 24 L. R. A. 671, 19 S. E. 767, it is held: "The courts will not interfere with the exercise of a discretion reposed in the municipal authorities of a city as to when, and to what extent, its streets shall be improved, except in cases of fraud and oppression, constituting manifest abuse of such discretion." In that case it was held that the discretionary power over the streets authorized the town council to remove shade trees, against the protest of the owner of the abutting lot. That case cites with approval the following from the United States Supreme Court, in *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440: "The authorities state, and our own knowledge is to the effect, that the care and superintendence of streets, alleys, and highways, the regulation of grades, and the opening of new and the closing of old streets, are peculiarly municipal duties. No other power can so wisely and judiciously control this subject as the authority of the immediate locality where the work is to be done." The right to open new and close old streets is certainly greater than the power of removing signs that obstruct the view and impede the circulation of air and light. The right of "superintendence of the streets," thus fully recognized by both courts, extends, like the defendant's ownership of his own lot, *usque ad cælum*. The city authorities are not chained down to surface improvements, but can rise to the level of the occasion.

STRAUSE BROTHERS

v.

ÆTNA INSURANCE COMPANY, Appt.

(.....N. C.....)

A debt due from an insurance company for loss in another state has no situs in a third state, so as to sustain a garnishment there by a creditor of the insured, merely because the insurance company has appointed an agent in that state on whom

NOTE.—As to situs of debt for purpose of garnishment, see *Missouri P. R. Co. v. Sharitt* (Kan.) 8 L. R. A. 385; *Illinois C. R. Co. v. Smith* (Miss.) 19 L. R. A. 577, and note; *Reimers v. Seaco Mfg. Co.* (C. C. A. 6th Cir.) 30 L. R. A. 364; *Wyeth Hardware & Mfg. Co. v. Lang* (Mo.) 27 L. R. A. 651; *Neufelder v. German American Ins. Co.* (Wash.) 22 L. R. A. 287; *Bragg v. Gaynor* (Wis.) 21 L. R. A. 161; *Douglass v. Phenix Ins. Co.* (N. Y.) 20 L. R. A. 118; *Lancashire Ins. Co. v. Corbetta* (Ill.) 36 L. R. A. 640; *Virginia F. & M. Ins. Co. v. New York Carousal Mfg. Co.* (Va.) 40 L. R. A. 237; *Louisville & N. R. Co. v. Nash* (Ala.) 41 L. R. A. 331; *Swedish American Nat. Bank v. Bleeker* (Minn.) 42 L. R. A. 283; *Stewart v. Northern Assur. Co.* (W. Va.) 44 L. R. A. 101; *National Bank v. Furtick* (Del.) 44 L. R. A. 115; and *Balk v. Harris* (N. C.) 45 L. R. A. 257.

process can be served, in pursuance of the state statutes as a condition of the right to do business therein.

(March 27, 1900.)

APPEAL by defendant from a judgment of the Superior Court for Pitt County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. H. G. Connor & Son, Burwell, Walker, & Casaler, and Jarvis & Blew for appellant.

Messrs. Aycock, Fleming, & Moore, for appellee:

There are two lines of authorities with reference to the situs of the debt. One line, having the better reason with them, holds that the situs is at the domicile of the creditor.

Balk v. Harris, 124 N. C. 468, 45 L. R. A. 260, 32 S. E. 799.

The other line holds that the situs of a debt for the purpose of garnishment is at the domicile of the debtor.

There is beginning to be another line of authorities which holds that for the purposes of garnishment the situs of the debt is not at all material, but that the true question is, Could the garnishee be sued by the creditor in the state where the attachment is taken out?

No court can have jurisdiction unless there is something in the state upon which the attachment may be levied, and legislation in the state cannot put property there, which is not there by the general law.

Louisville & N. R. Co. v. Nash, 118 Ala. 477, 41 L. R. A. 331, 23 So. 825; *Exchange Nat. Bank v. Clement*, 109 Ala. 280, 19 So. 814; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Freeman v. Alderson*, 119 U. S. 185, 30 L. ed. 372, 7 Sup. Ct. Rep. 165; *Martin v. Central Vermont R. Co.* 50 Hun, 347, 3 N. Y. Supp. 82; *Wells v. East Tennessee, V. & G. R. Co.* 74 Ga. 548.

The Connecticut corporation did not become a resident of Pennsylvania by conforming to the laws of Pennsylvania set out in the record for the purpose of garnishment.

Ruedish-American Nat. Bank v. Bleecker, 72 Minn. 383, 42 L. R. A. 283, 75 N. W. 740; *Reimers v. Seasco Mfg. Co.* 37 U. S. App. 426, 39 L. R. A. 364, 70 Fed. Rep. 573, 17 C. C. A. 228; *Douglass v. Phenix Ins. Co.* 138 N. Y. 209, 20 L. R. A. 118, 33 N. E. 938; *Renier v. Hurlbut*, 81 Wis. 24, 14 L. R. A. 562, 50 N. W. 783; *Louisville & N. R. Co. v. Dooley*, 78 Ala. 524; *Wright v. Chicago, B. & O. R. Co.* 19 Neb. 175, 56 Am. Rep. 747, 27 N. W. 90; *Keating v. American Refrigerator Co.* 32 Mo. App. 293; *National Bank v. Furtick*, 2 Marv. (Del.) 35, 44 L. R. A. 115, 42 Atl. 479.

A foreign corporation does not for all purposes become domestic, when it conforms to the laws of the states requiring "domestication," before transacting business; for instance, it does not become a citizen of the

state so as to prevent removals to the Federal courts.

Barron v. Burnside, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; *Philadelphia Fire Assn. v. New York*, 119 U. S. 120, 30 L. ed. 347, 7 Sup. Ct. Rep. 108; *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165.

If it is not, therefore, domesticated as to suit brought against it directly, how can it be said to be domesticated for the purpose of gaining jurisdiction over a nonresident, or his property to whom it owes money.

Garnishment had its origin in the custom of London, and by that custom garnishment did not lie unless the garnishee resided within the jurisdiction of the lord mayor's court.

Turbill's Case, 1 Wms. Saund. 67, note a; *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797.

If "suability" be the true test, then a debtor temporarily in the state could be garnished, for undoubtedly he could be sued. But the authorities are uniform that a debtor temporarily in the state cannot be garnished.

Balk v. Harris, 124 N. C. 467, 45 L. R. A. 260, 32 S. E. 799.

Clark, J., delivered the opinion of the court:

The defendant is a corporation chartered in Connecticut, and issued its policy of insurance to the plaintiffs, who are residents and citizens of this state, upon property located here. The property was partially destroyed by fire during the existence of the policy, and the amount of the loss has been adjusted in the manner required by the policy. This action is brought to recover that sum. The only defense set up is that a creditor of the plaintiffs in Pennsylvania has instituted an action against them in that state, and attached the liability of the defendant company to said plaintiffs by reason of said loss by garnishing the agent of the defendant in that state, which action was instituted before the beginning of this, and is still pending in the courts of that state; wherefore the defendant asks that this action be stayed till the determination of that. The courts of one state give full faith and credit to judgments rendered in another when jurisdiction has been obtained of the person or subject-matter; but, when such is not the case, the judgment of the foreign state is treated as a nullity. So the sole question here is whether the Pennsylvania court has acquired jurisdiction by such garnishment (for there was no personal service upon plaintiffs), since if it has not, then, as the judgment, if it shall be rendered adversely to these plaintiffs, will be a nullity, a stay of proceedings in the courts here will be useless. It is true that under the Pennsylvania statute the defendant, a Connecticut corporation, is required to appoint a resident agent in that state upon whom process can be served, and this is a condition which that state can exact of nonresident corporations, but that only renders the Connecticut corporation suable in Pennsylvania by giving

personal service upon its agent. It does not carry the situs of the debt it owes to the plaintiffs to Pennsylvania, and make the plaintiffs Strause suable in Pennsylvania, because their debtor, the defendant company, can be sued there for their own indebtedness to a plaintiff. If suability of the defendant were the test, the plaintiffs could be sued in every state and in every foreign country where their debtor has an agency. Many courts deny that a creditor can be brought into court by attaching a debt due to him, and it is certainly not very logical that a debt should have a situs where the debtor resides, for the debt is property of the creditor, not of the debtor. Some courts, however, have gone that far, including the courts of this state; but none have gone so far as to hold that debts may be ambulatory,—and well-nigh ubiquitous in this case,—by having a situs wherever the debtor has an agent who can be served with process for its own indebtedness. An attachment could be levied in Pennsylvania only upon property of the defendant in such action, and these plaintiffs had no property in that state, and the debt due them by the Connecticut corporation was not in the hands of such company's local agent in Pennsylvania. To put it as strongly as possible, suppose the defendant was a natural person, a citizen and resident of Connecticut, and was temporarily in Philadelphia, so that he could be personally served with process for his own indebtedness to a plaintiff, would that make him liable to garnishment by anyone holding a claim against those whom he owed? This question has often arisen, and has uniformly been decided in the negative. *Balk v. Harris*, 124 N. C. 467, 45 L. R. A. 260, 32 S. E. 709, and numerous cases cited at pages 469, 470, 124 N. C., p. 260, 45 L. R. A., and pp. 800, 801, 32 S. E. Even if the defendant company had become "domesticated," or had taken out incorporation in Pennsylvania, the Pennsylvania corporation would simply be an affiliated company, and would not swallow up or be substituted for the Connecticut corporation, which owes these plaintiffs, and the situs of whose indebtedness as such would not be affected, however it might be as to their transactions and indebtedness arising in Pennsylvania. The very point was decided in *Swedish-American Nat. Bank v. Bleecker*, 72 Minn. 383, 42 L. R. A. 283, 75 N. W. 740, where it is said: "The garnishee has filed such a stipulation [required by the statute], has established local agencies, and has been insuring property in this state. This did not, in our opinion, give the garnishee a domicile in this state for all purposes, or bring into this state the situs of debts which it owes elsewhere by reason of business transacted elsewhere. Neither the creditor nor the debtor resided in this state; none of the transactions out of which the indebtedness arose took place in this state, and the indebtedness was not payable in this state. Under these circumstances the debt has not a situs in this state. *Reimers v. Seasco Mfg. Co.* 37 U. S. App. 426, 30 L. R. A. 364, 48 L. R. A.

70 Fed. Rep. 573, 17 C. C. A. 228; *Douglass v. Phenix Ins. Co.* 138 N. Y. 209, 20 L. R. A. 118, 33 N. E. 938; *Renier v. Hurlbut*, 81 Wis. 24, 14 L. R. A. 562, 50 N. W. 783; *Louisville & N. R. Co. v. Dooley*, 78 Ala. 524; *Wright v. Chicago, B. & Q. R. Co.* 19 Neb. 175, 56 Am. Rep. 747, 27 N. W. 90; *Keating v. American Refrigerator Co.* 32 Mo. App. 293." The supreme court of Wisconsin, in *Renier v. Hurlbut*, cited above, says: "It is obvious from what has been said, that, if the indebtedness of the Boston company to Mrs. Renier had any situs outside of Wisconsin for the purposes of garnishment, it was at the home office of that company in Massachusetts; certainly not with the respective agents of that company, wherever located in the several states." This same view is taken and strongly reinforced in *National Bank v. Furtick*, 2 Marv. (Del.) 35, 44 L. R. A. 115, 42 Atl. 479, decided by the Delaware court of appeals in 1897. In that case, the court says: "True the garnishee is a corporation doing business in this state, but the debt due the defendant arose from its contract for insurance made through its agency in South Carolina with the defendant, a citizen of that state, and concerning property situate there, and was payable there, . . . and is not such a credit or property within this state as will confer jurisdiction. . . . To take any other view would be to hold that it existed, had its situs, and was liable to attachment in every state in this Union where the defendant happened to have an officer upon whom process could be served as a condition precedent to its being permitted to do business in such state." Upon the argument that, because the defendant is suable in Pennsylvania by service upon its local agent, therefore the plaintiffs, as creditors of the defendant, are suable also in that state, it may be said, following the Minnesota case, above cited, that while Strause Brothers might have sued the Connecticut Company in Pennsylvania by serving their summons upon its agent in Pennsylvania (by service upon the insurance commissioner in Minnesota, as required by its laws), this does not prove that the debt had a situs in Pennsylvania. Such action would be *in personam*, and not *in rem*, and it would be immaterial where the situs of the debt would be. Besides, the creditor may give the debt a situs there, for it naturally follows his person, and he can take it anywhere; but a third person, claiming to be a creditor of the creditor, cannot do this. He has no power to change the situs of the debt or give it a situs where it would not otherwise be. Statutes requiring domestication, or the appointment of a local agent by nonresident corporations as prerequisites to doing business in a state, enable any plaintiff to get personal service upon such corporation in an action upon its liabilities to such plaintiff, but it does not remove the corporation's property to such state, nor the situs of its debts, which have been created elsewhere; and it is only upon the latter ground that the indebtedness of the defend-

ant, a Connecticut corporation, to the plaintiffs, could be attached in Pennsylvania. In *Boyd v. Royal Ins. Co.* 111 N. C. 372, 16 S. E. 389, the point now presented was not discussed nor adjudicated, nor, indeed, does it appear that the insurance company, the garnishee, was not a Virginia company, which would have made the situs of the debt there, and attachable. At any rate,

the validity of the attachment was not questioned. *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797, also relied upon by defendant, does not apply, for it is not contended that the defendant here is a Pennsylvania corporation.

Affirmed.

OHIO SUPREME COURT.

BOARD OF COMMISSIONERS OF HARDIN COUNTY, *Plffs. in Err.*, v.

Josephine M. COFFMAN, Admr., etc., of
Freeman J. Coffman, Deceased.

(.....Ohio.....)

*1. An action under § 845 of the Revised Statutes, as amended April 13, 1894 (91 Ohio Laws, p. 142), to recover damages caused by the negligence of the county commissioners in failing to keep a bridge under their control in repair, is properly brought against the board in its official capacity; and the county is bound for the payment of the judgment recovered. Whether the county may have recourse to the official bonds of the commissioners for reimbursement,—*quære*.

2. The commissioners are bound to the exercise of ordinary care to keep the bridges under their control in a safe condition for all usual and ordinary modes of travel and transportation of property over them; but ordinary care does not require them to anticipate that a bridge will be used in an unusual and extraordinary manner, or subjected to an unusual and extraordinary burden involving peculiar danger, nor are they liable for an injury resulting from such use.

3. In an action against a board of county commissioners to recover damages for the death of a person caused by the breaking down of a bridge by a traction engine which was being propelled over it by steam, and drawing a water tank on which the deceased was riding, it is a question for the jury whether that method of using the bridge was, at the time of the accident, a usual and ordinary mode of travel and transportation of property over bridges in that locality, such as the commissioners should, in the exercise of ordinary care, have anticipated, and provided for by putting the bridge in proper condition for such use; and the question should be determined from a consideration of all the evidence.

4. A person about to cross a bridge in any of the usual and ordinary modes of travel, or transport property over it in any usual and ordinary way, has the right to assume that the public authorities have performed their duty, and therefore that the bridge is in a safe condition for such use;

*Headnotes by the COURT.

NOTE.—As to liability for breaking of bridge when subjected to unusual and extraordinary strain, see *Wabash v. Carver* (Ind.) 13 L. R. A. 851, and *note*; *Vermillion County Comrs. v. Chipps* (Ind.) 16 L. R. A. 228.
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and he is not chargeable with contributory negligence in acting upon that assumption, unless the appearance of the bridge, its situation, or structure, or other circumstance would suggest to a person of ordinary prudence that it is defective and dangerous, so that ordinary care would require either that he should forego the contemplated use, or make sufficient examination to reasonably assure him of its safety. But a person who chooses to subject a bridge to some extraordinary burden, by placing upon it some unusual weight, and causing it to be moved in an unusual manner, takes upon himself the risk of any injury thereby sustained, although the bridge is defective, and out of repair.

(June 20, 1899.)

ERROR to the Circuit Court for Hardin County to review a judgment affirming a judgment of the Court of Common Pleas in plaintiff's favor in an action brought to recover damages for the death of plaintiff's intestate, which was alleged to have been caused by defendants' negligently permitting a bridge to become out of repair. *Reversed*.

Statement by Williams, J.:

The original action was brought against the board of commissioners of Hardin county by Josephine M. Coffman, as executrix of her deceased husband, Freeman J. Coffman, to recover damages for his death, wrongfully caused, it is alleged, by the neglect of the commissioners to keep in repair a bridge under their control over a stream known as "Blanchard River," and forming part of a public road in that county. The death resulted from the bridge giving way on the 5th day of July, 1895, while the deceased was riding over it on a water tank drawn by a traction engine that was being propelled by steam. The petition charges that the bridge was of defective construction, and out of repair, in that the timbers which supported the floor were insufficient and unsound, the rods by which they were suspended from the truss were held only by nuts that were too small, and without washers, and the wood into which the rods were fitted was decayed; and these defects, it is averred, had increased from long exposure, rendering the bridge unsafe for travel upon it, of which the commissioners had notice, but nevertheless neglected to repair it. Issue was taken by the defendant on the charge of negligence, and a counter charge

made of contributory negligence on the part of the deceased. The plaintiff recovered a verdict on which judgment was rendered, and, that judgment having been affirmed by the circuit court, the commissioners brought error to this court. The opinion will contain such further statement of the case as may be considered necessary to an understanding of the questions upon which it is reported.

Messrs. Charles C. Lemert and Thomas C. Mahon, for plaintiffs in error:

The allegation that this bridge was located on a public county road does not state that it was a road that was generally traveled by the public.

Chase v. Cleveland, 44 Ohio St. 512, 58 Am. Rep. 543, 9 N. E. 225.

The expediency of building or repairing a bridge, however necessary, is an administrative, and not a judicial, question.

State ex rel. Emerson v. Hamilton County Comrs. 49 Ohio St. 305, 30 N. E. 785; 2 Kinkade, Pl. § 916.

Prior to the passage of the act of April 13, 1894, an action of this character could not be maintained.

Hamilton County Comrs. v. Mighels, 7 Ohio St. 120; *Grimwood v. Summit County Comrs.* 23 Ohio St. 600.

If the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, and not an individual, injury, and must be redressed, if at all, in some form of public prosecution.

Cooley, Torts, 379-382.

There is no authority for the commissioners to levy a tax for the payment of a judgment of this character.

Whenever the plaintiff's case shows any want of ordinary care under the circumstances, even the slightest, contributing in any degree, even the smallest, as a proximate cause of the injury for which he brings his action, his right of recovery is thereby destroyed.

Beach, Contrib. Neg. 2d ed. § 35; Cooley, Torts, 674, 675; *Timmons v. Central Ohio R. Co.* 6 Ohio St. 108; *Cleveland, C. & C. R. Co. v. Terry*, 8 Ohio St. 581; *Pittsburgh & W. Coal Co. v. Estievenard*, 53 Ohio St. 43, 40 N. E. 725; *Thomp. Neg.* 768, 769.

The defects complained of could not be detected from an ordinary examination, but it would require a close examination of an expert, by chopping or boring into the parts alleged to be defective, to discover the defects that caused the bridge to fall. To discover this alleged defect would have required extraordinary diligence on the part of the commissioners, and such a degree of vigilance as would have been unreasonable, —with their other official duties, impossible,—and such as, we think, the law does not require.

Blank v. Livonia Twp. 79 Mich. 1, 44 N. W. 157; *O'Neil v. Deerfield Twp.* 86 Mich. 610, 49 N. W. 596.

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only required to build and keep in repair bridges for ordinary use of the public, and with this exception is not liable.

Thomas, Neg. 794, 989, 991; *Chase v. Cleveland*, 44 Ohio St. 513, 58 Am. Rep. 543, 9 N. E. 225; *Oak Harbor v. Kallagher*, 52 Ohio St. 183; *Vermillion County Comrs. v. Chipps*, 131 Ind. 56, 16 L. R. A. 228, 29 N. E. 1066; *Clapp v. Ellington*, 51 Hun, 58, 3 N. Y. Supp. 516; *Gregory v. Adams*, 14 Gray, 242.

Messrs. Crow & Durbin and George E. Crane for defendant in error.

Williams, J., delivered the opinion of the court:

The action below was brought under favor of the provision added to § 845 of the Revised Statutes by the amendment of April 13, 1894 (91 Ohio Laws, p. 142). The material part of the section as thus amended reads as follows: "The board of commissioners shall be capable of suing and being sued, pleading and being impleaded in any court of judicature, and of bringing, maintaining, and defending all suits, either in law or in equity, involving an injury to any public state or county road, bridge or ditch, drain or watercourse established by such board in their county, and for the prevention of injury to the same; and any such board of county commissioners shall be liable in their official capacity for any damages received by reason of the negligence or carelessness of said commissioners in keeping any such road or bridge in proper repair." Though, prior to that amendment, the public roads and bridges of the several counties were placed under the control of their respective boards of commissioners, who were clothed with the necessary authority to keep them in repair, until its adoption there was no right of action against a county or its commissioners for damages sustained by the failure to keep a road or bridge in repair. So that the nature and grounds of the defendants' liability must be gathered from this amended statute, and its construction in these respects is, in several particulars, involved in the questions presented in the case. It is one of the claims of the plaintiff in error that the action will not lie, because no provision is made for raising the necessary fund with which to pay any damages that may be recovered. But it does not necessarily follow from the absence of such provision that the action must fail. Satisfaction comes after judgment, and that no present means exist of enforcing payment of a judgment is not a valid objection to its recovery. Means may be afterwards provided. There appears to be general authority vested in the commissioners to raise funds by taxation for all county purposes, and that would seem to include the power to levy taxes to the satisfaction of judgments against the county for whose payment no other or special provision is made.

Another claim of the plaintiff in error—one made on demurrer to the petition—is that, because the liability created by the statute is that of the commissioners in their

official capacity, for their official neglect, redress must be sought by action on their official bonds, which are required in order to secure a faithful and diligent performance of their official duties; and, furthermore, that as the negligence charged includes the defective construction of the bridge, which was built before the act was passed, the action is not maintainable against the board of commissioners as constituted when the injury complained of was sustained. The material fact, however, from which the liability for a defective bridge arises, is the negligence of the commissioners in not keeping it in repair when the injury occurs; and the length of time the defect had continued before, or how it originated, are unimportant, except as tending to show knowledge of its existence. The negligent omission to make needed repairs on a bridge known to be out of repair is, within the purview of the statute, a negligent failure to keep it in repair; and the liability of the commissioners in their official capacity is the liability of the county they represent to the person injured by their culpable neglect. Whether, in the first instance, recovery might be had on their bonds, or, whether the county may have recourse to them for reimbursement of the damages paid by it, are questions not now before us, and upon which we express no opinion. We are satisfied that in a proper case the action may be maintained, as this one was brought, directly against the board of commissioners in their official capacity.

Questions deemed of more practical importance in the report of the case arise upon the charge of the court and its refusal to charge as requested by the defendant. The jury were instructed, in substance, that the plaintiff was entitled to recover, in the absence of contributory negligence on the part of the deceased, if the defendant failed to have the bridge examined within a reasonable time after April 13, 1894 (when the amendment of the statute took effect), and from defects in its construction, or want of repair, as alleged in the petition, it was, at the time of the accident that resulted in the decedent's death, in an unsafe condition for the public use "in the way it was then being used." And furthermore, it was a question for the jury "whether the bridge, at the time of the accident, was in a reasonably safe condition for the use of the public in passing over it, in the way it was then being used." The effect of the charge was to hold the commissioners responsible if they failed to examine the bridge, and put it in a condition of safety for the use that was being made of it when it gave way,—that is, for the safe passage over it of the traction engine and water tank on which the deceased was riding,—although that may have been an unusual and unexpected use of the bridge, creating a burden of extraordinary weight. This is a different measure of responsibility from that imposed by the statute. It enjoins on the commissioners no absolute duty to make examination of the bridges

under their control, and to put them in a condition of safety for all possible emergencies. Their only liability is for such damages as result from their negligence with respect to keeping a bridge in repair; and, as no special standard of care is prescribed by the statute, the degree required does not extend beyond that which reasonably prudent persons would ordinarily exercise in a like situation, in view of the purposes of the bridge, and the general uses which it should reasonably be expected would be made of it. The object of the law in requiring the maintenance of highway bridges undoubtedly was to make provision, in a reasonable way, for the safety, convenience, and accommodation of public travel in all usual and ordinary ways to which they are adapted. Such probable use of them the commissioners are bound to anticipate, and proper care on their part would require them to keep such bridges in suitable repair for those purposes. That is no more than is demanded in the exercise of ordinary care. But it would seem unreasonable to require of the commissioners that they should anticipate and provide for some extraordinary use of a bridge that would subject it to an unusual burden,—one not likely to be placed upon it in its common and general use. That would impose upon them the duty of extraordinary care, which the statute does not exact. Accordingly we find that, when the question has been made in those states where local authorities are charged with the duty of maintaining ways and bridges, and made answerable in damages for their neglect to do so, it is held that a liability does not arise from neglect to keep a bridge in a safe condition for any unusual or extraordinary use, but only when there is a failure to keep it in repair for such use as is usual, ordinary, and probable. In *Gregory v. Adams*, 14 Gray, 242, 248, which was an action against a town for damages for the loss of an elephant killed by the falling of a bridge that was out of repair while the elephant was being taken over it, Merrick, J., states the rule to be that the public authorities in charge of bridges "are not required to make preparations for the safety or convenience of those who undertake to use those ways in an unusual or extraordinary manner, involving peculiar and special peril and danger, whether it be in respect to the kind or character of animals led or driven, or the magnitude or construction of carriages used, or the bulk or weight of property transported." In Pennsylvania, where townships are liable in damages for failure to keep their bridges over streams in repair, in an action brought against a township by the owner of a threshing machine for damages done to it by the breaking down of a bridge over which it was being moved by a traction engine, it was held that "a township is not required to assume that its bridges will be used in an unusual and extraordinary manner, either by crossing at great speed or by the passing of a very large and unusual weight. As it does not anticipate any such use, it is not required to so build as to pro-

tect against injury resulting from such reckless conduct. Its liability stops with constructing and maintaining its bridges so as to protect against injury by a reasonable, proper, and probable use thereof, in view of the surrounding circumstances, such as the extent, kind, and nature of the travel and business on the road of which it forms a part." *McCormick v. Washington Twp.* 112 Pa. 185, 4 Atl. 164. In that case instructions were affirmed by which the jury were informed that the duty of the supervisors of the townships was "well performed if the bridge complained of was in a reasonably safe condition for travel in the ordinary modes in the neighborhood, and by the people who commonly used the bridge;" and that they were not required "to make preparation for the safety or convenience of those who undertake to use the highway in an unusual and extraordinary manner, involving peculiar peril and danger by reason of the magnitude or construction of the carriages used, or the volume or weight of the property transported." That case was followed in *Com. v. Allen*, 148 Pa. 358, 16 L. R. A. 148, 23 Atl. 1115, and *Clulow v. McClelland*, 151 Pa. 583, 17 L. R. A. 650, 25 Atl. 147. In *Clapp v. Ellington*, 51 Hun, 58, 3 N. Y. Supp. 516, where the facts were not substantially different from those in this case, it was held that, "while the commissioner of highways is required to construct and maintain bridges of sufficient strength and material to insure the safety of persons passing over them with such vehicles as are commonly and ordinarily used in that county, he cannot be required or expected to construct and maintain bridges which will insure the safety of persons passing over them in a manner involving peculiar and special danger arising from any unusual weight." The doctrine of these cases has been maintained in *Yordy v. Marshall County*, 86 Iowa, 340, 53 N. W. 298, and other Iowa cases, and also in *Vermillion County Comrs. v. Chipps*, 131 Ind. 56, 16 L. R. A. 228, 29 N. E. 1066, and other cases in that state.

From these authorities, as well as upon principle, it seems clear that in determining the liability of the defendant in this case the controlling question is whether the use that was being made of the bridge when Coffman received the injury which caused his death was such usual and ordinary use of it as reasonably prudent persons in the situation of the commissioners, and charged with their duties, would, in the exercise of ordinary care, in view of all the facts, have anticipated would be made of the bridge, and would be attended with danger of injury resulting to persons or property. If so, and the injury resulted from the failure of the commissioners to keep the bridge in repair, there was actionable negligence on their part; but not if the use was of that unusual or extraordinary character involving peculiar danger which ordinary care did not require the defendants to anticipate and provide against. And that question, it is manifest, is one for the jury to determine from all the facts and circumstances of the 48 L. R. A.

case; not alone from the fact that the vehicle which was being moved over the bridge at the time was an engine and attachments weighing nearly 5 tons, to which the deceased added his own weight by riding upon it, and that it was propelled by steam power, though this could not be otherwise than important for the consideration of the jury. Such machinery and implements have come into use to some extent in some localities in threshing grain and other agricultural purposes, and are propelled by steam from place to place over the public highways, in the course of the business in which they are employed; and the extent to which that use of such machinery and that method of travel on the public roads and bridges had prevailed in that locality, if at all, before the occurrence, together with all the other pertinent facts shown by the evidence on the question, should be taken into consideration by the jury in determining whether that at the time had become a usual or ordinary method of travel and transportation in that locality,—such as, at that time, ordinary care on the part of the commissioners should have anticipated and provided for, within the rule already stated. In *Coulter v. Pine Twp.* 164 Pa. 543, 30 Atl. 490, it was held that, "in an action against a township to recover damages for death caused by a traction engine breaking through a township bridge, it is proper to leave to the jury the question whether or not traction engines had become a usual and ordinary mode of travel when the supervisors reconstructed the bridge, about five years before the accident." The instruction given in that case which was approved, was that the case turned upon the question whether or not traction engines had become a usual and ordinary mode of travel when the supervisors of the township reconstructed the bridge; and that, if they had, then it was the duty of the supervisors to so construct, and thereafter maintain, the bridge as to make it reasonably safe for such modes of travel. A similar instruction was sustained in *Clulow v. McClelland*, 151 Pa. 583, 17 L. R. A. 650, 25 Atl. 147, and *Clapp v. Ellington*, 51 Hun, 58, 3 N. Y. Supp. 516. The charge of the court in the case before us failed to submit this material question to the jury, and practically excluded its consideration.

Similar considerations enter into the question of the contributory negligence of the person injured in such a case. In *Gregory v. Adams*, 14 Gray, 242, 248, the supreme court of Massachusetts held it to be the proper rule that, "if any person undertakes to use or travel upon a public highway in an unusual or extraordinary manner, or with animals, vehicles, or freight not suitable or adapted to a way opened and prepared for the public use in the common intercourse of society and in the transaction of usual and ordinary affairs of business, he then takes every possible risk of loss and damage upon himself; and he can have no remedy against the town to recover recompense for injuries sustained, although they be the direct result of defects and im-

perfections in a way for which it would be responsible in case of injury to individuals in the lawful and proper use of it." In *Clapp v. Ellington*, 51 Hun, 58, 3 N. Y. Supp. 516, a charge was sustained which instructed the jury that, if "the vehicle upon which the plaintiff was riding, and with which he was connected in passing over the bridge at the time of the accident in question, was unusual and extraordinary in weight, in method of construction, or manner of propelling the same along the highway, and such unusual weight, method of construction, and locomotion was such as to cause unusual and extraordinary strain upon the bridge in passing over it, then the plaintiff took every possible risk of injury upon himself in trying to pass over the bridge, and the plaintiff cannot recover for the injuries sustained by the breaking down of the bridge under such circumstances, although his injuries were the direct result of such imperfections and defects in the bridge." The rule declared in these cases was followed, substantially, in each of the other cases already cited, and appears to be a reasonable one. A person about to cross a bridge in any of the usual and ordinary modes of travel, or transport property over it in any usual and ordinary way, has the right to assume that the public authorities have performed their duty, and therefore that the bridge is in a safe condition for such use; and he is not chargeable with contributory negligence in acting on that assumption, unless the appearance of the bridge, its situation or structure, or other circumstance would suggest to a person of ordinary prudence that it was defective and dangerous, so that ordinary care would require either that he should forego the contemplated use, or make sufficient examination to reasonably assure him of its safety. But a person who chooses to subject a bridge to some extraordinary burden by placing upon it some unusual weight, and causing it to be moved in an unusual manner, takes upon himself the risk of any injury thereby sustained, although the bridge was defective, and out of repair. The proper test is not, as stated in an instruction requested by the defendant, whether the engine and tank on which the deceased was riding were of greater weight, and more dangerous, than ordinary wagons and teams, but were they, with the deceased upon them, and the use to which the bridge was then being put, an unusual method of travel and transportation, involving extraordinary peril, at that time and place? or were the circumstances such that a person of ordinary prudence, in the exercise of ordinary care in the situation of the deceased, would reasonably apprehend and anticipate that it would be dangerous to go upon the bridge in that way? If so, he was guilty of negligence proximately contributing to his death; otherwise, not. The instructions given on the subject were such that, in order to charge the deceased with contributory negligence, it was necessary for the jury to find that he was actually "aware of the condition of 48 L. R. A.

the bridge, and had good reason to believe it was not sufficient to sustain the load that was about to pass over it." Actual knowledge and good reason to believe is more than the rule, as we have stated it, requires. The instructions requested were inaccurately expressed, and their refusal was not error. But the case was erroneously given to the jury, as we have indicated.

Judgment of the Circuit Court and of the Court of Common Pleas reversed, and cause remanded for a new trial.

STATE of Ohio, *Exceptant*,
v.

William THOMAS.

(61 Ohio St. 444.)

- *1. A judge of the court of common pleas has authority to hold court in any county in his district, though not designated by the judges of the district, as provided by § 468 of the Revised Statutes, to hold court in that county; and an indictment found and returned at a term so held is not invalid, either because the judge holding the term was not designated to hold the same, or because the judges of the district failed to apportion the labor of holding the courts among themselves, and issue an order specifying the terms to be held by each judge.
2. Construing § 457 of the Revised Statutes with § 446-2, which makes the first Monday in September a holiday to be known as "Labor Day," it is not unlawful to hold the court of common pleas on that day, when the judges of the district, in the exercise of their powers under the first of these sections, have fixed that day for the commencement of the term; and an indictment found and returned by a grand jury impaneled and sworn on that day is not, on that account, invalid.
3. Where, after a grand jury has been sworn, a member is discharged on account of sickness, and another person having the legal qualifications is sworn in his stead, as provided by § 7202 of the Revised Statutes, and the person so sworn takes his place on the panel, the body so constituted is a legal grand jury, though a foreman be not again appointed, nor the oath readministered to him or to the other members as a body.
4. It is not necessary that the records of the court should show how or by whom the grand jurors were selected and drawn. The legal presumption is that duty was regularly performed by the proper officers, but, if it was not so done, that is not a valid objection to an indictment.

(January 9, 1900.)

EXCEPTIONS by the state to rulings of the Court of Common Pleas for Brown County which resulted in the quashing of

•Headnotes by the COURT.

NOTE.—As to how far the law of holidays extends to matters other than those relating to negotiable paper, see *Merchants' Nat. Bank v. Jaffray* (Neb.) 19 L. R. A. 316, and *note*; *Whipple v. Hill* (Neb.) 20 L. R. A. 313.

an indictment for the stealing of a horse and carriage. *Sustained.*

Statement by **Williams, J.:**

The grand jury impaneled at the September term, 1899, of the court of common pleas of Brown county found and returned the following indictment against William Thomas for horse stealing and grand larceny: "The jurors of the grand jury of the state of Ohio, within and for the body of the county of Brown, aforesaid, on their oaths, in the name and by the authority of the state of Ohio, do find and present that William Thomas, late of the county aforesaid, on the 17th day of July, in the year of our Lord one thousand eight hundred and ninety-nine, at the county aforesaid, unlawfully and purposely did steal, take, and drive away one bay mare, of the value of forty dollars (\$40.00), the personal property of Frank E. Boyd, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio. And the jurors of the grand jury aforesaid, in and for the county aforesaid, upon their oaths aforesaid, and in the name and by the authority of the state of Ohio aforesaid, do find and present that the said William Thomas aforesaid, late of the county aforesaid, at the times and date aforesaid, at the county aforesaid, unlawfully and purposely did take, steal, and haul away one black-painted, top buggy, then and there being of the value of fifty dollars (\$50.00), the personal property, goods, and chattels of one Frank E. Boyd, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio." The indictment was duly signed and indorsed, and was placed on file by the clerk.

At the same term the accused filed the following motion to quash the indictment: "The defendant, William Thomas, moves the court to quash the said indictment against him for the following defects appearing on the face of the record, to wit: (1) Because no judge was assigned and designated to hold the April term, A. D. 1899, of said common pleas court, as required by § 468 of the Revised Statutes of the state of Ohio. (2) Because no judge was assigned and designated to hold the September term, A. D. 1899, of said court, as required by law. (3) Because no valid order was made for the drawing of the grand jury which found said indictment. (4) The judge who fixed and determined the number of ballots to be drawn from the jury wheel for the grand jury and the petit jury for the September term, A. D. 1899, of said court, had not been designated to hold the common pleas court in said county, as required by law. (5) The grand jury which found said indictment was not drawn and impaneled as required by law. (6) The record does not show that the grand jury which found said indictment was drawn at the time and place and by the persons designated by law. (7) The judge who convened and presided at the September term, A. D. 1899, of the said court 48 L. R. A.

of common pleas, had no authority or jurisdiction to hold the said September term, A. D. 1899, of the said court of common pleas; and neither the said judge nor the said court had jurisdiction or authority, at the time and place appearing on the face of the records, to open or hold said court, or to impanel, swear, or charge, or to have impaneled, sworn, or charged, the said grand jury which found the said indictment against this defendant; the day of the convening of said court, and impaneling of said grand jury, to wit, the 4th day of September, being a legal holiday, to wit, Labor Day. (8) The said grand jury which found said indictment had no jurisdiction of the person of this defendant, nor had said grand jury any jurisdiction to inquire into said alleged offense, or present any indictment against this defendant therefor. (9) The said Samuel F. Walker, one of the grand jurors who found said indictment, and who was called by the court instead of A. E. Emmett, discharged, was not sworn as such grand juror according to law. (10) The said grand jury which found said indictment, after the substitution of the said Samuel F. Walker as a member thereof for the said A. E. Emmett, discharged, was not impaneled, sworn, or charged according to law. (11) Because no foreman of said grand jury, as it was constituted after the substitution of the said Samuel F. Walker for the said A. E. Emmett, was appointed by the court, or sworn in the manner and form prescribed by law. (12) The grand jury which found said indictment was not impaneled and sworn as required by law. (13) Said grand jury was not legally constituted, and was not a lawful grand jury. (14) Because said indictment was not prepared nor presented by the grand jury as required by law. (15) Because the said indictment is insufficient in form and substance. (16) For other reasons apparent on the record."

The motion was sustained, and the defendant ordered to enter into a recognizance, with surety, for his appearance at the next term of the court, to await the action of the grand jury at that term, and, in default thereof, to stand committed for that purpose. The prosecuting attorney excepted to the ruling of the court in sustaining the motion, and, on leave granted him, filed a bill of exceptions taken in that behalf, in this court. The only questions argued are those involved in the motion to quash the indictment, and they are sufficiently stated in the opinion.

Mr. James W. Tarbell, for exceptant:

Rev. Stat. § 468, so far as it requires the judges to fix the terms of the common pleas courts, is mandatory; but the other provision of the section, for the apportionment of the labor, and specifying what judge shall hold each term or part of term, is merely directory. An act of the essence of a thing required by a statute is imperative; but the mode of doing it may be directory.

Hubble v. Renick, 1 Ohio St. 175; *State v. Elson*, 45 Ohio St. 648, 16 N. E. 684.

Where the provision of a statute is the essence of the thing required to be done, it is mandatory; otherwise, when it relates to form and manner; and where an act is incident, or after jurisdiction acquired, it is directory merely.

Davis v. Smith, 58 N. H. 17; *Endlich*, Interpretation of Statutes, §§ 431, etc.; 14 Am. & Eng. Enc. Law, 249; 1 Bouvier Law Dict. 424; *Dutiot v. Doyle*, 16 Ohio St. 400.

No law can require the correction of an error in its construction, which has long existed and has been generally acquiesced in.

Brown v. Farran, 3 Ohio, 140; *Chesnut v. Shane*, 16 Ohio, 599, 47 Am. Dec. 387; *Craig v. Fox*, 16 Ohio, 568; *Bank of Chillicothe v. Swayne*, 8 Ohio, 284, 32 Am. Dec. 707.

The judges of the courts of common pleas are judges of their respective districts, and not of the mere subdivisions thereof. The subdivision of districts is for election purposes merely.

Const. art. 4, § 3; *Harris v. Gest*, 4 Ohio St. 473; *Cincinnati, S. & C. R. Co. v. Sloan*, 31 Ohio St. 1.

The record need not affirmatively show that the grand jury which found the indictment was drawn at the time and place, and by the persons, designated by the law.

Blair v. State, 5 Ohio C. C. 496; *Huling v. State*, 17 Ohio St. 583.

The organization of the grand jury will be presumed to be regular until the contrary is shown by the plea.

9 Am. & Eng. Enc. Law, p. 5; *Preston v. State*, 63 Ala. 127.

It is not necessary that all of the jurors should hear the full charge.

Wadlin's Case, 11 Mass. 142; *State v. Froiseth*, 16 Minn. 313, Gil. 277; *Findley v. People*, 1 Mich. 235.

Is it absolutely necessary that they should be instructed at all by the judge?

9 Am. & Eng. Enc. Law, 8.

When the grand jury retired on the 5th day of September, unchallenged, to consider of cases, it was a legal grand jury with full legal authority to find and return indictments.

Hastings v. Columbus, 42 Ohio St. 585.

A court may meet and adjourn on Sunday.

Jones v. State, 14 Ohio C. C. 35.

Messrs. **W. D. Young** and **E. R. Young**, for defendant:

The drawing of the grand jury list is an essential step in the prosecution for crime.

An indictment can be found only by a lawful grand jury.

Doyle v. State, 17 Ohio. 222.

If the record must disclose the names of the grand jurors,—and that it must cannot be doubted,—there is more potent reason for the requirement that their names should be lawfully selected.

This omission cannot be supplied by presumption.

Goodin v. State, 16 Ohio St. 344; *Cantwell v. State*, 18 Ohio St. 477.

The court could not lawfully transact any
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business on Labor Day, except to adjourn to a subsequent day; and its action in impaneling the grand jury was absolutely void, and the grand jury impaneled and sworn on that day was illegal and wholly without lawful power to find the indictment.

Ohio Rev. Stat. § 4446-2; *Spiedel Grocery Co. v. Armstrong*, 8 Ohio C. C. 489; *Jones v. State*, 14 Ohio C. C. 35.

Although by virtue of Rev. Stat. § 7202, the court had a right to discharge the sick member and make the substitution of Walker, yet this action was but a part of the proceedings to make another and different grand jury, to make which a legal grand jury a foreman should have been selected and the jury sworn as provided in §§ 7190, 7191, and 7203.

If the grand jury that found the indictment was one and the same grand jury that was first impaneled and sworn, then there must have been an interregnum—a period of time, long or short—during which but fourteen members composed the grand jury. But the words "grand jury" import, *ex vi termini*, a body composed of fifteen grand jurors; it cannot consist of a greater or less number than fifteen.

Young v. State, 6 Ohio, 435; *Doyle v. State*, 17 Ohio, 222.

Whatever is prescribed by the Constitution and laws of the state to be done in the prosecution of crimes is essential to the jurisdiction and power of the court, and can neither be omitted nor waived.

Doyle v. State, 17 Ohio, 225; *Williams v. State*, 12 Ohio St. 622; *Goodin v. State*, 16 Ohio St. 346; *Cantwell v. State*, 18 Ohio St. 477.

Williams, J., delivered the opinion of the court:

The objections made to the indictment are in substance: (1) That the judge who opened and held the term of the court at which the indictment was found was without jurisdiction to impanel the grand jury, or to receive its report, because he had not been assigned to hold that term by the judges of the district, nor so designated in any order issued by them; (2) that the grand jury was without authority to find and return the indictment, because it was impaneled and sworn on a legal holiday known as "Labor Day;" (3) that the body by which the indictment was found and returned was not a legally constituted grand jury, for the reason that, after the original panel was sworn, and before the indictment was returned, a new member was substituted in the place of one who was excused on account of sickness, and after the substitution the body was not again sworn and charged, though the new member was; and (4) that the record fails to show the grand jury was selected and drawn as required by law. It should be observed here that none of these objections properly arise on motion to quash; and for that reason alone the exception should be sustained. Except so far as they tender issues of fact, the proper mode

placed on the power of the judges with respect to the days they may fix for the commencement of the term, but that is left entirely to their discretion; and the courts are required to commence on the days they shall so fix. Considering this section in connection with the Labor Day statute, under a well-settled rule of interpretation, the former being a special provision for particular cases, acts authorized by it may be regarded as excepted from the operation of the latter, especially since the latter contains no express prohibition against such acts. As a general rule, no act can be considered unlawful by implication from one statute that is expressly authorized and required by another valid statute. Though that section (457) was passed before the Labor Day statute, there is nothing in the latter to indicate an intention to repeal the former, or that restricts its operation; nor is there such inconsistency between them that both may not stand together and each have its appropriate effect. The prohibitive and penal provisions of the latter statute, whatever those may be, cannot be enlarged by implication so as to render unlawful any act authorized by the former, and it is not claimed that result is accomplished by any express provision. If it were enacted by statute that a term of court should commence on the first Monday of September, it could not be doubted that the term so held would be lawful, and its proceedings valid, notwithstanding the statute making that day a holiday; and the effect cannot be different where that day is so fixed by the judges under the express authority conferred on them by statute. It was perfectly competent for the legislature to make any act lawful when done on Labor Day that is lawful on any other day, and to that extent the statute creating Labor Day must be regarded as qualified and restrained. It was upon this principle that the case of *Perkins v. Jones*, 28 Wis. 243, was decided. It was there held that a statute which declared that no court shall transact any business on the 22d day of February, "unless it be for the purpose of instructing or discharging a jury, or receiving a verdict," and another statute, which required that "in all cases where a verdict shall be rendered in a justice's court, the justice shall 'forthwith render judgment,'"—must be construed together so as to prevent a failure of justice, and must be held to authorize an immediate entry of judgment where the verdict is received on the 22d of February." It is apparent that 48 L. R. A.

we have before us a much stronger case for the application of the principle than the one just cited, for there is, as has been seen, no express provision of our Labor Day statute that conflicts with § 457. Ordinarily it may be supposed that the judges would not fix a holiday for the commencement of a term of the court, but, if they choose to do so, or do so inadvertently, it is nevertheless an authorized exercise of the powers conferred on them, and neither their action nor that of the court held in pursuance thereof is, for that reason, void. It appears from the bill of exceptions that, after the grand jury had been sworn and charged, one of its members was discharged on account of sickness, and another person, having all legal qualifications, was sworn and substituted as a grand juror in the place of the one discharged; and the body thus constituted found the indictment in question. It is contended that body was not a legal grand jury; that, when the member was discharged, the grand jury of which he had been a member was dissolved, and, when the substitution was made, it was necessary to organize a new grand jury by the appointment of a foreman, and administering the necessary oath to him and to his fellow jurors. But the action of the court seems to have been in conformity with the statute, by which it is provided that, "in case of sickness, death, discharge, or nonattendance of a grand juror after the grand jury is sworn, the court, at its discretion, may cause another to be sworn in his stead." Rev. Stat. § 7202. When the new juror is so sworn, and takes his place, the vacancy is filled, and the grand jury again complete; and in their deliberations, findings, and presentments all of the grand jurors are bound by the same oath. The readministration of the oath to the foreman and to the members as a body, could add nothing to its obligation, is not required by the statute, and would at most be an idle ceremony, the omission of which could work no substantial injury.

The remaining objection to the indictment is sufficiently answered by what has already been said. It is not necessary that the records of the court should show how, or by whom, the grand jurors were selected and drawn. The presumption of law is that duty was regularly performed by the proper officers, but, if it was not so done, the objection, if it can be of any avail, must be made in a different mode.

Exceptions sustained.

CONNECTICUT SUPREME COURT OF ERRORS.

STATE of Connecticut *ex rel.* Morgan G. BULKELEY *et al.*

v.

Samuel H. WILLIAMS, Treasurer of Glastonbury, *Appt.*

(68 Conn. 181.)

1. The legislature may require a town to contribute a portion of the cost of maintaining a highway or bridge wholly outside of its territorial bounds, but which specially benefits the town.
2. The representation of a town in the state legislature, which charges the town with a portion of the expense of a highway or bridge district in which the town is placed and which is under the control of commissioners not selected by the town, but who draw orders for funds upon it, is sufficient answer to the objection that the town is taxed by these commissioners without representation.

3. A town tax for moneys to be paid over to the treasurer of a bridge or highway district in which the town is included, for district expenditures, may be required by the legislature.

4. The right of a town to regulate its own finances and affairs, superior to all legislative control, is not among the rights and privileges "derived from our ancestors," to "define, secure, and perpetuate" which the Constitution of Connecticut was adopted, and to which its preamble refers.

5. Failure to require any estimate of the amount needed for the ensuing year to be submitted to a town by a bridge district which includes it, before the time for laying a tax, does not make void a statute

NOTE.—Power of the legislature to impose burdens upon municipalities and to control their local administration and property.

- I. Introductory.
- II. Power to impose burdens.
 - a. Generally.
 - b. Public and quasi-public improvements.
 - c. Compelling payment of non-legal demands.
 - d. Validating defective obligations.
- III. Power in respect to officers and local administration.
- IV. Power in respect to property and franchises.

I. Introductory.

Municipal corporations are, for the purposes of this note, deemed to include only incorporated villages, towns, and cities.

The general subject of legislative power over municipal corporations is discussed in the note to *Daly v. Morgan* (Md.) 1 L. R. A. 757.

Many of the cases assert a very extensive power of control in the legislature over municipal corporations.

Thus: The United States Supreme Court in affirming the principal case in *Williams v. Eggleston*, 170 U. S. 304, 42 L. ed. 1048, 18 Sup. Ct. Rep. 617, says "a municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as such it is subject to the control of the legislature."

Cities are the auxiliaries of the state in the business of municipal rule, but they cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between themselves and the legislature. *Mount Pleasant v. Beckwith*, 100 U. S. 514, 25 L. ed. 699.

This statement was made with reference to an act which extinguished a municipal corporation and annexed its territory to other corporations.

The legislature may, under proper limitation, change, modify, or restrain public corporations, which, like counties, towns, and cities, exist only for public purposes, securing, however, the property for the uses of those for whom and at whose expense it was originally purchased. *Terrett v. Taylor*, 9 Cranch, 48, 3 L. ed. 650.

A municipal corporation is a public institution created for public purposes, and is a political subdivision or department of the state government, regulated and constituted by public

law. The original power to control as well as to create them is in the legislature. *Payne v. Treadwell*, 16 Cal. 221.

Private corporations cannot be deprived of their franchises except by a judicial judgment, but all such as are created merely for the purpose of city government are so far creatures of the legislature that they may be controlled and have their constitutions altered and amended by it in such manner as the public interest may require. *State v. Savannah*, 8. M. Charit. (Ga.) 250.

The division of laws which establish and regulate municipal corporations, into organic and ordinary, does not exist in Louisiana. "In the country from which we derive our ideas on the subject of municipal corporations, the charters of cities were . . . contracts entered into between the corporators on the one hand, and the king or feudal lord on the other, by which liberties and franchises were bartered for personal service or money. The rights and powers which those charters conferred were of the nature of those secured to the people at large by our constitutions. They were intended to be permanent, and could not be lawfully taken away. . . . But the relation existing between our municipal corporations and the sovereign is not the same." *Reynolds v. Baldwin*, 1 La. Ann. 162.

The legislature may extend, abridge, or abrogate by general law the powers and functions of the instrumentalities of government which it has created, and may impose additional duties and confer additional power upon the municipalities. *Jones v. Lake View*, 151 Ill. 683, 38 N. E. 688.

The legislature has power to create municipal corporations, to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action whenever it is deemed unwise, impolitic, or unjust, and even abolish them altogether in the legislative discretion. *Groff v. Frederick City*, 44 Md. 67.

No principle is better established or more fundamental in its character than that a municipal corporation, being organized for political purposes, is constantly subject to the control of the legislature, and is liable at all times to have its public powers, rights, and duties modified, changed, or abolished as the legislature may deem proper. *Frederick v. Groshon*, 30 Md. 436, 96 Am. Dec. 591.

Where a municipal board is acting in its municipal capacity in the discharge of duties imposed upon it by the legislature for the pub-

charging the town with a portion of the expenses of the district, on the ground that it does not provide the necessary funds.

6. The legislature may reconsider an apportionment of the expense of a highway and bridge over a river between a city and certain towns, although its former apportionment was based on a determination by judicial proceeding.
7. A statute taking the maintenance of a bridge upon the state has no element of a contract, and gives rise to no vested rights such that the legislature cannot afterwards charge the expense of the bridge upon towns specially benefited thereby.
8. The invalidating of a provision in and impairment of a contract between the state and a bridge company for the construction of a bridge, by a statute charging the burden of the bridge upon a city and towns specially benefited, instead of upon the

state, will not avail to relieve the city and towns of their liability,—especially after a settlement between the state and the company.

9. A right to the equal protection of the laws is not secured to a municipal corporation as against the state by the 14th Amendment to the Federal Constitution, so as to limit in any way the power of the state legislature to charge the municipality with public obligations; nor have the inhabitants in their capacity of members of such corporation any greater rights or immunities.
10. A town is not deprived of property without due process of law by a statute making it a part of an incorporated highway or bridge district under the control of commissioners who may draw upon the town for a fixed portion of the expenses of the district.
11. No such right of local self-government is given to a town, under the Constitution of the United States or that of

lic benefit, it may be said practically to be entirely within the control of the legislature. *State ex rel. Cleveland v. Jersey City Bd. of Finance and Taxation*, 88 N. J. L. 259.

The grant of powers of local government to a municipal corporation is not a contract, but an exercise of legislative power, and the legislature may at any time take away, resume, or limit such powers in the same manner as those conferred upon courts. *Jersey City v. Jersey City & B. R. Co.* 20 N. J. Eq. 360.

The legislature has the right to change or repeal a municipal charter, and such right is not changed or impaired by the fact that the charter is granted in the same act that creates a private corporation whose rights cannot be changed or repealed without its consent. *Patterson v. Society for Establishing Useful Manufactures*, 24 N. J. L. 585.

The legislature has entire control over municipal corporations, to create, change, or destroy them at pleasure, and they are absolutely created by the act of incorporation without the acceptance of the people, or any act on their part, unless otherwise provided by the statute itself. *Berlin v. Gorham*, 34 N. H. 266.

The legislature may recall to itself and exercise at its pleasure so many of the powers it has conferred upon the city corporation as are not secured to it by the Constitution. This necessarily results from the fact that all the legislative power of the people is granted to the legislature, except such as is expressly reserved. *People v. Pinckney*, 32 N. Y. 377.

A town is, as to the powers it shall possess and the functions it shall perform, the creature of the legislative will. *Duanesburgh v. Jenkins*, 57 N. Y. 177.

All the authorities are agreed that municipal corporations are within the absolute control of the legislature, and they may be abolished at any time in its discretion. *Luehrman v. Shelby County Taxing Dist.* 2 Lea, 425.

A city is entirely under the control of the legislature, and it has no vested right, which may not be taken away by the legislature, to tax particular property for municipal purposes. *State Bank v. Madison*, 3 Ind. 43.

Considered as mere agencies of government, municipal corporations are undoubtedly subject to the absolute control of the legislature, except, perhaps, as to their property rights.

Many of the cases, however, have recognized a twofold character in such corporations,—the one public, as regards the state at large in so far as they are its agents in government; the other private in so far as they are to provide the local necessities and conveniences for their own citizens,—and have denied the absolute

control of the legislature over matters referable to the private, as distinguished from the public, character of such corporations.

The difficulty in placing a limit to the legislative control over municipal corporations, at least where their property rights are not concerned, is to find any constitutional restriction upon it.

This difficulty was obviated by Justice Cooley, in *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, by resorting to the doctrine of an implied constitutional guaranty to municipal corporations of the right of self-government in respect to purely local affairs. He based this doctrine upon the fact that the Constitution was adopted in view of, and recognized the existence of, a system of local government well understood and tolerably uniform in character, existing from the early settlement of the country. The opinion says that the question, broadly and nakedly stated, is "whether local self-government in this state is or is not a mere privilege conceded by the legislature in its discretion, and which may be withdrawn at any time at pleasure." As already shown, he regarded it as a constitutional right, and not merely as a legislative privilege; but a different view of the question has been taken by other courts.

Thus: The maxim of republican government that local affairs shall be managed in the local district is subject to such exceptions as the legislative power shall see fit to make. The legislature has the power to do whatever is not expressly or by necessary implication forbidden by the Constitution. *Luehrman v. Shelby County Taxing Dist.* 2 Lea, 425.

There is strong reason to recognize the right of local self-government, but it is a matter pertaining to the policy of legislation, rather than a question of constitutional construction. *Re Senate Bill*, 12 Colo. 188, 21 Pac. 481.

In *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759, it was said in reply to a contention based upon the doctrine of an implied guaranty of self-government, that the constitutionality of an act must be determined by the body of the Constitution itself, and not by reference to general principles of justice, liberty, and right not contained or expressed in that instrument.

The opinion in the principal case says that the right of a town to regulate its own finances and affairs, superior to all legislative control, is not among the rights and privileges "derived from our ancestors," to "define, secure, and perpetuate" which the Constitution of Connecticut was adopted, and to which its preamble refers.

Connecticut, as precludes the legislature from exacting of the town payment of a portion of the expense of an incorporated highway or bridge district of which the town is made a part, although the town has no share in choosing the members or directing the affairs of such district.

12. Mandamus to the treasurer of a town to compel payment of a share of the expense of a bridge district to which it belongs is properly issued against him, without making the bridge district or the towns which belong to it parties defendant.

(Andrews, Ch. J., and Hamersley, J., dissent.)

(June 25, 1896.)

APPEAL by defendant from a judgment of the Superior Court for Hartford County awarding a writ of mandamus to compel him to pay an order drawn on him

by the board of commissioners for the Connecticut river bridge to defray expenses incident to the maintenance of such bridge. *Affirmed.*

The facts are stated in the opinions.

Messrs. J. R. Buck, Perkins & Perkins, Case, Bryant, & Case, Lewis E. Stanton, Olin R. Wood, and John H. Brocklesby, for appellant:

The act of 1895 denies the validity of the contract with the Berlin Iron Bridge Company, and compels the company to go to the court to establish its validity.

The act of 1893 provides that "the expense of repairing and maintaining said highway and bridges shall be incurred by said board of commissioners on behalf of the state."

The duty to rebuild the bridge in case public convenience, necessity, or safety requires it is put on the state by the act.

And the United States Supreme Court in affirming the decision in that case says: "Whatever may have been the practice of the state in the past, it cannot be doubted that the power of the legislature over all local municipal corporations is unlimited save by the restrictions of the state and Federal Constitutions."

It is to be observed, however, that the maintenance of the highway and bridges involved in that case was a matter in which the state at large, or the general public, had an interest, and therefore, as subsequently shown, comes within the exception to the doctrine of local self-government as laid down in *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, *supra*.

There are expressions in the opinion of the state court, that seem broad enough to deny the doctrine of local self-government *in toto*, but there are other expressions indicating that the court had in mind the distinction between matters in which the state at large was interested, and those in which only the people of the town were interested, and intended only to deny the doctrine as applied to matters of the former kind.

The dissenting opinion in the state court seems to take a broader view of the right of local self-government, at least as applied to towns in Connecticut, and to include within the protection of the doctrine such matters as that involved in the action.

The doctrine as laid down in *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, is confined strictly to matters which relate to the private as distinguished from the public functions of municipal corporations. Thus, its application was denied by *Davock v. Moore*, 105 Mich. 120, 28 L. R. A. 783, 63 N. W. 424, to an act to establish a board of health for the city of Detroit, to be appointed by the governor, with the advice and consent of the senate, upon the ground that the matter of the public health related to the public functions of the municipality, and was therefore within the control of the legislature.

And *People ex rel. Park Comrs. v. Detroit*, 5 Mich. 228, 15 Am. Rep. 202, *infra*, concedes that as to all matters of general concern the state may exercise compulsory authority, referring with approval to *People ex rel. Drake v. Ishanney*, 13 Mich. 481, which upheld an act that in effect conferred a limited taxing power upon a police board designated by statute.

But it is held in *Allor v. Wayne County Auditors*, 43 Mich. 76, 4 N. W. 492, that no business which is in its nature municipal can be controlled by state or any other outside authorities.

troled by state or any other outside authorities.

The distinction between the public and private functions of municipalities in respect to the legislative control over them is recognized in many cases which are cited under the appropriate subdivisions in this note.

Louisville v. Com. 1 Duv. 295, 85 Am. Dec. 624, illustrates the extent to which this distinction has been carried. It holds that the property of a municipality "used for carrying on its municipal government"—*e. g.*, a courthouse, prison, and the like—is exempt from state taxation though not expressly exempted by statute, upon the same principle that property owned by the state itself is exempt; but it holds that property owned and used by the city in its social or commercial capacity as a private corporation, and for its own profit,—such as vacant lots, market houses, fire engines, and the like,—is subject to state taxation.

The distinction is further explained and illustrated by the case of *Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669, which was an action against the city of New York for injuries occasioned by negligence and unskillfulness in the construction of a dam which was to be used in connection with the water supply. The opinion says that, in separating the powers which pertain to the public character from those which pertain to the private character of a municipal corporation, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. It held that the construction of the dam in question was for the purpose of the private advantage of the city, and that, therefore, the city was answerable.

David v. Portland Water Committee, 14 Or. 98, 12 Pac. 174, *infra*, seems to make the legislature the judge whether a particular matter appertains to the public or the private side of a corporation.

The application that has been made of the doctrine of local self-government, and the distinction between the public and private functions of municipal corporations, and the cases which decline to accept such doctrine and distinction, are shown by the citations made under the subsequent divisions of this note.

II. Power to impose burdens.

a. Generally.

The question as to the power of the legislature to impose burdens upon municipalities without their consent is closely connected with

Mather v. Crawford, 36 Barb. 564; *Hugans v. Riley*, 125 N. Y. 91, 25 N. E. 993; *Com. v. Deerfield*, 6 Allen, 456.

The passage of the public act of May 24, 1895, and the special act of June 28, 1895, by the general assembly, impaired the obligation of the contract of the state with the Berlin Iron Bridge Company, and consequently those acts are null and void.

The obligations of a contract are that the contractor shall have the right under the law to have his contract enforced or performed, or, failing to have it enforced and performed, he shall recover in the courts of the state the full amount of damages that he is able to prove he has suffered by reason of breaking the contract.

Walker v. Whitehead, 16 Wall. 317, 21 L. ed. 357; *Wolff v. New Orleans*, 103 U. S. 367, sub nom. *United States ex rel. Wolff v. New*

Orleans, 26 L. ed. 399; *Fletcher v. Peck*, 6 Cranch, 135, 3 L. ed. 177; *Sturges v. Crowninshield*, 4 Wheat. 200, 4 L. ed. 549; *Miller*, Const. 530, 539, 540.

The act of May 24, 1895, provides a new remedy, and limits the amount of damages which the Berlin Iron Bridge Company may recover to \$40,000.

One of the tests that a contract has been impaired is that its value has by legislation been diminished.

Planters' Bank v. Sharp, 6 How. 327, 12 L. ed. 458; *Ogden v. Saunders*, 12 Wheat. 320, 6 L. ed. 606.

A legislative act equivalent to a contract which is perfected, requiring nothing further to be done in order to its entire completion, is a contract executed; and whatever rights are thereby created, a subsequent legislature cannot impair.

the question as to the extent of the legislative power of taxation, including the apportionment of the burden.

Some of the cases seem to hold that the legislative power of taxation is absolute, or subject only to the limitation that it shall be for a purpose which the legislature deems for the benefit of the locality taxed, and that the power to tax includes the power to apportion the burden of the tax. *New Orleans v. Clark*, 95 U. S. 644, 24 L. ed. 521; *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 43 L. ed. 796, 19 Sup. Ct. Rep. 513; *People ex rel. Blanding v. Burr*, 18 Cal. 343; *Sinton v. Ashbury*, 41 Cal. 530; *Creighton v. San Francisco City & County Supers.* 42 Cal. 446; *State ex rel. Cleveland v. Jersey City Bd. of Finance & Taxation*, 88 N. J. L. 259; *Gulford v. Chenango County Supers.* 18 N. Y. 143; *Thomas v. Leland*, 24 Wend. 65; *Davidson v. New York*, 27 How. Pr. 342; *Darlington v. New York*, 31 N. Y. 164, 88 Am. Dec. 248; *Gordon v. Cornes*, 47 N. Y. 608; *People ex rel. New York & H. R. Co. v. Havemeyer*, 47 How. Pr. 494; *Brewster v. Syracuse*, 19 N. Y. 116; *New York v. Tenth Nat. Bank*, 111 N. Y. 446, 18 N. E. 618; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *Philadelphia v. Field*, 58 Pa. 320; *Erie v. Erie Canal Co.* 59 Pa. 174.

This position apparently denies the right of the municipality to determine even the strictly local purposes for which taxes shall be laid, and if well taken it is difficult to place any limit on the power of the legislature to impose burdens upon municipalities, at least so long as its exercise may be referred to the power of taxation.

In addition to the cases which naturally fall under the other subdivisions, it has been held under the influence of this principle—

That the legislature may constitutionally make cities liable for damages caused by mobs. *Pennsylvania Co. v. Chicago*, 81 Fed. Rep. 317; *Davidson v. New York*, 27 How. Pr. 342; *Luke v. Brooklyn*, 43 Barb. 54. Other cases to the same effect are cited in a note to *Glanfortone v. New Orleans* (C. C. E. D. La.) 24 L. R. A. 592.

The opinion in *Davidson v. New York*, 27 How. Pr. 342, rests the decision in that case upon the theory that the act was a mere exercise of the power of taxation, and that the remedy by taxation provided by the act was exclusive, and held that if an execution could issue upon a judgment recovered under the act, against the city, the act would violate the constitutional objection against taking property without due process of law. The opinion, therefore, makes the power of the legislature 48 L. R. A.

to impose such a burden upon the municipality dependent upon the manner in which the power is sought to be exercised, and, while placing municipal corporations within the protection of the Constitution so far as their property is concerned, leaves them subject to the power of the legislature to dictate for what purposes they shall levy and raise taxes.

The same statute was involved in *Darlington v. New York*, 31 N. Y. 164, 88 Am. Dec. 248, where it was again upheld, but upon broader ground than that taken in the preceding case. The opinion, after showing that, so far as the act was an exercise of the power of taxation, it was not within the inhibition against taking property for public use without compensation, admitted that it could not be referred solely to the power of taxation, and that a judgment recovered under it might be enforced by execution against the city, under which its property held for the purpose of income or for sale, and unconnected with any use for the purpose of municipal government, might be levied on and sold. In answer to the contention that this construction of the statute rendered it obnoxious to such constitutional provision, the court repudiated the distinction between the public and the private character of municipalities, and held that such property of a municipality was not private within the sense of the constitutional provision.

In *People ex rel. Park Comrs. v. Detroit*, 25 Mich. 228, 15 Am. Rep. 202, however, the court denied the power of the legislature to compel a municipal corporation to contract a debt for local purposes against its will. Justice Cooley in his opinion said: "The constitutional principle that no person shall be deprived of property without due process of law applies to . . . municipal corporations in their private capacity as well as to corporations for manufacturing and commercial purposes. And when a local convenience or need is to be supplied, in which the people of the state at large, or any portion thereof outside the city limits, are not concerned, the state can no more by process of taxation take from the individual citizens the money to purchase it than they could, if it had been procured, appropriate it to state use." The opinion approves and reaffirms the doctrine laid down in *People ex rel. Le Roy v. Huribut*, 24 Mich. 44, 9 Am. Rep. 103, of a constitutional guaranty of self-government in respect to purely local affairs; and it was upon that principle that the court in effect held that it is for the municipality, and not for the state, to determine for what purely

Bishop's Fund Trustees v. Rider, 13 Conn.

94.

The state is under the same obligation to fulfil its contract that an individual is.

Com. v. Proprietors of New Bedford Bridge, 2 Gray, 339.

The prohibition of the Constitution embraces all contracts, executed or executory, between private individuals, or a state and individual, or corporations, or between the states themselves.

Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547; *Wolff v. New Orleans*, 103 U. S. 358, *sub nom. United States ex rel. Wolff v. New Orleans*, 26 L. ed. 395; *Havemeyer v. Iowa County*, 3 Wall. 294, 18 L. ed. 38; *Louisiana v. Pilsbury*, 105 U. S. 300, 26 L. ed. 1098.

Assuming the act to have been void before the state made the settlement, the effect of the claim of the relator is that the settle-

ment gave validity to an act that before was void.

The respondent, being one of the five towns directly affected by said act, has a pecuniary interest in the matter, and consequently has a right to raise the question of the validity of the acts of 1895 in this action, which is brought to enforce a payment thereunder.

The issue in the case must be made upon the facts, rights, and duties of the parties as they existed at the time of the commencement of the suit, or, at the latest, at the time that they are actually joined.

State ex rel. Reed v. Ramsey, 8 Neb. 286; *State ex rel. Willard v. Stearns*, 11 Neb. 104, 7 N. W. 743; *State ex rel. Franklin County v. Cole*, 25 Neb. 342, 41 N. W. 245; *Ex parte Candee*, 48 Ala. 386; *Day v. Callow*, 39 Cal. 593.

local matters the power of taxation shall be exercised.

Atkins v. Randolph, 81 Vt. 226, held unconstitutional a provision of an act entitled "An Act to Prevent Traffic in Intoxicating Liquor for the Purpose of Drinking," which authorized an agent appointed by the county commissioner to purchase liquors at the expense of the town for which he is appointed, without its assent, either express or implied. This decision rests upon the ground that, so far as a municipal corporation is endowed by law with the power of contracting, and as such is made capable of acquiring, holding, and disposing of property, and subject to the liabilities incident to the exercise of such power and capacity, it must stand on the same ground of exemption from legislative control and interference as a private corporation.

It will be observed that neither of the latter two cases denies the power of the legislature to impose burdens upon municipalities in respect to matters which pertain to their public, as distinguished from their private, functions.

The following cases involve matters of general, rather than purely local, concern, and therefore do not trench upon the doctrine of local self-government.

The legislature may require a city to pay out of its treasury the salary of the stenographer of courts in the city having jurisdiction in cases of felony. *Young v. Kansas City*, 152 Mo. 661, 54 S. W. 535.

The legislature may constitutionally impose upon the city the expense of renting and keeping a place for holding court and for the offices of clerk, sheriff, and juries of the court. *State ex rel. Anll v. Field*, 119 Mo. 593, 24 S. W. 752.

The legislature may constitutionally provide that ordinances relating to the sale of intoxicating liquors in force in a municipality annexed to another city shall continue in full force and effect unless repealed in the manner provided in the act. *Swift v. Klein*, 163 Ill. 289, 45 N. E. 219.

The legislature may, in the exercise of its police power, impose upon counties, cities, incorporated villages, or townships the support of paupers. *Fox v. Kendall*, 97 Ill. 72.

Brunswick v. Litchfield, 2 Me. 28, however, held that if a resolution of the legislature validating marriages of paupers were to be construed to impose upon towns in which female paupers had derived derivative settlements by the marriages an obligation to pay for supplies 48 L. R. A.

furnished them prior to its passage, it would be unconstitutional.

The legislature may impose upon towns the debts of school districts which have been abolished by a previous statute. *Whitney v. Stow*, 111 Mass. 368.

It is within the power of the legislature in changing the boundaries of counties, towns, or cities, or in annexing one to another, to provide how the property of former corporations and the burden of paying their debts shall be distributed among them. *Stone v. Charlestown*, 114 Mass. 214.

The Illinois Constitution of 1848, art. 9, § 5, provided that corporate authorities might be vested with power to assess and collect taxes for corporate purposes.

Under that provision it was held that the legislature could not without the consent of a municipality, either directly or indirectly, create a debt or levy a tax upon the municipality for a purely local purpose. *Wider v. East St. Louis*, 55 Ill. 185; *Cairo & St. L. R. Co. v. Sparta*, 77 Ill. 505; *Gaddis v. Richland County*, 92 Ill. 119.

Other cases decided under that constitutional provision are cited in the following subdivision.

b. Public and quasi-public improvements.

People ex rel. Park Comrs. v. Detroit, 28 Mich. 228, 15 Am. Rep. 202, upon the ground already explained (see *supra*, II. a) denied the power of the state legislature to compel a municipal corporation to establish and pay for city parks.

Callam v. Saginaw, 50 Mich. 7, 14 N. W. 677, says, *arguendo*, that the legislature cannot compel a city to bear the whole expense of county buildings.

Bank of Sonoma County v. Fairbanks, 52 Cal. 196, which upheld an act authorizing city authorities to purchase a park, said that such an act could not, perhaps, have been made mandatory.

Baltimore v. Reits, 50 Md. 574, however, holds that the legislature had power to pass a mandatory act to compel municipal authorities to condemn and acquire a particular tract of land for park purposes. The court in this case seems to take the view that the matter pertains to the public, rather than the private, functions of the municipality.

Under the provision of the Illinois Constitution of 1848, art. 9, § 5, providing that corporate authorities may be vested with power to assess and collect taxes for corporate purposes, it was held that the legislature could not compel a municipal corporation against its

If those parts of the acts of May 24 and June 28, 1895, which affect this contract, are void, then so much of those acts as puts the duty of maintenance on the five towns is void, because the sections relating to the contract are substantial and important sections of the acts, and if any substantial part thereof falls the whole law falls.

Warren v. Charlestown, 2 Gray, 84; *State v. Wheeler*, 25 Conn. 290; *Pollock v. Farmers' Loan & T. Co.* 158 U. S. 635, 39 L. ed. 1125, 15 Sup. Ct. Rep. 912; *Poindexter v. Greenhow*, 114 U. S. 304, 29 L. ed. 197, 5 Sup. Ct. Rep. 903, 962; *Sprague v. Thompson*, 118 U. S. 94, 30 L. ed. 116, 6 Sup. Ct. Rep. 988.

Said special act of June 28, 1895, is in violation of article 14 of the Amendments of the Constitution of the United States, and of § 1 of article 1 of the Constitution of this

state, because it deprives the town of Glastonbury and the citizens thereof of their property without due process of law, and also denies to said town and the citizens thereof equal rights with the citizens of other towns under the law.

The general assembly cannot make a contract between two individuals or two corporations without their consent. It is impossible in the nature of things, for the essence of a contract is the agreement of the parties.

Sharpless v. Philadelphia, 21 Pa. 165. 39 Am. Dec. 759; *Bowdoinham v. Richmond*, 6 Me. 112, 19 Am. Dec. 197; *Hasbrouck v. Milwaukee*, 13 Wis. 38, 80 Am. Dec. 718; *Atkins v. Randolph*, 31 Vt. 236; *Hampshire County v. Franklin County*, 16 Mass. 84; *Ellis v. Marshall*, 2 Mass. 269, 3 Am. Dec. 49.

Providing for public roads is one of the

own will to issue bonds or incur a debt for a merely corporate purpose, like the creation of a public park or other local improvement. *People ex rel. McCagg v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *Marshall v. Stillman*, 61 Ill. 218.

People ex rel. Wilson v. Salomon, 51 Ill. 37, while holding that several towns may be united in one district for the purpose of establishing and maintaining a public park, holds that the power of the legislature is subject to the limitation that a local burden of that character cannot be imposed upon the people by the district so created without their consent.

A mandatory statute compelling a town or other municipal corporation to become a stockholder in a railroad or other corporation by exchanging its bonds for stock, without its consent in any given way, is unconstitutional. *People ex rel. Dunkirk, W. & P. R. Co. v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480. This decision rests upon the ground that such purpose is not solely public, but is in part private, and that the power of the legislature over municipal corporations is supreme only for public, and not for private, purposes.

In reply to the contention that the statute in question was but the mere exercise of the power of taxation, and that such power might be exercised upon the state at large, or any particular locality, in the discretion of the legislature, the court said that the act could not be maintained upon the taxing power; that a municipal corporation cannot be compelled to embark in a business of private character, because its prosecution by it will probably or certainly lead to its taxation for the capital to be invested or expenses incurred therein.

Williams v. Duaneburgh, 66 N. Y. 129, while holding under authority of *People ex rel. Dunkirk, W. & P. R. Co. v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480, that the legislature cannot compel a municipal corporation to subscribe for railroad stock and to issue its bonds in payment, yet held that if the bonds are issued by the municipality without compulsion of judicial process, they are regarded as issued voluntarily, and are not invalidated by the compulsory character of the act.

The court in *Duaneburgh v. Jenkins*, 57 N. Y. 177, which was decided by the commissioners of appeals,—of concurrent jurisdiction and equal authority with the court of appeals,—expressed its opinion that the legislature has power to compel, as well as to authorize, a municipal corporation to aid in the construction of a railroad, in the construction of which, in the judgment of the legislature, it has a public interest. The opinion says with reference

to *People ex rel. Dunkirk, W. & P. R. Co. v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480, that its admission of the competency of a municipal corporation by its own assent and that of a majority of some sort, and with the authority of the legislature, to make such a subscription, is inconsistent with its decision denying the power of the legislature to compel a town to make a subscription without its assent. The argument of the court is that as the right of the majority of a municipal community to bind the minority to a subscription for stock is not inherent, but is derived from a grant of the legislature, the legislature may on the same principle make the duty imperative on both majority and minority, since if it may bind one citizen without his consent it may bind all.

It will be observed that this reasoning denies the right of municipalities to self-government in respect to local matters. It is true that whether the subscription is made with or without the assent of the municipal authorities or a majority of the taxpayers or citizens, a burden is imposed upon the dissenting citizens or taxpayers without their consent, but in one case the right of self-government is preserved, and in the other denied.

The opinion on this point is *obiter*, since the decision of the case did not necessarily involve the overruling of *People ex rel. Dunkirk, W. & P. R. Co. v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480, and the opinion in fact distinguished the case at bar from that case. The opinion was, however, alluded to in *Thompson v. Perrine*, 108 U. S. 806, 28 L. ed. 612, as being in conflict with *People ex rel. Dunkirk, W. & P. R. Co. v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480, and as creating a doubt in respect to the power of the legislature to compel a subscription.

The decision in *People ex rel. Dunkirk, W. & P. R. Co. v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480, admitting the power of the legislature to authorize, but denying its power to compel, a municipal subscription, was reaffirmed by a majority of the court in the case of *Williams v. Duaneburgh*, 66 N. Y. 129.

This question is incidentally discussed under subd. II. d, *infra*.

A statute which requires a city or town, if it desires to own its own water plant or system, to purchase whatever plant or system is owned or controlled by any person or corporation under any contract or franchise entered into with or granted by such city or town, is in violation of a constitutional provision prohibiting the legislature to levy taxes upon inhabitants or property of a municipality for

recognized functions of government, and they may be supported and kept in repair by taxation of the state or of the several towns, each town paying for the highway within its limits.

The people who are to pay the taxes must vote them, either directly or by their legal representatives.

Any district of the state which demands taxes from the people must be able to show due authority from the state to make the demand.

Cooley, Taxn. 2d ed. 243, 324.

The power to impose taxes cannot be delegated to administrative or ministerial officers.

Cooley, Taxn. 2d ed. 61-66.

It is the settled custom and law of this state, and has been so for more than one hundred years, to allow the communities of

the state to determine the character of their local improvements, the amount to be expended thereon, and to lay a tax upon the ratable estate of the inhabitants thereof, to raise the amount of money needed therefor.

The system of local taxation under compulsion of the legislature, adopted in a few of the states, has not been put in force here.

Cooley, Taxn. 1st ed. 494, 495.

This special act as a law of taxation does not comply with the custom and law of this state, and therefore is not a "due process of law," and is null and void.

Weimer v. Bunbury, 30 Mich. 202; *Davidson v. New Orleans*, 96 U. S. 102, 24 L. ed. 618.

Said act does not accord equal rights to the citizens of said Glastonbury, because by the settled custom and law of this state communities are entitled to vote their own

municipal purposes. *Helena Consol. Water Co. v. Steele*, 20 Mont. 1, 37 L. R. A. 412, 49 Pac. 382. The opinion recognizes the distinction between private and public duties, and holds that the purchase of a water plant relates to the private, as distinguished from the public or governmental, functions of the municipality.

The legislature cannot deprive the city council or other legislative body of all discretion with respect to a local improvement within the limits of a city, when by the charter the matter of such improvements is confined to the judgment and discretion of that local body. *People v. Lynch*, 51 Cal. 18, 21 Am. Rep. 677.

This decision rests upon the following reasoning: The provision of the Constitution requiring the legislature to provide for the organization of cities and incorporated villages, and the provision that each town or city and incorporated village shall make provision for the support of its own officers, subject to such restrictions and regulations as the legislature may prescribe, contemplate cities and villages having the essential features of American cities and villages. The very idea of an American city or village involves the idea of local self-government, of local officers selected by the inhabitants and reflecting the wants and wishes of the inhabitants, and that such officers shall exercise their own judgment in respect to the internal affairs committed to their charge by the laws of their creation. The case substantially follows the reasoning of *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202.

The opinion says with reference to *Sinton v. Ashbury*, 41 Cal. 530, *infra*, that it seems to have been conceded by counsel in that case that the legislature had power by special act to direct and control the disposition of the funds or property of a municipal corporation for a municipal purpose.

With reference to *People ex rel. Blanding v. Burr*, 13 Cal. 343, *infra*, it says: "The court does not seem to have addressed itself to the broader question which has now been considered, and which may be stated thus: Do the constitutional provisions which require the establishment of cities and incorporated villages, construed in the light of the history of such municipalities and the traditions of our people, restrict the general powers of the state legislature so that they can neither compel a city to create a debt or levy a tax for a particular city purpose, nor directly intervene to levy an assessment on the property of the whole body, or a portion of the

citizens, for a particular municipal improvement?"

It also points out that the broader question above quoted was not considered in *Gulford v. Chenango County Supers.* 13 N. Y. 148; but that the court in that case merely held that none of the constitutional provisions relied on by counsel were violated by the act in question.

The six cases next cited do not trench upon the principle of local self-government, since they proceed on the theory that the matters involved pertain to the public side of the municipality, in respect to which it is a mere agency of government for the state.

The legislature, having determined that the intersection of two railways with a highway in a city at grade is a nuisance dangerous to life, in the absence of action on the part either of the city or the railroads, may compel them severally to become the owners of the right to lay out new highways and new railways over such land and in such manner as will separate the grade of the railways from that of the highways; may compel them to use the right for the accomplishment of the desired end; and may determine that the expense shall be paid by either corporation alone, or in part by both. *Woodruff v. Catlin*, 54 Conn. 277, 6 Atl. 849.

Pumphrey v. Baltimore, 47 Md. 145, 28 Am. Rep. 446, while admitting that the power of the legislature over municipal corporations is not absolute or unlimited, upholds the constitutionality of a mandatory act requiring a city to take charge of and maintain as a public highway a certain bridge within the city. The opinion says that the duty is one falling within the ordinary functions of municipal government.

People ex rel. McLean v. Flagg, 46 N. Y. 401, upholds the constitutionality of an act which required a town to issue bonds and use the proceeds in the improvement of highways. This decision was put upon the ground that the matter related to a public duty, and the court says if the object of the expenditure were private, or if the money to be raised were directed to be paid to a private corporation authorized to use the improvements for private gain, the question would be different.

The legislature has power to require a city without its consent to incur a debt for the acquisition of public bridges and ferries. *Simon v. Northrup*, 27 Or. 487, 30 L. R. A. 171, 40 Pac. 560. The opinion refers to *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202, and other cases of that kind, and says

taxes for local improvements, determine the amount of those taxes, and how the money shall be expended.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 554, 39 L. ed. 809, 15 Sup. Ct. Rep. 673; *M'Culloch v. Maryland*, 4 Wheat. 428, 4 L. ed. 606.

The act compels the citizens of Glastonbury to pay for the construction and maintenance of a highway and bridges that are wholly outside of the limits of that town.

Manifest injustice found in a legislative act can be corrected.

Washington Avenue, 69 Pa. 352, 8 Am. Rep. 255; *Hammett v. Philadelphia*, 65 Pa. 155, 3 Am. Rep. 615; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *People ex rel. McCagg v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *Lovington v. Wider*, 53 Ill. 302; *People ex rel. Wider v. Canty*,

55 Ill. 33; *Wider v. East St. Louis*, 55 Ill. 133; *Gage v. Graham*, 57 Ill. 144; *East St. Louis v. Witts*, 59 Ill. 155; *Marshall v. Silliman*, 61 Ill. 218; *Cairo & St. L. R. Co. v. Sparta*, 77 Ill. 505; *Barnes v. Lacon*, 84 Ill. 461.

A statute empowering the authorities of a city to construct sidewalks and make local assessments on the property fronting the same, "for so much of the expense thereof as they shall deem just and equitable," is unconstitutional in that there is no fixed, certain, and legal standard of assessment.

Barnes v. Dyer, 56 Vt. 469; *Providence Bank v. Billings*, 4 Pet. 562, 7 L. ed. 956; *People ex rel. Griffin v. Brooklyn*, 4 N. Y. 426, 55 Am. Dec. 266; *Allen v. Drew*, 44 Vt. 174.

The Connecticut river at the place where the highway and bridge referred to in these

that they hold, and perhaps properly, that a municipal corporation cannot be burdened with a debt without its consent for a matter of local, as distinguished from state, concern. It says, however, that it is substantially agreed that when the debt or liability is to be incurred in the discharge of some duty which is imposed upon the municipality exclusively for public purposes, and in the performance of which the general public, as distinguished from the inhabitants of the particular municipality, have an interest, it is within the power of the legislature to compel it to perform such duty and incur a debt therefor. It further held that the bridges and ferries referred to in the act, when acquired, would belong to the city in its public or governmental character, and that in acquiring them it but discharged a public or state duty which it was entirely proper for the legislature to impose upon it.

Kimball v. Mobile County, 8 Woods, 555, Fed. Cas. No. 7,774, upholds the power of the legislature to compel a county against its will to levy and collect a tax for the improvement of a river or harbor within the county limits, and in which the county is vitally interested, although other counties, and the state at large, may also derive benefit from the improvement. The court says it may be conceded that the legislature has no power against the will of a municipal corporation to compel it to contract debts for local purposes in which the state has no concern.

Prince v. Crocker, 166 Mass. 347, 32 L. R. A. 610, 44 N. E. 446, held that as to roads of all kinds, and bridges and sewers, the legislature may prescribe what shall be done, and require cities and towns to bear the expense to such an extent and in such proportion as it may determine.

So, also, the principal case upheld a statute which erected several towns into a district for road and bridge purposes, and compelled the town in whose behalf the action was brought to contribute to the cost of maintaining a highway and bridge wholly outside of its territorial bounds. The United States Supreme Court in affirming that decision in *Williams v. Eggleston*, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617, held that neither the constitutional guaranty of equal protection, nor that of due process of law, was violated by the statute.

The four cases next cited, however, seem to rest upon the theory that the legislature's power of taxation and apportionment is absolute, and therefore in effect deny the right of local self-government in respect to taxation for municipal purposes.

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Thomas v. Leland, 24 Wend. 65, upholds the constitutionality of a statute levying a tax upon the owners of real estate in a city to pay the extraordinary expense of the termination of a canal at the city, instead of at the place originally contemplated. The decision is upon the ground that the statute was an exercise of the taxing power, and therefore not obnoxious to the objection that it took the individual taxpayers' property without compensation. In this case several private individuals had previously entered into a bond to pay the extra expense, and the statute operated to relieve them, but the court held that that fact did not affect the question.

Gordon v. Cornes, 47 N. Y. 608, upheld the constitutionality of an act which empowered the trustees of a village to raise money for a state normal school. It was urged that the institution for which the money was to be raised was not a local one, but was for the equal benefit of the whole state, and that the assessment ought to be imposed with equality upon all the property within the state. The court said, however, that the power of apportionment was included in the power to impose taxes vested in the legislature, and in the absence of any constitutional restraint the exercise of it could not be reviewed by the courts.

People ex rel. New York & H. R. Co. v. Havemeyer, 47 How. Pr. 494, upheld the constitutionality of an act which imposed upon the city a portion of the cost of the work of changing the mode of construction of railroad tracks in a city street, and directed that when the expenditure had been made the comptroller of the city should draw his warrant upon the treasury for the city's proportion of the cost, and that the amount thereof should be raised by taxation. The court said that even if the tax were to be deemed for the benefit of the railroad company the act would not, therefore, be unconstitutional, since there was no such limitation upon the taxing power of the legislature.

The legislature has power to appoint commissioners to build a free bridge over a river within the city, to create a loan for the purpose, and to require the municipal authorities of the city to provide for the payment of the loan. *Philadelphia v. Field*, 58 Pa. 320. The statute in question seems to be referred to the taxing power of the legislature.

Erie v. Erie Canal Co. 59 Pa. 174, while denying the power of the legislature to compel a quasi-public corporation, like a canal company, to rebuild and repair bridges over its canals, held that it might compel a municipal

acts cross it is a navigable river, and is not located within the limits of the town. A bridge spanning that river would be a structure for the benefit of the general public, and being such a public work, the expense of construction cannot legally be put on the towns named in these acts, but the expense should be borne by the state.

Adams v. Pease, 2 Conn. 481; *Middletown v. Sage*, 8 Conn. 221; *Chapman v. Kimball*, 9 Conn. 38, 21 Am. Dec. 707.

Messrs. Lewis Sperry, George P. McLean, and Austin Brainard, for appellees:

The general assembly has the power to establish a bridge or highway district, and place the burden of the construction and maintenance of a highway or bridge upon the towns or localities included in said district.

corporation to construct and keep in repair bridges within its bounds.

It would seem that the decisions in the latter two cases might be upheld without denying the right of self-government in respect to taxation for purely local purposes, since the matters involved are of public concern, and therefore in any event within the control of the legislature; but the opinions evidently proceed upon the theory of unlimited control in the legislature without any distinction between public and private matters.

c. Compelling payment of non-legal demands.

It has been frequently held that the legislature may require a municipality to pay a claim which is just and equitable, but not legally enforceable.

Thus: It is competent for the legislature to impose upon a city the payment of claims just in themselves, for which an equivalent has been received, but which, from some irregularity or omission in the proceedings creating them, cannot be enforced at law. *New Orleans v. Clark*, 95 U. S. 644, 24 L. ed. 521. The opinion says: "The power of taxation which the legislature of a state possesses may be exercised to any extent upon property within its jurisdiction, except as specially restrained by its own or the Federal Constitution; and its power of appropriation of the moneys raised is equally unlimited. It may appropriate them for any purpose which it may regard as calculated to promote the public good.

The power which it may thus exercise over the revenues of the state it may exercise over the revenues of a city for any purpose connected with its present or past condition, except as such revenues may, by the law creating them, be devoted to special uses; and in imposing a tax it may prescribe the municipal purpose for which the moneys raised shall be applied.

In directing, therefore, a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the legislature only exercises a power through its subordinate agent which it could exercise directly; and it does this only in another way when it directs such corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent."

Guthrie Nat. Bank v. Guthrie, 173 U. S. 528, 43 L. ed. 796, 19 Sup. Ct. Rep. 513, holds that the territorial legislature of Oklahoma has power to create a special tribunal for hearing and deciding upon claims against a municipal corporation which had no legal obligation,

Free highways and bridges are constructed and maintained for the benefit of the public. It is impossible to apportion the expense equally among the individuals that may use them. Whether the state, or Hartford county, or the five towns, or one town, is compelled to pay for the bridge and causeways in question, is unimportant.

Granby v. Thurston, 23 Conn. 416; *Stonington v. State*, 31 Conn. 214; *Abendroth v. Greenwich*, 29 Conn. 362; *Webster v. Harwinton*, 32 Conn. 131; *State ex rel. Coe v. Fyler*, 48 Conn. 158; *Turney v. Bridgeport*, 55 Conn. 414, 12 Atl. 520; *Dailey v. New Haven*, 60 Conn. 320, 14 L. R. A. 69, 22 Atl. 945; *Chidsey v. Canton*, 17 Conn. 478; *Mower v. Leicester*, 9 Mass. 247, 6 Am. Dec. 63; *Reed v. Belfast*, 20 Me. 246; *Burn, Justice of the Peace*, 164.

The power of the general assembly to es-

but which the legislature thinks had sufficient equity to make it proper to provide for their investigation and payment when found proper. This decision rests upon the same ground as that in the preceding case. The opinion says that the legislature might have decided the facts for itself, but, instead of that, appointed a tribunal.

The legislature may require the payment by a municipal corporation of claims invalid in the forum of the law, but equitable and just in themselves. *People ex rel. Blanding v. Burr*, 18 Cal. 843.

The act involved in that case provided for the issuance of bonds to the holders of the claims, and directed a levy of an annual tax for the payment of interest and the creation of a sinking fund. The opinion, which was by Field, J., held that the direction to levy the tax was a legitimate exercise of the taxing power of the legislature.

The legislature has the constitutional power to direct and control the affairs and property of a municipal corporation for municipal purposes, provided it does not impair the obligation of contracts, and by appropriate legislation may so control its affairs as ultimately to compel it, out of the funds in its treasury, or by taxation to be imposed for the purpose, to pay a demand, when properly established, which in good conscience it ought to pay, even though there be no legal liability to pay it. *Sinton v. Ashbury*, 41 Cal. 525.

The legislature may compel a city to pay a claim equitably due to a contractor on account of a street improvement, although it was not legally enforceable. *Creighton v. San Francisco City & County Supers.* 42 Cal. 446.

The legislature may, in strict conformity with its constitutional powers and duties, recognize a moral obligation of a municipal corporation as the sole basis for the imposition of taxes. *Beals v. Amador County*, 35 Cal. 624.

The authority of these California cases has been weakened, if they have not been entirely overruled, by *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677, *supra*, II. b.

It is within the power of the legislature to relieve from the consequences of noncompliance with the formalities prescribed by a city charter in respect to city contracts, and give contractors their equitable right to compensation for services rendered and materials furnished in good faith for the public benefit under a contract in respect to which the formalities required by the charter have not been observed. *State ex rel. Cleveland v. Jersey City Bd. of Finance & Taxation*, 38 N. J. L. 259.

establish a bridge district without regard to municipal or political subdivisions, and place the burden of the construction and maintenance of the bridge upon such district, in such proportions and in such manner as the general assembly may provide, cannot be questioned.

Desty, Taxn. 5th ed. 276, 279, 285; *Luehrman v. Shelby County Tazing Dist.* 2 Lea, 425; *Bowles v. State*, 37 Ohio St. 35; *Shaw v. Dennis*, 10 Ill. 416; *Malohus v. District of Highlands*, 4 Bush, 547; *Shelby County Judge v. Shelby E. Co.* 5 Bush, 225; *People ex rel. McSpedon v. Hauss*, 34 Barb. 69; *People v. Central P. R. Co.* 43 Cal. 398; *People ex rel. Griffin v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Parker v. Challiss*, 9 Kan. 155.

The power to determine what shall be the taxing district for any particular burden is

Municipal corporations, being creatures of the legislative power, and subordinate parts of the government of the state, are subject to the legislative will to the extent that it may provide for the appointment of a tribunal for the adjustment of claims against them without a jury trial. *Ibid.*

The legislature has power to arrest work done upon a city reservoir, which is being done partly under contract and partly outside of the contract without legal authority, and compel a settlement, and may also declare what shall be the equitable terms of the settlement, even to the extent of declaring that the contractor shall not be charged with overpayments if any such have been made. *Ibid.*

State ex rel. Hernandez v. Flanders, 24 La. Ann. 57, upheld the validity of an act directing a city to include in its funded debt all registered certificates owned by bona fide purchasers. The certificate in question in this case was originally unauthorized because in the nature of a gratuity. The court said: "A municipal corporation is created for a political purpose.

It is invested with subordinate legislative powers, to be exercised for local purposes connected with the public good, and is subject to the control of the legislature.

When it holds specific property for municipal purposes, that property is said by some to be invested with the security of private rights, but in most other respects the state through the legislature has full control."

Guliford v. Chenango County Supers. 13 N. Y. 143, upheld the constitutionality of an act directing the board of supervisors to assess and collect from the taxable property of a town an amount sufficient to pay a claim which was unenforceable at law, and which had been rejected by the voters of the town. This decision rests upon the ground that the act was an exercise of the taxing power. The court said: The legislature is not confined in its appropriation of the public moneys, or the sums to be raised by taxation, in favor of individuals, to cases in which a legal demand exists against the state, and it can recognize claims founded in equity and justice in the largest sense of those terms, or in gratitude or charity. Independently of express constitutional restrictions, it can make appropriations of money whenever the public well-being requires or will be promoted by it, and it is the judge of what is for the public good. It can, moreover, under the power to levy taxes, apportion the public burden among all the taxpaying citizens of the state, or among those of a particular section or political division. It is well settled that the authority to raise money by the exercise of the 48 L. R. A.

purely a legislative power, subject to be controlled only by constitutional provisions.

Desty, Taxn. 276; *People ex rel. Griffin v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Shaw v. Dennis*, 10 Ill. 416; *Goncell v. Connersville*, 8 Ind. 358; *Challiss v. Parker*, 11 Kan. 394; *Hingham & Q. Bridge & Turnp. Corp. v. Norfolk County*, 6 Allen, 353; *Malchus v. District of Highlands*, 4 Bush, 547; *Philadelphia v. Field*, 58 Pa. 320; *Langhorne v. Robinson*, 20 Gratt. 661.

The legislature judges finally and conclusively upon all questions of policy, as upon all questions of fact, involved in the determination of a taxing district.

Litchfield v. Vernon, 41 N. Y. 133.

Courts are without power to interfere with the legislative discretion, however erroneous it may be.

Scorill v. Cleveland, 1 Ohio St. 138; *Gor-*

taxing power is not in conflict with the constitutional provisions protecting private property from seizure.

The legislature may authorize the levy of a tax to pay a sewer contractor an addition to the contract price, which the corporation was forbidden by its charter to pay. *Brewster v. Syracuse*, 19 N. Y. 116.

Municipal corporations are the creatures of the state, and exist and act in subordination to its sovereign power. The legislature may determine what moneys they may raise and expend, and what taxation for municipal purposes may be imposed; and it does not exceed its constitutional authority when it compels a municipal corporation to pay a debt which has some meritorious basis to rest on. *New York v. Tenth Nat. Bank*, 111 N. Y. 446, 18 N. E. 618.

In this case an act requiring the comptroller of the city of New York to pay back to various banks moneys which had been advanced by them for the use of any of the departments or commissioners of the city or county was held to be a valid exercise of legislative power, although the advances in question were unauthorized, and part of them were misappropriated by conspirators, some of whom were directors of the bank.

The legislature has power to provide for the issuance of bonds by a municipality to pay an assessment against the town for its share of the cost of the construction of a highway, notwithstanding that the act providing for the construction of the highway and the assessment of a portion of the expense against the town was unconstitutional, the highway having been laid out in the meantime. *Knapp v. Newtown*, 1 Hun, 268.

Hoagland v. Sacramento, 52 Cal. 142, while admitting the power of the legislature to furnish a remedy or remove an impediment preventing the enforcement of a legal or equitable right or duty already existing, denied its right to compel a city to pay a claim which it was under no legal or moral obligation to pay. The distinction is between recognizing an existing claim which has a moral basis but is not legally enforceable, and creating a claim previously nonexistent.

So, also, the opinion in *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 43 L. ed. 796, 19 Sup. Ct. Rep. 513, *supra*, said: "It is not necessary to say in this case that the legislature had the power to donate the funds of the municipality for purposes of charity alone."

The legislature may require a municipal corporation to audit and allow a judgment pre-

don v. Cornes, 47 N. Y. 611; *Allen v. Drew*, 44 Vt. 187; *Alcorn v. Hamer*, 38 Miss. 652; *Arbogast v. Louisville*, 2 Bush, 271.

The power of apportionment is included in the power to impose taxes, and is vested in the legislature.

Gordon v. Cornes, 47 N. Y. 608.

Making and improving the public highways, and the imposition of taxes, are among the ordinary subjects of legislation.

People ex rel. McLean v. Flagg, 46 N. Y. 406; *East Portland v. Multnomah County*, 6 Or. 62; *Norwich v. Hampshire County Comrs.* 13 Pick. 62.

The power of the general assembly to form a bridge district like the one in question, and to provide for the issue and payment of bonds for the construction of a public bridge, is in no way limited by the Federal or the state Constitution. The legislature

is the sole judge of benefits and assessments and methods of payment.

Deady, Taxn. 280; *People ex rel. McLean v. Flagg*, 46 N. Y. 406; *Williams v. Cammack*, 27 Miss. 210, 61 Am. Dec. 508; *Alcorn v. Hamer*, 38 Miss. 652; *Daily v. Swope*, 47 Miss. 367; *Slack v. Mayesville & L. R. Co.* 13 B. Mon. 28; *State ex rel. Farren v. St. Louis*, 62 Mo. 244; *Talbot County Comrs. v. Queen Anne County Comrs.* 50 Md. 245; *Thomas v. Leland*, 24 Wend. 65; *Com. v. Newburyport*, 103 Mass. 129; *Luehrman v. Shelby County Tazing Dist.* 2 Lea. 425; *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Baltimore v. State ex rel. Board of Police*, 15 Md. 376, 74 Am. Dec. 572; *Mobile County v. Kimball*, 102 U. S. 706, 28 L. ed. 243.

Statutes regulating the construction and maintenance of highways and bridges are in

viously rendered against it. In so doing the legislature neither attempts to create nor to adjudicate in respect to a debt against the corporation. *People ex rel. O'Donnell v. San Francisco City & County Supers.* 11 Cal. 206.

Johnson v. San Diego, 109 Cal. 468, 30 L. R. A. 178, 42 Pac. 249, held that the legislature had power to change and readjust the burden of municipal indebtedness after the division of a city, so as to impose a heavier burden of indebtedness upon the municipality than existed under the act of separation. The opinion does not deny that in respect to mere local, as distinguished from public, concerns municipal corporations are entitled to the same protection as a private corporation, but holds that the adjustment of the indebtedness related to the political and governmental affairs of the municipality.

It has been held, however, that—

The legislature has no power to provide means for the collection of a void obligation of a municipal corporation. *Mosher v. Independent School Dist.* 44 Iowa, 122.

That the legislature cannot definitely fix the amount due to persons named from a municipal corporation. *State ex rel. Arick v. Hampton*, 13 Nev. 441. This decision is put upon the ground that such provision is an attempt on the part of the legislature to exercise judicial power.

State ex rel. McCurdy v. Tappan, 29 Wis. 664, 9 Am. Rep. 622, holds that an act which attempted to compel a municipality to pay a claim to reimburse the treasurer of a city for the amount paid by him as a bounty to a volunteer whom he supposed was credited on the quota of the city, but who was in fact credited on the quota of the town, was unconstitutional. The court said that the legislature might authorize, but could not compel, a municipality to levy taxes for public purposes not strictly of a municipal character, but from which the public have received or will receive some direct advantage, or where the tax is to be expended in paying claims founded upon natural justice and equity, or upon gratitude for public services or expenditures, or in discharging the obligations of charity and humanity.

While most of the cases that uphold the power of the legislature to compel municipal corporations to pay claims not legally enforceable trace it to the power of taxation, they do not seem to limit the doctrine to cases in which the legislation has taken the form of an exercise of the power of taxation, but seem to treat the imposition of such a burden as in effect an exercise of the taxing power, since 48 L. R. A.

taxation is the source from which the funds to pay the claims must come. The statutes involved in *Sinton v. Ashbury*, 41 Cal. 525, and *Creighton v. San Francisco City & County Supers.* 42 Cal. 446, directed the issuance of warrants to be paid out of the city treasury.

It will also be observed that the Illinois cases treated the power to create a debt as the same thing as the power to direct the levy of a tax, for the purposes of the constitutional provision that the corporate authorities may be vested with power to assess and collect taxes for corporate purposes. See *Wilder v. East St. Louis*, 55 Ill. 135, and *Gaddis v. Richland County*, 92 Ill. 119, *supra*, II. a.

In *People ex rel. Baldwin v. Haws*, 37 Barb. 440, however, the court held that a provision of a statute for the appointment of arbitrators to adjust and determine the damages to contractors from the Croton Aqueduct violated §§ 1 and 6 of article 1 of the Constitution providing that no person shall be deprived of life, liberty, or property without due process of law. The court said that *Gulford v. Cornell*, 18 Barb. 615, related, not to the right or power of the legislature to compel an individual or corporation to pay a debt or claim, but to the power of the legislature to raise money by tax and apply such money when so raised to the payment thereof. It said, further, that under the decisions of the court made in that and other cases the court could not hold that the legislature had no authority to impose a tax to pay any claim, or to pay it out of the state treasury, and for that purpose to impose a tax upon the property of the whole state or any portion of it; but that neither that case nor *People ex rel. Griffin v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266, warrants the opinion that the legislature has a right to direct a municipal corporation to pay a claim for damages for breach of a contract out of the funds or property of such corporation without a submission of such claim to a judicial tribunal.

The decision in the preceding case was reaffirmed in *Baldwin v. New York*, 45 Barb. 350, involving the same statute. The opinion of Ingraham, Ch. J., says: "The opinion of Denio, Ch. J., in *Darlington v. New York*, 28 How. Pr. 852, contained much not at all necessary to the decision of that case, and the unlimited power claimed in that opinion for the legislature over the property of municipal corporations should be authoritatively declared in a case which would make it binding as an authority, before it is adopted as law removing, as in this case, all the protection which the

no sense contracts with the town affected. Towns cannot acquire vested rights under such laws, and the power of the legislature to change and redistribute these public burdens has always been conceded.

Scituate v. Weymouth, 108 Mass. 130; *Brighton v. Wilkinson*, 2 Allen, 27; *Carter v. Cambridge & B. Bridge Proprs.* 104 Mass. 236; *Atty. Gen. v. Cambridge*, 16 Gray, 247; *Agawam v. Hampden County*, 130 Mass. 530.

The respondent town is "specially benefited" by the highway and bridge in question.

The decision of a court of competent jurisdiction is final and conclusive upon the parties and as to the title claimed under it.

Rose v. Himely, 4 Cranch, 241, 2 L. ed. 608; *Gelston v. Hoyt*, 3 Wheat. 315, 4 L. ed. 398; *Hopkins v. Lee*, 6 Wheat. 113, 5 L. ed.

219; *Elliott v. Peirsol*, 1 Pet. 334, 7 L. ed. 167; *Holcomb v. Phelps*, 16 Conn. 132; *Spratt v. Spratt*, 4 Pet. 408, 7 L. ed. 902; 1 Van Fleet, Former Adjudication, 603; *Ashton v. Rochester*, 133 N. Y. 187, 30 N. E. 965, 31 N. E. 334.

The general assembly has power to order a locality or district to construct and maintain a public bridge or highway, and the proportion to be paid by each municipality cannot be reviewed by the courts.

Gordon v. Cornes, 47 N. Y. 608.

The alleged contract between the state of Connecticut and the Berlin Iron Bridge Company was clearly illegal and *ultra vires*.

The commissioners acting for the state could not exceed the authority of the act. An agent has no power to bind his principal outside the scope of his authority.

Mechem, Agency, § 274; *Baltimore v.*

Constitution has given to private property and to a trial by jury in case of disputed claims."

These cases do not wholly deny the power of the legislature to compel municipal corporations to pay claims not legally enforceable, but seem to limit the doctrine to statutes taking the form of an exercise of the power of taxation.

But when the case of *Baldwin v. New York* came before the court of appeals, Justice Peckham, in the prevailing opinion in 2 Keyes, 387, while distinguishing the case from *Gulford v. Chenango County Supers.* 13 N. Y. 143, and *Brewster v. Syracuse*, 19 N. Y. 116, questioned the decisions in those cases. He said that when, as in the case at bar, the legislature admitted the demand to be unliquidated, disputed, and denied, its adjudication belonged exclusively to the courts established under the Constitution, and that when the legislature assumed to direct an arbitration for its settlement, and ordered the award to be paid, it violated the constitutional provisions declaring that no person shall be deprived of property without due process of law, and guaranteeing the right of trial by jury; expressing his opinion that both of such constitutional provisions apply to municipal corporations. The opinion admits that, when the legislature orders a tax to be levied for the payment of any alleged claim against a locality, it is more delicate, and practically more difficult, to declare it void, but says if it appear or be conceded that the tax is for a claim for services or damages disputed and denied by the corporation, the act would be void as in violation of the foregoing constitutional provisions.

Re Jensen, 28 Misc. 378, 59 N. Y. Supp. 653, holds unconstitutional an act authorizing any official who has been prosecuted for an alleged crime in connection with his official duties, and has been acquitted, to proceed *ex parte* before the supreme court for an allowance of a claim for reasonable counsel fees and expenses incurred by him in the prosecution, and compelling the city to include the amount so allowed in its tax levy. The decision is put upon the ground that the act violates the constitutional provision against taking property without due process of law; the court holding that the term "person," in the constitutional provision, relates to municipal corporations in their private capacity.

d. Validating defective obligations.

The legislatures have frequently undertaken to impose burdens on municipalities by validating L. R. A.

ing contracts or obligations which without legislative aid would be unenforceable.

The power to do this has been upheld where the invalidity arose from some irregularity.

Thus: The legislature may cure irregularities in an election on a proposition for a municipal subscription to railroad stock. *St. Joseph Twp. v. Rogers*, 16 Wall. 644, 21 L. ed. 328.

The legislature may ratify a fraudulent or irregular issue of bonds by a municipality, where they were issued to redeem an outstanding valid indebtedness of the municipality. *Black v. Cohn*, 52 Ga. 621.

Gardner v. Haney, 86 Ind. 17, upholds the validity of an act validating bonds of incorporated towns which were void for irregularities in the conduct of the election on the proposition to issue them.

The legislature may cure irregularities in the execution of the power conferred upon a municipal corporation to take stock in a railroad. *People ex rel. Albany & S. R. Co. v. Mitchell*, 35 N. Y. 551.

Tift v. Buffalo, 82 N. Y. 204, holds that the legislature has power to adopt and legalize the acts of a municipality invalid because of irregularities merely in the mode of procedure, when there was municipal jurisdiction of the subject-matter. The statute involved in that case cured irregularities in proceedings for the repair of a city street. The opinion says: It is not meant to assert that the legislature may by a retrospective statute validate a municipal action that trenches upon vested rights or affects substantial equities, but to declare that where there was municipal jurisdiction of the subject-matter, and the defects in the exercise of it are irregularities in the mode of procedure, it is within the legislative discretion to adopt and confirm the result of the informal act, or send back the matter to the municipality, with power to begin again and go forward in the mode prescribed by the original authority.

The legislature may by a retrospective statute validate an irregular or defective execution of a power by the authorities of a municipal corporation acting under a former statute, where no contract is impaired and the rights of third persons are not injuriously affected. Here the ratification was of municipal bonds issued in payment of a subscription to railroad stock. *Belo v. Forsythe County Comrs.* 76 N. C. 489.

But the courts have gone still further, and upheld acts validating contracts or obligations which were void for want of authority. Thus: *Bass v. Columbus*, 30 Ga. 845, holds that it is within the power of the legislature to validate a subscription to railroad stock and the issue

Eckbach, 18 Md. 282; *United States v. Doerty*, 27 Fed. Rep. 730; *Hawkins v. United States*, 96 U. S. 689, 24 L. ed. 607; *White-side v. United States*, 93 U. S. 247, 23 L. ed. 882; *Moffat v. United States*, 112 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10; *Gibbons v. United States*, 8 Wall. 289, 19 L. ed. 453; *Filor v. United States*, 9 Wall. 45, 19 L. ed. 549; *Mechem*, Pub. Off. § 512; *Moorhead v. Little Miami R. Co.* 17 Ohio, 353.

If the bridge company had a contract with the state, this contract cannot be taken advantage of by the respondent in this or any other proceeding.

Changes in the forms of action and modes of proceeding do not amount to an impairment of the obligations of a contract, if an adequate and efficacious remedy is left.

Sturges v. Crowninshield, 4 Wheat. 200, 4 L. ed. 549; *Cooley*, Const. Lim. 5th ed. 349;

Mason v. Haile, 12 Wheat. 378, 6 L. ed. 663; *Bronson v. Kinzie*, 1 How. 316, 11 L. ed. 145; *Von Hoffman v. Quincy*, 4 Wall. 553, sub nom. *United States ex rel. Von Hoffman v. Quincy*, 18 L. ed. 409; *Drehman v. Stifle*, 8 Wall. 602, 19 L. ed. 510; *Gunn v. Barry*, 15 Wall. 623, 21 L. ed. 215; *Walker v. Whitehead*, 16 Wall. 317, 21 L. ed. 357; *Terry v. Anderson*, 95 U. S. 633, 24 L. ed. 366; *Tennessee v. Sneed*, 96 U. S. 69, 24 L. ed. 610; *Louisiana v. Pilebury*, 105 U. S. 301, 26 L. ed. 1098; *Munn v. Illinois*, 94 U. S. 132, 24 L. ed. 86; *Jackson ex dem. Hart v. Lamp-hire*, 3 Pet. 290, 7 L. ed. 683; *Cooley*, Const. Lim. 443.

The state may by public act interfere with a contract entered into by her agents without authority, and whether void or valid, if the party claiming under it cancels and surrenders it to the state for a valuable and

ance of bonds to pay therefor by a municipality, although they were previously void.

Grenada County Supers. v. Brogren, 112 U. S. 261, sub nom. *Grenada County Supers. v. Brown*, 28 L. ed. 704, 5 Sup. Ct. Rep. 125, upholds the constitutionality of an act ratifying county bonds which were issued without legislative authority, but at a time when such authority might have been conferred by the legislature.

Dows v. Elmwood, 84 Fed. Rep. 114, is to the same effect. The court in the latter case says: "It is clear on principle as well as upon the authorities, that wherever the legislature has power to authorize the different municipalities of the state to vote and issue bonds under authority of an act of the legislature, if the people vote those bonds voluntarily, and the action of the electors is afterwards confirmed and approved by the legislature, and their acts made binding upon the town by an express act ratifying their action, it stands precisely on the same footing as though there had been an enabling act in advance."

The legislature may legalize an issue of scrip by a city to a railroad company in payment of a subscription to stock, notwithstanding that the submission of the question to the people was under a wrong law. *Campbell v. Kenosha*, 5 Wall. 194, 18 L. ed. 610.

The legislature may ratify a subscription by a municipal corporation to the stock of an incorporated company, though originally unauthorized. *First Municipality v. Orleans Theater Co.* 2 Rob. (La.) 209; *State ex rel. Copes v. Charleston*, 10 Rich. L. 491.

The legislature has power to ratify bonds issued by a municipal corporation without precedent authority, for the purpose of securing the location of a county seat within the city, and aiding in the erection of necessary county buildings. *Schneck v. Jeffersonville*, 152 Ind. 204, 52 N. E. 212.

The legislature has power to ratify a contract entered into by a municipal corporation for a public purpose, which is *ultra vires*. *Brown v. New York*, 63 N. Y. 239.

Baker v. Seattle, 2 Wash. 576, 27 Pac. 462, upholds an act validating municipal indebtedness, where the invalidity resulted from the fact that the indebtedness exceeded the amount authorized by the charter. The court held that the case fell within the principle that where a municipal corporation has done an act beyond its statutory powers, but within the powers which it was competent for the legislature to have conferred upon it, the act may be validated by a curative statute.

Morris v. State, 62 Tex. 728, held that the 48 L. R. A.

legislature had power to validate a municipal ordinance which was passed for the benefit of a contractor but did not conform to the requirements of the charter.

Article 9, § 5, of the Illinois Constitution of 1849, contained a provision that the corporate authorities of counties, townships, school districts, cities, towns, and villages might be invested with power to assess and collect taxes for corporate purposes. As already shown, this provision was construed by the courts to prohibit the legislature from creating municipal indebtedness to be paid by taxation.

It was held in *Marshall v. Silliman*, 61 Ill. 218, and *Wiley v. Silliman*, 62 Ill. 170, that the legislature had no power to validate a vote on a proposition as to a municipal subscription to railroad stock, under which bonds had been issued, where such vote was void because the municipality had already exhausted its power by previously voting a subscription to the full amount of the statutory limit. These decisions rest upon the ground that the act attempts to compel a municipal corporation to incur a debt for a purely local municipal purpose, in violation of the foregoing constitutional provision.

A similar decision was made upon the authority of those cases by *Cairo & St. L. R. Co. v. Sparta*, 77 Ill. 505, although in the latter case the invalidity arose from a departure from the statute, in the proposition submitted to the people, in respect to the time the proposed bonds should run. The opinion admitted that the former cases were stronger, there having been no color of authority for the election involved in them, and a mere excess of power in the case at bar; but the court thought that the same principle governed.

The same principle was applied by *Gaddis v. Richland County*, 92 Ill. 119, to a case where the election was called and ordered by unauthorized persons.

In *Cairo & St. L. R. Co. v. Sparta*, 77 Ill. 505, *supra*, a writ of mandamus was sought to compel the issuance of the bonds. In the other three cases the bonds had been issued.

St. Joseph Twp. v. Rogers, 16 Wall. 644, 21 L. ed. 328, involved an act passed by the Illinois legislature while the Constitution of 1848 was in force, which purported to validate municipal elections upon propositions respecting subscription to railroad stock. It was contended that the act was unconstitutional as creating a debt for a municipality, but the court said that, according to the repeated decisions of the supreme court of Illinois and of "this" court, defective subscriptions of the kind there made

good consideration, and expressly waives all rights which he might otherwise have had to question its validity.

The act is left to operate in all other respects as though the contract had never existed.

Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325; *Detmold v. Drake*, 46 N. Y. 318; *Cooley*, Const. Lim. 5th ed. 197; *Wellington*, *Petitioner*, 16 Pick. 87, 26 Am. Dec. 631; *Hingham & Q. Bridge & Turnp. Corp. v. Norfolk County*, 6 Allen, 353; *Heyward v. New York*, 8 Barb. 486; *Re Albany Street*, 11 Wend. 149, 25 Am. Dec. 618; *Sill v. Corning*, 15 N. Y. 297; *People ex rel. Burrows v. Orange County Supers.* 17 N. Y. 235; *Derby Turnp. Co. v. Parks*, 10 Conn. 522, 27 Am. Dec. 700; *People v. Rensselaer & S. R. Co.* 15 Wend. 113, 30 Am. Dec. 33; *Hartford Bridge Co. v. Union Ferry Co.* 29 Conn. 210;

Holden v. James, 11 Mass. 396, 6 Am. Rep. 174; *Adams v. Howe*, 14 Mass. 340, 7 Am. Dec. 216; *Norwich v. Norwich County Comrs.* 13 Pick. 60.

The unconstitutional law must operate as far as it can.

Re Middletown, 82 N. Y. 196; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Adams v. Howe*, 14 Mass. 340, 7 Am. Dec. 216; *Williamson v. Carlton*, 51 Me. 453; *Jones v. Black*, 49 Ala. 541; *Smith v. McCarthy*, 56 Pa. 359.

Baldwin, J., delivered the opinion of the court:

The provision of suitable means of communication between the opposite banks of the Connecticut river has been, from early colonial days, a frequent subject of legislation by the general assembly. Numerous

"may in all cases be ratified where the legislature could have originally conferred the power," citing a number of earlier Illinois cases, but making no reference to those above referred to, although they had been decided at the time the opinion in this case was written. The bonds in question, however, were issued before those decisions, and the court may have thought that the earlier decisions should control.

Anderson v. Santa Anna, 116 U. S. 364, 29 L. ed. 635, 6 Sup. Ct. Rep. 413, involved the same act as that involved in the preceding case, and also upheld it. The court expressed its opinion that at the time the bonds were issued the Illinois decisions sustained such curative acts, and that the bonds could not be affected by the change of opinion evidenced by the later decisions above referred to. The opinion, however, upon the assumption that there were no decisions sustaining such acts when the bonds were issued, passes independently upon the power of the legislature, and upholds the act, notwithstanding an objection based on the constitutional provision already alluded to, upon the ground that such an act does not in any just sense impose a debt upon the township against the will of the corporate authorities, but merely gives effect to the previously declared will of the electors.

Bolles v. Brimfield, 120 U. S. 759, 30 L. ed. 786, 7 Sup. Ct. Rep. 736, is to the same effect as the preceding case.

The same court in *Elmwood Twp. v. Marcy*, 92 U. S. 289, 23 L. ed. 710, had held that an Illinois statute which ratified a subscription made pursuant to a vote at an election held after the town had exhausted its power to subscribe was unconstitutional, but, as explained in *Anderson v. Santa Anna*, 116 U. S. 364, 29 L. ed. 635, 6 Sup. Ct. Rep. 413, the court in that case felt bound by the later Illinois decisions, and did not intend to overrule *St. Joseph Twp. v. Rogers*, 16 Wall. 644, 21 L. ed. 328, *supra*.

It will be observed that the cases heretofore cited, which have upheld acts validating municipal subscriptions to the stock of railroad corporations, are cases in which the consent of the municipality had been given, though in some cases without any previous authority.

Horton v. Thompson, 71 N. Y. 513, involved an act which attempted to validate town bonds issued, without the consent of the town itself or its inhabitants, by town commissioners (whom the court held not to be town officers and not to represent the town) in exchange for the stock of a railroad.

The court held the act unconstitutional upon 48 L. R. A.

the ground that it had been already decided (*People ex rel. Dunkirk, W. & P. R. Co. v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480, *supra*) that a municipal corporation could not be compelled without its consent or that of its taxable inhabitants to become a stockholder in a railway corporation, or to incur a debt in its behalf; and that, since the legislature could not have originally authorized the issuance of the bonds without such consent, it could not ratify bonds issued without such consent.

Thompson v. Ferrine, 103 U. S. 806, 26 L. ed. 612, however, upheld the constitutionality of the act involved in the preceding case. The opinion reviews the New York cases upon the question as to the power of the legislature to require a municipal corporation without the consent of the people to aid, by a subscription to the capital stock, in the construction of a railroad, and to cure by retrospective enactment defects in the exercise of powers granted to municipal corporations, and held that the question could not be considered as at rest in the courts of that state so as to oblige the United States Supreme Court to follow the decision in *Horton v. Thompson*, 71 N. Y. 513, *supra*. The court also takes the position that at the time the act in question was passed (which was before the decision in *People ex rel. Dunkirk, W. & P. R. Co. v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480) "it was the established doctrine of the highest court of New York, as it was of this court, that the legislature, unless restrained by the organic law of the state, could authorize or require a municipal corporation, with or without the consent of the people, to aid by a subscription of capital stock in the construction of the railroad: . . . that defects or omissions, upon the part of such municipal corporation or its officers, in the execution of the power conferred, or in the performance of the duty imposed, could be cured by subsequent legislation,—certainly where the corporation had received the benefits which the original subscription was designed to secure."

As already shown under subd. II. b, *supra*, the opinion in *Duanesburgh v. Jenkins*, 57 N. Y. 177, questioned the correctness of the decision in *People ex rel. Dunkirk, W. & P. R. Co. v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480, that the legislature had no power to compel a municipal corporation to subscribe for railroad stock, but the decision upon the facts involved in the case only goes to the extent of upholding the constitutionality of an act ratifying bonds issued by a commissioner (whom the court treated as a town officer) after a vote by the taxpayers, a question having arisen as to whether the requirements of the original stat-

ferries have been set up, from time to time, at different points, by virtue of franchises, conferred in some cases upon towns, and in others upon individuals; and several toll bridges have been erected during the present century, under charters granted to private corporations.

One of these bridges took the place of an ancient ferry between the towns of Hartford and East Hartford, in which each town had a proprietary interest. The bridge company, by a voluntary settlement, paid to Hartford a satisfactory compensation for the revocation of its ferry franchise, but declined to recognize any claim of East Hartford, the original grant to which, by its express terms, was only during the pleasure of the general assembly, and had been repealed without qualification. Litigation resulted, and this court held (*East Hartford v. Hartford Bridge*

Co. 17 Conn. 78) that no rights of East Hartford had been violated,—a decision afterwards affirmed, upon proceedings in error, by the Supreme Court of the United States. In the opinion there delivered, it was held that the state, on the one hand, and the town of East Hartford, on the other, did not stand, with reference to the grant and repeal of the ferry franchise, in the attitude of parties to a contract. "The legislature," it was declared, "was acting here on the one part, and public municipal and political corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the legislature as to this ferry must be considered rather as

ute in respect to the consents and proofs thereof had been complied with. The decision rests upon the ground that even under the doctrine laid down in *People ex rel. Dunkirk, W. & P. R. Co. v. Batchelor*, the legislature might originally have substituted the commissioners' consent for that of the taxpayers', and therefore might do so by a retrospective act.

Williams v. Duaneburgh, 66 N. Y. 129, decided by the court of appeals, involved the same statute and made substantially the same decision as *Duaneburgh v. Jenkins*, 57 N. Y. 177. Three of the five judges who sat in the case rested their decision on the ground that the legislature, while it could not compel, might authorize, municipal corporations to issue such bonds, and that it could have originally dispensed with the consent of the taxpayers and authorized the municipal authorities to issue the bonds without the consent of the inhabitants. Two of the judges were of the opinion, as an independent proposition, that the case of *People ex rel. Dunkirk, W. & P. R. Co. v. Batchelor*, 53 N. Y. 128, 13 Am. Rep. 480, had in effect overruled the prior decisions authorizing municipal corporations to subscribe for and hold stock, and that, therefore, the legislature had no power to pass an act like that in question, but concurred in the decision upon the ground that the court was bound in respect to the bonds in suit by the decision in *Duaneburgh v. Jenkins*, 57 N. Y. 177.

Katzenberger v. Aberdeen, 121 U. S. 172, 30 L. ed. 911, 7 Sup. Ct. Rep. 947, holds that the legislature has no power, after the adoption of a Constitution making the consent of two thirds of the voters of a city requisite to a subscription to stock of a railroad company, to ratify a subscription and issue of bonds to which the voters of the city had not consented as contemplated by the statute, although they were issued before the adoption of the Constitution, at a time when the legislature might in the first instance have dispensed with such consent.

The legislature may, without affecting the consents of taxpayers previously given to the issuance of bonds by a town in aid of a railroad, authorize a change in the form of the bonds before their issuance, where the legislature might in the first instance have authorized bonds in the changed form. *Brownell v. Greenwich*, 114 N. Y. 518, 4 L. R. A. 685, 22 N. E. 24.

Bridgeport v. Housatonic R. Co. 15 Conn. 475, also upheld the validity of an act which confirmed and made obligatory on the city a prior unauthorized subscription to the stock of a railroad company. In this case, however, 48 L. R. A.

the ratifying act, pursuant to a proviso thereof, was accepted and approved by the freemen of the city.

Sykes v. Columbus, 55 Miss. 115, denied the right of the legislature to ratify bonds originally issued by a town without authority, where in the meantime a new Constitution had been adopted forbidding the legislature to authorize any city or town to become a stockholder in any company, association, or corporation without the consent of two thirds of the qualified voters.

Hasbrouck v. Milwaukee, 18 Wis. 38, 80 Am. Dec. 718, held that a subsequent legislative ratification or recognition of a municipal contract for the construction of a harbor which exceeded the limit of expenditure was insufficient, *proprio vigore*, without evidence that the municipality assented to it or subsequently acted upon or confirmed it, to make the contract obligatory upon the corporation.

This decision was approved in *Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578.

The legislature cannot legalize the proceedings of a town whereby, without any authority, it undertook to pay bounties to drafted men, unless the town ratifies the curative act. *Wahlschlager v. Liberty*, 23 Wis. 362.

Fisk v. Kenosha, 26 Wis. 23, held an act recognizing the right of a city to redeem city scrip, issued in aid of a railroad, which was invalid because the act under which it purported to be issued did not, as required by the Constitution, place a limit on the amount of the issue, insufficient as a ratification of the scrip because it left the duty to limit the amount unperformed.

III. Power in respect to officers and local administration.

People ex rel. Le Roy v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 108, *supra*, which announced the doctrine of an implied guaranty of self-government in respect to purely local matters, involved a statute which established a board of public works and attempted to appoint, for the full terms, the members thereof. The opinion of Justice Cooley, which holds the statute unconstitutional as an unwarranted interference with the right of local self-government, does not deny all right of interference by the legislature in local concerns, but says that the right in the state is a right, not to run and operate the machinery of local government, but to provide and put it in motion. More specifically, it held that it was competent for the legislature to abolish the old municipal boards and provide for a new one to take their place,

public laws than as contracts. They related to public interests. They changed as those interests demanded. The grantees likewise, the towns being mere organizations for public purposes, were liable to have their public powers, rights, and duties modified or abolished at any moment by the legislature. They are incorporated for public, and not private, objects. They are allowed to hold privileges or property only for public purposes. The members are not shareholders nor joint partners in any corporate estate which they can sell or devise to others, or which can be attached or levied on for their debts. Hence, generally, the doings between them and the legislature are in the nature of legislation, rather than compact, and subject to all the legislative conditions just named, and therefore to be considered as not violated by subsequent legislative changes.

and, further, that it might make provisional appointments to put a new system in operation, but that it exceeded its power when it made appointments which were not provisional and which were for full terms.

The limitations of the doctrine were still further explained in *People ex rel. Park Comra. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202, in which Judge Cooley said, referring to *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103: "We intended in that case to concede most fully that the state must determine for each of its municipal corporations the powers it should exercise and the capacities it should possess, and that it must also decide what restrictions should be placed on these, as well to prevent clashing of action and interest in the state, as to protect individual corporators against injustice and oppression at the hands of the local majority. And what we said in that case we here repeat, that while it is a fundamental principle in this state, recognized and perpetuated by express provisions of the Constitution, that the people of every hamlet, town, and city of the state are entitled to the benefits of local self-government, the Constitution has not pointed out the precise extent of local powers and capacities, but has left them to be determined in each case by the legislative authority of the state, from considerations of general policy as well as those which pertain to the local benefit and local desires."

The limitations of the doctrine are further illustrated by *People ex rel. Atty. Gen. v. Detroit*, 29 Mich. 108, which upholds a statute so far as it transfers to a board of public works, to be appointed by the mayor and common council, powers formerly exercised by the board of sewer commissioners. Judge Cooley, who wrote the opinion, assented to the position that the common council of a city—4, *e. g.*, the board commonly known by that name—is a distinctive and inseparable feature in municipal government, and that the legislature can neither abolish it nor strip it of its legislative powers. He did not pass upon the question whether any of the powers conferred upon the board were legislative in their nature, or whether any of them were unconstitutional, but held that the powers formerly exercised by the board of sewer commissioners were not legislative, and that, therefore, the act was not unconstitutional *in toto*. That was as far as a decision was necessary.

As already observed in discussing the Michigan cases in subdivision I., the doctrine of local self-government is limited to matters pertaining to the private, as distinguished from the public, functions of the municipality.

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It is hardly possible to conceive the grounds on which a different result could be vindicated without destroying all legislative sovereignty, and checking most legislative improvements and amendments, as well as supervision over its subordinate public bodies. Thus, to go a little into details, one of the highest attributes and duties of a legislature is to regulate public matters with all public bodies, no less than the community, from time to time, in the manner which the public welfare may appear to demand. It can neither devolve these duties permanently on other public bodies, nor permanently suspend or abandon them itself, without being usually regarded as unfaithful, and, indeed, attempting what is wholly beyond its constitutional competency. It is bound, also, to continue to regulate such public matters and bodies, as much as to organize them at first. Where

This distinction is illustrated by *Davock v. Moore*, 105 Mich. 120, 28 L. R. A. 783, 63 N. W. 424, which upholds an act establishing a city board of health to be appointed by the governor with the advice and consent of the senate. The opinion refers to the distinction between public and private functions, and says that in the discharge of public duties there is no right of local self-government involved, and that the care of the public health is within the police power, and therefore within the control of the legislature.

So, also, *People ex rel. Park Comra. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202, cites with approval *People ex rel. Drake v. Mahaney*, 18 Mich. 481, *supra*, which upheld an act appointing police commissioners for a city.

People ex rel. Atty. Gen. v. Lothrop, 24 Mich. 235, held that the functions of park commissioners of the city of Detroit were local and municipal, and that their selection could not properly be made without the assent of the people of the city or the local authorities, but also held that the common council, by ratifying the acts of commissioners designated by statute in selecting a location for a park, admitted their right to assume the agency.

The right of local self-government is not infringed by a statute which leaves it to a state officer to supervise the appropriation of state lands to a local improvement. *Sparrow v. State Land Office Commissioner*, 56 Mich. 567, 23 N. W. 315.

As already observed, the matter involved in the principal case was one of public concern, and therefore the provisions of the act which place the highway and bridge district under the control of commissioners, not selected by the town, but who are empowered to draw upon it for funds, do not come within the doctrine.

The doctrine was recognized and enforced by *State ex rel. Jameson v. Denny*, 118 Ind. 352, 4 L. R. A. 79, 21 N. E. 252, which held that a statute which undertook to place in the hands of a board of public works appointed by the legislature the exclusive control of all the streets, alleys, lanes, thoroughfares, etc., of each city of a certain size, without the consent of those to be affected thereby, and with full power to improve, alter, or change them, was an unconstitutional interference with local self-government.

State ex rel. Atty. Gen. v. Moore, 55 Neb. 480, 41 L. R. A. 624, 76 N. W. 175, held an act authorizing the governor to appoint fire and police commissioners in cities of the metropolitan class void as an unlawful interference with the right of local self-government. The court held that, conceding the legislature might pro-

not restrained by some constitutional provision, this power is inherent in its nature, design, and attitude; and the community possesses as deep and permanent an interest in such power remaining in and being exercised by the legislature, when the public progress and welfare demand it, as individuals or corporations can, in any instance, possess in restraining it." *East Hartford v. Hartford Bridge Co.* 10 How. 511, 533, 13 L. ed. 518, 527.

In view of these principles of constitutional law, an act was passed by the general assembly in 1887, for the purpose of making this same bridge a free public highway, and throwing the burden of its support on the towns which would be especially benefited by such a change. At that time there were three toll bridges across the Connecticut river in Hartford county. By this act, which

was entitled "An Act to Establish Free Public Highways across the Connecticut River in Hartford County" (Pub. Acts 1887, p. 746, chap. 126), the state's attorney was directed to bring a complaint, in the name of the state, to the superior court for that county, against the corporations owning these bridges, for the purpose of making each of them a free public highway. Notice of the pendency of the proceedings was to be given to all towns interested, and any town might appear and become a party. Commissioners were to be appointed by the court, who should "lay out and establish highways across the Connecticut river where the toll bridges in said county now are, and across said bridges, and across and along the causeways and approaches appurtenant to and connected therewith."

The commissioners, after such notice as

vide the mode of selecting police officers, it had no power or authority to deprive the municipality of the right to select officers whose duties are solely of a local nature, such as officers connected with the fire department. The opinion adopts the doctrine of *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, *supra*, as to an implied guaranty of local self-government, and expressly overrules *State ex rel. Simeral v. Seavey*, 22 Neb. 454, 35 N. W. 228, which upheld a similar statute.

And *Evansville v. State ex rel. Blend*, 118 Ind. 426, 4 L. R. A. 93, 21 N. E. 267, held that an act providing for a board of metropolitan police and a fire board to be appointed by the legislature for cities of a certain class, which is to have supreme control of both departments and power to contract debts, is unconstitutional as a denial of the right of local self-government. The opinion said that "if the act related alone to the management of the police department, and the state was proposing to take upon itself the burden of maintaining the department as well as its management, or if it were made to appear that the city had failed to furnish a police force or one that was sufficient for the protection of persons and property, then a very different question would be presented.

Except so far as an efficient police department goes, which is for the protection of the public at large, the people of the state are not interested in any of the matters to which the said act of the legislature relates; . . . the two cities to which the act applies are alone interested. It therefore becomes a question whether or not the legislature may take from the people of these two cities the right of local self-government, the right to manage and control their own purely local affairs in their own way, and place the management of all such local affairs under state control. We do not believe that the legislature has any such power. Before written constitutions the people possessed the power of local self-government.

All the power which the people have delegated is what has passed from them by the Constitution."

State ex rel. Terre Haute v. Kolsem, 130 Ind. 434, 14 L. R. A. 566, 29 N. E. 595, upholds the constitutionality of an act establishing boards of metropolitan police consisting of commissioners to be appointed by state officers. This decision is put upon the ground that, in providing for the appointment of officers connected with the constabulary of the state, there is not an invasion of the right of local self-government, but simply the exercise of the power to provide for the selection of peace officers of the state.

State ex rel. Atwood v. Hunter, 38 Kan. 578, 17 Pac. 177, upholds the validity of the metropolitan police act, which provides for the appointment of a board of police commissioners by the executive council, consisting of state officers. This case recognizes the distinction between private and governmental functions, and holds that the police is a matter pertaining to governmental functions.

Diamond v. Cain, 21 La. Ann. 309, holds that the omission from the Constitution of 1868 of article 133 of the Constitution of 1864, giving to the citizens of New Orleans the appointment of officers necessary for the administration of the police of the city, left the whole subject of the city police under the power and discretion of the legislature, enabling it to create a board of police commissioners to be appointed by the governor.

Baltimore v. State ex rel. Board of Police, 15 Md. 376, 74 Am. Dec. 572, upholds the constitutionality of an act providing a permanent police for the city of Baltimore, under the control of a board of police consisting of commissioners appointed by the legislature. The court held, in reply to the criticism of a section of the statute which transferred the use of the station house, etc., that that was not private property within the protection of the Constitution. It remarks that the use of the property is the same, and the character and title of the property is not changed by authorizing only a change in the agency by which the use is to be directed.

The legislature has power to create a board of police for a city, to be appointed by the governor and council from the two principal political parties. It was suggested that the act in question was unconstitutional because it took from the city the power of self-government in matters of internal police. The court said that there was no provision of the Constitution with which it conflicted, and that the court could not declare an act of the legislature invalid because it abridged the exercise of the privilege of local self-government in a particular in regard to which such privilege is not guaranteed by any provision of the Constitution. *Com. v. Plaisted*, 148 Mass. 375, 2 L. R. A. 142, 19 N. E. 224.

But see *Rathbone v. Wirt*, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15, *infra*, to the contrary effect.

State ex rel. Atty Gen. v. Covington, 29 Ohio St. 102, upheld the constitutionality of an act which vested police powers and duties of cities in a board to be appointed by the governor. It was urged that the statute violated art. 1, § 2, of the Constitution, which provided that all

the court should prescribe as to those towns which they should deem interested, were to "estimate and assess the damages caused by the layout and establishment of such free highways, and shall estimate and assess said damages upon the several towns which they shall find will be specially benefited by the layout and establishment of said highways, as benefits accruing to said several towns, in such proportion as said commissioners shall find to be equitable." Their report, if accepted by the court, was to be "final and conclusive as to all matters therein contained, and said court shall render judgment thereon against said several towns for the amount assessed against them respectively; and the clerk of said court shall forthwith notify each of said towns of the judgment against it by mailing to the clerk thereof a notice specifying the date and amount of such judgment."

powers not delegated remain with the people. The argument was that, at the time of the adoption of the Constitution, the police of the several cities and villages were elected by the electors resident therein, or appointed by boards or officers elected by such electors. The opinion rejects this view, and cites as in harmony with its position, *People ex rel. Wood v. Draper*, 15 N. Y. 532.

As the cases last cited involved matters relating to the police power, they did not fall within the doctrine of local self-government as laid down by the cases previously cited, but the opinions do not refer to the distinction between public and private functions of municipalities.

The right of local self-government in respect to local officers was recognized by article 10 of the New York Constitution of 1846, which required all county, city, town, and village officers whose election or appointment was not provided for by the Constitution to be elected by the electors of the respective localities, or appointed by such authorities thereof as the legislature designates for that purpose. This provision seems to make no distinction between the public and private character of municipal corporations, and it was held by *People ex rel. Wood v. Draper*, 15 N. Y. 532, that officers of the police department of a city would be within the constitutional provision if the act which attempted to make appointments of such officers was limited territorially to the city. The act involved in that case, however, was not so limited, but purported to create a metropolitan police district including the cities of New York and Brooklyn. The opinion admitted that the recognition by the Constitution of counties and cities had the effect, not only to guarantee their preservation, but to prevent the legislature from doing anything respecting them which would render them less suitable for the purposes for which they were recognized and employed by the Constitution. It says, however, that the matters of police, though they have generally been of local cognizance, have not by any constitutional provision or arrangement been irrevocably committed to the civil divisions recognized by the Constitution, and therefore it was competent for the legislature to create new districts for police purposes.

That case also held that the constitutional provision was limited to officers existing at the time of the adoption of the Constitution, and upon the authority of that decision *People v. Pinckney*, 32 N. Y. 377, upheld the constitutionality of an act which created a metropolitan fire district, notwithstanding the commissioners whose appointment is directed by the act were limited in their authority and functions to the city of New York alone, and therefore were not in any real sense officers of a new civil district. The act was upheld upon the ground that the officers created by the act were new in respect to their substantial functions, and therefore not within the constitutional provision, although if their duties and functions had been substantially the same as those of corresponding officers under the city of New York the act would have been unconstitutional.

The act also contained the following provisions:

"Sec. 5. Said towns so assessed shall, within three months from the rendition of said judgment, deposit with the treasurer of this state the sums so severally assessed against them, and at the expiration of said three months the comptroller shall draw his order on the treasurer in favor of the several persons or corporations in whose favor damages have been assessed, for the amount of damages so assessed respectively, and said treasurer shall hold the amount thereof for the benefit and subject to the order of the several parties in whose favor said orders were drawn, and shall notify said several parties that he so holds said amounts, and thereupon said highways so laid out as aforesaid shall become and remain public highways. In case any town shall fail to pay the judgment rendered against it as aforesaid, with-

tionality of an act which created a metropolitan fire district, notwithstanding the commissioners whose appointment is directed by the act were limited in their authority and functions to the city of New York alone, and therefore were not in any real sense officers of a new civil district. The act was upheld upon the ground that the officers created by the act were new in respect to their substantial functions, and therefore not within the constitutional provision, although if their duties and functions had been substantially the same as those of corresponding officers under the city of New York the act would have been unconstitutional.

People ex rel. McMullen v. Shepard, 36 N. Y. 285, upheld the constitutionality of an act which included in a new police district certain cities and the territory between them included within the lines of the property of a railroad company. The court refused to inquire into the motives of the legislature in creating the new district.

People ex rel. Bolton v. Albertson, 55 N. Y. 50, however, held that the constitutional requirement that city officers shall be elected by the electors of the city was violated by an act establishing a new police district which included a city and a small fragment of territory outside of the city limits, and providing for the appointment by the governor of magistrates of the proposed district, and the appointment of the police force by commissioners to be appointed by the governor. The decision is put upon the ground that the purpose of the constitutional provision is to secure to the several recognized civil and political divisions of the state the right of local self-government, that the police powers are among the most important conferred upon city governments, and that the main object of the act in question was the establishment of a police force, under a new organization, for the city. The opinion criticises *People ex rel. Wood v. Draper*, 15 N. Y. 532, but distinguishes it upon the ground that in that case there was occasion for the exercise of legislative discretion in the creation of a police district, while in the case at bar there was not. The opinion says if any civil division other than those recognized by the Constitution is allowable, it can only be when neither of the others will serve or answer the purpose, or the objects cannot be accomplished by organizing the territory in view under one or the other forms of municipal government authorized by the Constitution.

People ex rel. Townsend v. Porter, 90 N. Y.

in the time aforesaid, said court shall order execution upon said judgment to be issued against said town in favor of the state."

Each town so assessed was given, by § 6, power to issue bonds to raise the money to pay its assessment.

"Sec. 7. When said highways, so established as aforesaid, shall have become free public highways as aforesaid, the same shall thereafter be maintained by said towns so assessed in proportion to the assessment upon said towns as hereinbefore provided. The first selectmen of said several towns shall meet on the 2d Monday after said highways shall have become free highways as aforesaid, at the office of the selectmen in Hartford, and annually thereafter and at such other times as they shall deem necessary, and said several first selectmen shall constitute a board for the care, maintenance, and control of said highways. Said board shall ap-

point a chairman, secretary, and treasurer; and said board shall apportion the expense of repairing and maintaining said highways upon the said several towns in proportion to the assessment against said towns as aforesaid, and said chairman shall draw his order on the respective treasurers of said towns to the order of the treasurer of said board for the proportional amount payable by said towns, as aforesaid, for such repairs and maintenance. Any damages resulting from the defective condition of said highways or the bridges upon the same shall be paid by said towns in proportion to the said assessment. For the purpose embraced in this section said board shall be a body politic and corporate by the name of the "Board for the Care of Highways and Bridges across the Connecticut River in Hartford County," and actions may be brought against said board by service upon its secretary, and any

68, condemned an act creating a separate police district upon the same ground as the preceding case.

Rathbone v. Wirth, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15, held that such constitutional provision was violated by an act which in effect conferred upon the members of the common council of a city who are members of the political party having a minority representation in the council the appointment of two of the four police commissioners. The decision is placed by a majority of the court upon the ground that such minority is not a city authority within the meaning of the constitutional provision.

Lovington v. Wilder, 53 Ill. 302, and *Wilder v. East St. Louis*, 55 Ill. 135, denied the constitutionality of an act which vested the control of the police department of certain cities in commissioners appointed by the governor with the consent of the senate, and authorized them to incur indebtedness in behalf of the city. These decisions, however, do not rest upon the general doctrine of an implied guaranty of local self-government, but upon the express provision of the Illinois Constitution, already cited, that the legislature may give the corporate authorities of cities and towns the right to tax for corporate purposes. The court held that this constitutional provision prevented the legislature from granting the right of corporate or local taxation to any other person than the corporate or local authorities; that such commissioners were not corporate authorities, since they were neither directly elected by the people nor appointed in a mode to which the people had given their assent; and that the power to create a debt against the city is substantially the same thing as power to levy a tax. The ground on which the decision rests is illustrated by the remark in the latter case that the police force organized by the police commissioners appointed under the act would doubtless have a legal right to serve, if they chose to do so, gratuitously, and to that extent the law might be upheld.

Speed v. Crawford, 3 Met. (Ky.) 207, holds that the members of a police board of a city are officers for the city within the meaning of a constitutional provision providing that officers for cities and towns shall be "elected for such terms and in such manner as may be prescribed by law," and that an act providing for the appointment of such members by the chancellor or governor is unconstitutional.

Metropolitan Bd. of Health v. Heister, 87 N. Y. 661, held that the constitutional provision already alluded to did not prevent the legisla-

ture from establishing new civil districts for the administration of the health laws.

But it was held by *People v. Acton*, 48 Barb. 524, to be violated by an act investing the board of metropolitan police, appointed by the governor, with the powers and duties previously conferred upon the mayor and the common council in respect to places of public amusement, etc. The opinion says that, although the legislature might have the power to take the discharge of such duties from the mayor or common council, they were required to place the performance of them with local officers or boards, and could not vest officers appointed under authority of the state with the performance thereof.

A similar decision was made by *Schuster v. Metropolitan Bd. of Health*, 49 Barb. 450, in respect to an act which attempted to confer upon the metropolitan board of health, holding office under appointment of the governor, legislative powers previously exercised by the common council of the city.

Re Central Park Comrs. 35 How. Pr. 255, held that the act of 1865, so far as it authorized the commissioners of Central Park, instead of the common council of the city of New York, to apply to the court for the opening of a road or public drive above 59th street, was not unconstitutional. This decision rests upon the ground that the common council has never had authority since 1807 to lay out streets or public places in that part of the city. The court says, however, that the right to grade the streets in the city has always been exercised by the common council, and that it may be doubted whether the legislature can take from the common council this power and confer it on state officers.

Astor v. New York, 62 N. Y. 567, held that the provision of the New York Constitution already cited was not violated by the act of 1867 which confers upon the commissioners of Central Park the exclusive care, management, and control of a portion of an avenue and certain streets for the purpose of regulating, grading, and otherwise improving it. This decision rests upon the ground that the acts referred to have an especial relation to and connection with the park system. The opinion says it would be carrying the doctrine of noninterference with local officers far beyond any reported case, to hold that in no case whatever could any of the powers existing in a local officer at the time of the adoption of the Constitution be taken away without violating the constitutional provision.

State ex rel. Howe v. Des Moines, 103 Iowa, 76, 39 L. R. A. 285, 72 N. W. 639, holds that

judgment recovered therein shall be paid by said towns in said proportions and in the same manner as herein provided for the payment of the expenses of repairs and maintenance as aforesaid. Said board shall annually report to said several towns the expenses incurred and paid by them during the preceding year."

By a joint resolution, approved on the same day, it was provided that this act should not affect the bridge between Windsor Locks and Warehouse Point, nor that between Suffield and Enfield.

Due proceedings were had under the act, resulting in a final judgment, in 1889, establishing a free public highway across the river between Hartford and East Hartford, including the bridge and causeway of the Hartford Bridge Company, and awarding it \$210,000 damages. The court also "found that

the towns of Hartford, East Hartford, Glastonbury, South Windsor, and Manchester will be specially benefited by the layout and establishment of such free highway, and estimated and assessed said damages upon said several towns as benefits accruing to said several towns in such proportion as said commissioners found to be equitable; that is to say, as follows: To the town of Hartford, ninety-five thousand (\$95,000) dollars; to the town of East Hartford, sixty-six thousand (\$66,000) dollars; to the town of Glastonbury, twenty-five thousand (\$25,000) dollars; to the town of South Windsor, twelve thousand (\$12,000) dollars; to the town of Manchester, twelve thousand (\$12,000) dollars."

Pending the action, the general assembly in 1889 appropriated \$84,000 from the treasury of the state, for the purpose of paying

the legislature cannot delegate the power to fix and determine the amount of a tax for a public library which must be levied by the common council, to a board not chosen by and directly responsible to the taxpayers, unless the people assent thereto. This decision rests upon the ground that there is an implied limitation upon the power of the legislature to delegate the power of municipal taxation, and that it cannot delegate it to other than municipal authorities.

The legislature has power to appoint officers within a city for a specific purpose, such as laying out a street and assessing the damages and benefits arising to the property taken for that purpose. *Daly v. St. Paul*, 7 Minn. 390, Gil. 311.

People ex rel. Kilmer v. McDonald, 69 N. Y. 362, holds that the constitutional provision before referred to did not prohibit the legislature from appointing commissioners to widen a designated highway in a village by proceedings different from those which could be taken by the commissioners of highways under the existing laws of the state, the commissioners of highways to continue in office, and to have charge of the widened avenue after the fulfillment of the office of the avenue commissioners.

The validity of a statute providing for the laying out or improvement of a city street is not affected by the fact that the power to do the work is conferred upon commissioners appointed by the act, instead of upon the municipal authorities. *Re Woolsey*, 95 N. Y. 135.

Illinois Constitution, art. 9, § 9, providing that for corporate purposes all municipal corporations may be vested with authority to assess and collect taxes, and § 10, providing that the general assembly shall not impose taxes upon municipal corporations or the inhabitants or property thereof for corporate purposes, but shall require that all the taxable property within the limits of municipal corporations shall be taxed for the payment of debts contracted under authority of law, prevent the legislature from granting the right to assess and collect taxes to any other than the corporate authorities of the municipalities or districts to be taxed, and prevent such taxation from being imposed without the consent of the taxpayers to be affected. *Wetherell v. Devine*, 116 Ill. 631, 5 N. E. 596, 8 N. E. 788. This case holds that "corporate authorities" are those authorities who are directly elected by the population to be taxed, or are appointed in some mode to which they have given their assent, but that when the people of the city, by a vote duly authorized, adopt an election law providing for the appointment of election commissioners who

are to be appointed by the county court, and are to incur indebtedness, such commissioners will be regarded as corporate authorities.

The taxpayers of a village have no inherent right to have the assessment of their property made by an officer elected by them, or to have their taxes collected by such officer. *Jones v. Kolb*, 56 Wis. 263, 14 N. W. 177.

David v. Portland Water Committee, 14 Or. 98, 12 Pac. 174, upholds the constitutionality of an act which empowers a city to establish or purchase waterworks, and provides that such power shall be exercised by a committee appointed by the act. The opinion recognizes the distinction between the public and private functions of a municipal corporation, and says the power of the legislature over municipal corporations, in the absence of constitutional restrictions, is unlimited except so far as they are endowed with rights incident to a private corporation, and refers to the fact that some decisions have undertaken to draw lines between powers which are governmental in their nature and those which relate to local convenience for the citizen, and to place those relating to water, gas, and public parks on the quasi-private side of the corporation, but says: "Public parks, gas, water, and sewage in towns and cities may, ordinarily, be classed as private affairs, but they often become matters of public importance; and when the legislature determines that there is a public necessity for their use in a certain locality I do not think they can be designated as mere private affairs. That is a relative question." The court further said that it must regard the matter in question as public in character, in view of the legislative action.

Luehrman v. Shelby County Taxing Dist. 2 Lea, 425, upheld the constitutionality of the provisions of an act creating municipal corporations, conferring legislative power upon a legislative council, one half of the members of which are to be appointed for the full term by the governor with the consent of the senate, all of the members to be elected by the people after the expiration of the first term. The court says, conceding that it may admit a doubt whether the legislature could permanently appoint, under "our" Constitution and the democratic character of "our" institutions, the officers and governing body of a municipal corporation, its right to make provisional appointments is beyond doubt, citing *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103.

The Colorado supreme court, in *Re Senate Bill*, 12 Colo. 188, 21 Pac. 481, held that a bill creating a board of public works for a city

40 per cent of these damages. Special Laws, vol. 10, p. 1321. In view of this, the judgment of the superior court concluded with an order that "the town of Glastonbury shall, within three months from the date of rendition of this judgment, deposit with the treasurer of this state the sum of fifteen thousand (\$15,000) dollars, the same being 60 per cent of the sum so assessed against it," and a like provision with respect to the assessment against each of the other four towns, and a further order that, "at the expiration of said three months from the date of the rendition of this judgment, the comptroller of the state shall draw his order on the treasurer in favor of the Hartford Bridge Company for the sum of \$210,000, the same being the amount of the damages that have been so assessed in its favor, and that the treasurer shall hold the amount thereof, *viz.*,

said two hundred and ten thousand (\$210,000) dollars, for the benefit and subject to the order of said Hartford Bridge Company, and shall forthwith notify said Hartford Bridge Company that he so holds said amount, and thereupon, as soon as the treasurer shall give said notice, said highway so laid out as aforesaid shall become and remain a public highway. The treasurer of the state shall at the same time give notice to the first selectman of each of said towns, *viz.*, Hartford, East Hartford, Glastonbury, South Windsor, and Manchester, that said highway has become a free public highway to be thereafter maintained by said towns."

After this judgment had been fully executed the general assembly, in 1893, passed an act (Pub. Acts 1893, p. 395, chap. 239) declaring that the highway, which included the bridge and its approaches, should there-

whose members are to be appointed by the governor with the consent of the senate, and which is charged with numerous duties and endowed with extensive powers in relation to the expenditure of city funds, the payment and cancellation of outstanding city warrants, and the making of public improvements, does not violate art. 5, § 35, of the Constitution, prohibiting the legislature from delegating to any special commission power to make, supervise, or interfere with any municipal improvement, money, property, or effects, or perform any municipal function whatever. The court said that there was strong reason to recognize the right of local self-government, but that was a matter pertaining to the policy of proposed legislation rather than a question of constitutional construction.

Coyle v. Gray, 7 Houst. (Del.) 44, 30 Atl. 728, was a quo warrant proceeding by one appointed chief engineer of the waterworks of a city by a board of water commissioners appointed by the legislature, who were vested with full authority to appoint and discharge officers and employees, and to contract indebtedness in behalf of the city for the improvement and extension of a water plant. The court upheld the appointee's right to the office upon the ground that all the agencies of the city can be abolished or changed at the will of the legislature. The court, however, expresses no opinion as to the constitutionality of the act so far as it undertakes to authorize the commissioners to incur indebtedness on the part of the city. Counsel for defendant urged the dual character of municipal corporations, and that the matter in question pertained to the private as distinguished from the governmental functions of the corporation, and therefore was beyond the control of the legislature. The court apparently repudiates the doctrine of the dual character of such corporations. It says, however, that while the corporation exists by authority of the state, authorized to purchase and hold property for the inhabitants, it would not be competent for the state to take away the property and give it to other corporations or persons.

State *ex rel.* Herron v. Smith, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829, upholds the constitutionality of an act creating a board of public affairs for cities of a certain class, to be appointed by the governor and to have all the powers, perform all the duties and be the successor of the board of public works. This decision is made upon the authority of State v. Covington, and proceeds upon the theory that there is no constitutional restriction against the appointment of municipal officers by the governor, and rejects the theory of local self-

government adopted in People *ex rel.* Le Roy v. Huribut, 24 Mich. 44, 9 Am. Rep. 103.

Municipal charters are subject to repeal or amendment at the pleasure of the legislative power granting them, and the absolute and unconditional repeal of a municipal charter, abolishes all offices under it. People *ex rel.* Fowler v. Brown, 83 Ill. 95.

Corporations having municipal powers are mere tenants at will of the legislature so far as the officers thereof are concerned. State v. Jennings, 27 Ark. 419.

The legislature may fix the salary of a municipal officer, and unless restrained by the Constitution may change it at any time, even during the official term, and may delegate such power to the common council. Wyandotte v. Drennan, 46 Mich. 478, 9 N. W. 500.

The legislature may fix the salary of a city officer. If it has not delegated the power to do so to the city. Speed v. Detroit, 100 Mich. 92, 58 N. W. 638.

A municipal corporation is a legislative creation, and its offices are mere agencies or instrumentalities through which the corporate power is exercised and the corporate duty discharged, and it is competent for the legislature to provide for filling such offices, either by election or appointment, or any other mode deemed expedient. Moulton v. Beld, 54 Ala. 320.

A statute which requires the mayor of a city to prepare rules for the selection of city officers which rules must be approved by the state civil service commission before they can go into effect, does not subordinate the power of the local authorities to that of the state authorities in violation of a constitutional provision delegating the appointing power to the municipal authorities. Rogers v. Buffalo, 123 N. Y. 173, 9 L. R. A. 579, 25 N. E. 274.

IV. Power in respect to property and franchises.

The necessity of invoking the doctrine of an implied guaranty of local self-government is not so apparent when the legislature undertakes to deprive a municipality of property which it has already acquired, and holds, in its private capacity, as when the legislature undertakes to prescribe the local municipal purposes for which taxes shall be levied. As already shown, some of the courts, while admitting the power of the legislature to compel municipal corporations to exercise their power of taxation for a particular purpose, deny its

after be maintained by the state at its expense, and providing for the appointment, on the nomination of the governor, of a board of three commissioners, for the care, maintenance, and control of the highway; such expenses as they might incur for repairing and maintaining it to be paid from the state treasury on the order of the comptroller. All acts inconsistent therewith were repealed.

Commissioners were duly appointed under this act, who soon afterwards, the bridge having become unsafe, executed a contract in behalf of the state with the Berlin Iron Bridge Company for the erection of a new one at a cost of over \$300,000. After the company had begun the work of construction, the old bridge was accidentally destroyed by fire, and the commissioners thereupon ordered, under one of the provisions of

the contract, the erection of a temporary bridge by the same company.

While it was fulfilling this order an act was passed, which was approved and took effect May 24, 1895 (Pub. Acts 1895, p. 530, chap. 168), repealing the act of 1893, and requiring the towns of Hartford, East Hartford, Glastonbury, South Windsor, and Manchester thereafter to maintain the highway across the Connecticut river where the old bridge formerly was, with the proper approaches, and to erect a new bridge whenever necessary, and maintain the same, contributing to any expenses to which they might be thus subjected "in proportion to the assessment made upon said towns by the superior court in the proceedings in which said highway was laid out and established: that is to say, Hartford, 95-210; East Hartford, 66-210; Glastonbury, 25-210; South

power to subject to such purpose the property acquired by a municipal corporation in its private capacity. Davidson v. New York, 27 How. Pr. 342, *supra*; People *ex rel.* Baldwin v. Haws, 87 Barb. 440; Baldwin v. New York, 45 Barb. 359, 2 Keyes, 387.

The following cases hold that the property acquired by a municipal corporation in its private capacity is within the constitutional provision as to due process of law: People *ex rel.* Park Comrs. v. Detroit, 28 Mich. 228, 15 Am. Rep. 202; Davidson v. New York, 27 How. Pr. 342; People *ex rel.* Baldwin v. Haws, 87 Barb. 440; Baldwin v. New York, 45 Barb. 359, 2 Keyes, 387; *Re* Jensen, 28 Misc. 378, 59 N. Y. Supp. 653.

A municipal corporation exercising powers conferred, not for public purposes, but for its private benefit and emolument, will be regarded *quod hoc* as a private corporation. Paterson v. Society for Establishing Useful Manufactures, 24 N. J. L. 385.

Towns and other public corporations may have private rights and interests vested in them under their charter, and as to those rights they are to be regarded and protected the same as if they were the rights and interests of individuals or of private corporations. Montpelier v. East Montpelier, 29 Vt. 12, 67 Am. Dec. 748.

So far as a municipal corporation is endowed by law with the power of contracting, and as such is made capable of acquiring, holding, and disposing of property, it must stand on the same ground of exemption from legislative control and interference as a private corporation. Atkins v. Randolph, 31 Vt. 226.

The doctrine is well settled in respect to public corporations created for public purposes, that the legislature has the exclusive right, as trustee of the public interest, to regulate, control, and direct the corporation and its funds and franchises, for the reason that the whole interest and franchise are given by the act of incorporation for the public use and advantage. Bush v. Shipman, 5 Ill. 190.

Mr. Justice Story, in his opinion in the case of Dartmouth College v. Woodward, 4 Wheat. 694, 4 L. ed. 673, remarked: "Corporations for mere public government, such as towns, cities, and counties, may in many respects be subject to legislative control. But it will hardly be contended that even in respect to such corporations the legislative power is so transcendent that it may at its will take away the private property of the corporation or change the uses of its private funds acquired under the public faith."

Tarrett v. Taylor, 9 Cranch, 43, 3 L. ed. 650, says: "In respect also to public corporations, 48 L. R. A.

which exist only for public purposes, such as counties, towns, cities, etc., the legislature may under proper limitations have a right to change, modify, enlarge, or restrain them, securing however, the property for the uses of those for whom and at whose expense it was originally purchased."

Mr. Justice Matthews, in New Orleans, M. & T. R. Co. v. Ellerman, 105 U. S. 166, 26 L. ed. 1015, says: "Whatever powers the municipal body rightfully enjoys over the subject is derived from the legislature. They are merely administrative, and may be revoked at any time, not touching, of course, any property of the city actually acquired in the course of administration."

Savannah v. Steam Boat Co. R. M. Charit. (Ga.) 342, while admitting that the legislature has a superintending and controlling power over a municipal corporation, holds that it cannot take away property acquired by it, or vested in such corporation by legislative acts.

Even municipal corporations, though their charters are in no sense contracts, are protected by the Constitution in the property they rightfully acquire for local purposes, and the state cannot despoil them of it. Detroit v. Detroit & H. Pl. Road Co. 43 Mich. 140, 5 N. W. 275.

A city, though a civil institution created to be employed to some extent as an instrument of government, is not the government itself, but a distinct though subordinate being, and although as a public corporation it holds its existence and peculiar forms and faculties at the will of the government of which it is an instrument, or in some sense a part, it is not so identified with it that all its acts and acquisitions must necessarily be ascribed to the government or inure to its benefit, and it may acquire corporate rights beyond the control of the government. Louisville v. University of Louisville, 15 B. Mon. 642.

The legislature has no power, either directly or indirectly, to divest a municipal corporation of its private property without the consent of its inhabitants. Milwaukee v. Milwaukee, 12 Wis. 94. This decision was made in a case involving the question whether an act extending the limits of a city so as to embrace land formerly included in a town divested the town's title to land within the annexed territory. The court remarked it did not hold that the legislature might not, upon a repeal of the charter of a municipal corporation or a division of its territory, provide for a fair and equitable disposition or division of its public property; but where the legislature takes from a town a portion of its territory which

Windsor, 12-210; Manchester, 12-210." Half the taxes received by the state during the next five years from any street-railway companies using the bridge was to be paid over to the towns in proportion to their assessments, and 10 per cent of such receipts during each succeeding year. A commission was also appointed to hear and determine all legal claims, not exceeding in all \$40,000, for any contract obligations already incurred by the bridge commissioners,—their decision in favor of such claimants to be final against the state, and any sums awarded by them, not exceeding \$40,000, to be paid from the state treasury. If any claimant was dissatisfied with their decision, he was at liberty to bring suit against the state in the superior court, and should the Berlin Bridge Company so sue, then whether it proved the existence of any valid contract with the

bridge commissioners under the act of 1893, or not, it was to be entitled to recover for all materials furnished or expenses incurred under or in connection with any contract with the commissioners, including all legal expenses. Any judgment of the court in favor of the claimant in any suit was to be paid from the state treasury. If the contract already described between the Berlin Iron Bridge Company and the bridge commissioners should be adjudged valid, then the comptroller was directed to carry it out and pay the contract price. In such case the towns were not to receive half the railway taxes for five years, but were to receive 10 per cent of them annually, and were to remain charged with the perpetual maintenance and repair of the highway over the river, including the new bridge.

On June 28, 1895 (Special Acts 1895, p.

includes lands to which it has the exclusive title, and annexes the same to another town or municipality without providing for the disposal of such lands, and under such circumstances that the assent of the town to part with its title cannot be presumed, such town still continues to be the owner of such lands, notwithstanding the separation.

But *Bristol v. New Chester*, 3 N. H. 524, upholds the constitutionality of a provision of an act forming a new town from parts of two existing towns, that certain portions of the property of the old towns shall belong to the new. The court says that, even if the act incorporating the original town is a contract the obligation of which cannot be impaired, still, the provision in question does not have the effect to impair it.

Grogan v. San Francisco, 18 Cal. 590, held that an act which attempted to confirm an unauthorized sale of property granted to a city by the state was invalid. The opinion, which was by Field, Ch. J., afterwards an associate justice of the United States Supreme Court, based the decision upon the ground that a legislative grant was an executed contract, and as such within the clause of the Federal Constitution prohibiting the state from impairing the obligations of contracts, and that there was no difference in the inviolability of the contract between a grant of property to an individual and a like grant to a municipal corporation. Chief Justice Field said: "Though a municipal corporation is the creature of the legislature, yet when the state enters into a contract with it the subordinate relation ceases, and that equality arises which exists between all contracting parties. And however great the control of the legislature over the corporation, it can be exercised only in subordination to the principle which secures the inviolability of contracts." The opinion distinguishes *Hart v. Burnett*, 15 Cal. 530, and *Payne v. Treadwell*, 16 Cal. 222, which asserted authority of the legislature over pueblo lands held by municipal corporations, upon the ground that those lands were held originally by the pueblo, and afterwards the city as its successor, in trust for public municipal purposes, the trust being subject to the direction, supervision, and control of the government, and the cases were, therefore, held to have no application to a case like the one at bar, where the legislature had undertaken to divest property not held upon any such trust, without the city's previous consent or subsequent acceptance of its acts.

The same distinction applies to *Gordon v. San Diego*, 101 Cal. 522, 36 Pac. 18, which held that the legislature might validate a conveyance

of pueblo lands by the city of San Francisco, originally invalid for want of a corporate seal.

Proprietors of Mount Hope Cemetery v. Boston, 158 Mass. 509, 33 N. E. 695, denied the power of the legislature to compel the city of Boston to transfer without compensation to a private corporation property purchased and improved by it for the purpose of a cemetery. The decision rests upon the ground that such property is held in the private, and not in the public or political, character of the city. The court said that the legislative power over municipal property, when it exists, does not extend so far as to enable the legislature to require a transfer, without compensation, to a private person or private corporation. The control which the legislature may exercise is limited. It must act by public agencies and for public uses exclusively. If the city has purchased property for purposes which are strictly and purely public, as a mere instrumentality of the state, such property is so far subject to the control of the legislature that other instrumentalities of the state may be substituted for its management and care, but even the state itself has no power to require the city to transfer the title from public to private ownership.

Webb v. New York, 64 How. Pr. 10, held that the provision of an act for the removal of a reservoir situated upon land the fee-simple absolute of which was in the city of New York was unconstitutional. The opinion says that the property, which New York holds in its proprietary or private character, and which concerns the private advantage of the corporation as a distinct legal personality, is stamped with so many of the rights and powers of natural persons or private corporations as that the city cannot be deprived of the reservoir without due process of law and without just compensation. The opinion further says that the contention of defendants that the legislature may direct to what use such property shall be put may within certain limits be conceded to be correct. "Indeed, in the exercise of its superintending and governmental powers as *parens patrie*, the legislature doubtless may designate the particular instrument in the varied and somewhat complex machinery of this vast municipality for discharging its duties, and for the protection of its rights. But I cannot assent to the proposition that the state may absolutely and unqualifiedly direct the use which shall be made by the city of its property held in fee, when the use named by necessary intentment, and the mode adopted of changing an old public use to another, involve a denial of all the essentials entering into proprietorship."

485, chap. 343), a private act was passed, entitled "An Act Creating the Connecticut River Bridge and Highway District." By this the towns of Hartford, East Hartford, Glastonbury, Manchester, and South Windsor were constituted a corporation under the name of the "Connecticut river bridge and highway district," "for the construction, reconstruction, care, and maintenance of a free public highway across the Connecticut river at Hartford, and the causeway and approaches appertaining thereto, as described in a decree of the superior court of Hartford county, passed on the 10th day of June, 1889, in which decree said highway was laid out and established."

Four citizens of Hartford and one from each of the other towns were appointed "commissioners for said district, with authority to maintain said free public highway, and,

whenever public safety or convenience may require, to erect new bridges along or upon said highway, to reconstruct, raise, and widen the causeway and approaches appurtenant to or a part of said highway, at the expense of the towns named in § 1 of this act, and composing said bridge district, at a cost not exceeding \$500,000." This board was to report annually to the several towns the expenses incurred and paid by it during the year preceding. It was authorized to issue the bonds of the district to an amount not exceeding \$500,000 to provide means for building a new bridge or improving the highway across the river. Each of the five towns, in order to meet the principal and interest due and to become due upon these bonds, was to pay over to the treasurer of the commission, on his written order, annually, 25 cents on each \$1,000 of its grand

In *State v. Savannah*, R. M. Charit (Ga.) 250, the city of Savannah had built a county jail, and afterwards by an act of the legislature was vested with the sole and entire government of the jail. That act was afterwards repealed by an act which vested the jail in the justice and the sheriff. The court upheld the latter act. It says that private corporations cannot be deprived of their franchises except by a judicial judgment, but that all such as are made merely for the purpose of city government are so far creatures of the legislature that they may be controlled by it, and have their constitutions altered and amended by the government in such manner as the public interest may require.

Columbus v. Columbus, 82 Wis. 374, 16 L. R. A. 695, 52 N. W. 425, decided that where a town holds the naked legal title, in trust for the inhabitants of a town and city, of cemetery grounds within the city, exclusively for burial purposes, the legislature may enact that the city shall have exclusive care and management of the cemetery for the beneficiaries. The court distinguishes the case from *Milwaukee v. Milwaukee*, 12 Wis. 94, upon the ground that the town in that case held the absolute title in fee to the land, and that there was no trust for a particular purpose.

In *Skinkle v. Essex Public Road Board*, 47 N. J. L. 93, the court discussed the question whether property purchased by a municipal body for unpaid taxes laid to enable it to exercise its granted functions of government passes beyond legislative control, save through the power of eminent domain, and expressed its opinion that it does not. It says the cases draw a distinction as to property rights of a strictly private character vested in municipal corporations, and remarks that if such a corporation has power to hold devises and legacies to charitable uses the legislature cannot seize and appropriate them to other purposes, but even in such a case the legislature may deprive the public body of the capacity to act as trustee, in which event equity will substitute a trustee to perpetuate the trust, as was done in *Montpelier v. East Montpelier*, 29 Vt. 12, 67 Am. Dec. 748. With reference to municipal property, such as city halls, markets, waterworks, and ferries, it says, upon general principles, immunity from legislative control must be conceded to an extent that will prohibit the lawmakers from divesting the title for the purpose of devoting it to private uses, or diverting it to the support or benefit of other municipal bodies.

State, Millburn, Prosecutor, v. South Orange, 55 N. J. L. 254, 26 Atl. 75, upheld an act which requires the consent of the township committee within whose boundaries the lands are located,

before any city which has theretofore acquired land outside its limits, may use the same for sewage purposes. The court says the authority granted to a municipal corporation to purchase property must be presumed to be for the purpose of enabling it to discharge its public functions in a beneficial way, and its title cannot be regarded as so absolute as to strip the legislature of all control whatever over its uses, in exercising its unquestionable right to regulate and modify the powers bestowed upon the local government. It further says that while it may be conceded that the legislature cannot deprive a municipality of the title to its land and bestow it upon another political district, the legislature has not denuded itself of the capacity to prescribe the mode in which such property shall be enjoyed by the public corporation. If a contract between the state and the public corporation can be deduced from the fact that there is legislative authority to purchase property for a specified public purpose, the extreme limit of the restraint it imposes upon the legislature is that, while it may regulate or change the uses to which such property may be devoted, it cannot deprive the corporation of it.

Poultney v. Wells, 1 Aik. (Vt.) 180, held that a share or right of land, granted by the charter of a township to those persons whose names are entered on the back of the charter, for the benefit of a school in the town, belongs to the town so that the legislature can exercise no power over it to vary the appropriation without the consent of the town, and that such consent must be by those who are inhabitants of the town at the time the assent is given. The legislature had set off a part of one town to another, and it was held that they could not give the latter the control of any part of the fund arising from the school lot in the former, without the former's consent.

The legislature cannot without the consent of a town make any change in the appropriation of the rents from a right of land reserved by its charter for the use of schools in the town. *White v. Fuller*, 38 Vt. 193.

Grants of property to municipal corporations in trust for other purposes than corporate and municipal use are not more the subject of legislative control than are the private and vested rights of individuals. *Montpelier v. East Montpelier*, 29 Vt. 12, 67 Am. Dec. 748. In this case a town was a trustee of certain rights of land reserved for public uses, such as the support of the Gospel and schools. The original town was extinguished and the territory incorporated into two new towns. The court held that a new trustee should be ap-

list, until its share of the whole had been fully satisfied, in the proportion of Hartford, 79-100, East Hartford, 12-100, Glastonbury, 3-100, Manchester, 3-100, and South Windsor, 3-100; and for the ordinary support and maintenance of said highway each town was also directed to pay upon the orders of the commission, from time to time, such further sums as the commission might determine as its proper proportion of the total expense under the provisions of the act, and to provide for such payments in voting its annual tax levy. Half of all taxes received by the state during the next five years from street-railway companies using the bridge, and 10 per cent annually of all future receipts of the same character, were to be paid to the treasurer of the commission. The commissioners were given full power to construct and reconstruct all neces-

sary bridges and approaches, and their orders were made obligatory upon the towns, and sufficient authority for the town treasurers to pay any sums to the treasurer of the commission which the commission might direct. The courts were empowered to enforce, by mandamus or otherwise, any orders of the commissioners made under authority of the act. The commissioners under the act of 1893 were directed to turn over all property and papers in their hands to the new board. The latter was authorized to assume the cost of constructing the temporary bridge which was in course of erection under the contract made by the commissioners under the act of 1893. So much of the public act of May 24, 1895, as fixed the proportion in which each town was to contribute to the cost of constructing and maintaining the bridge and highway, was repealed.

pointed to take charge of the property and execute the trust for the benefit of the inhabitants of the territory which comprised the original township.

Philadelphia v. Fox, 64 Pa. 169, upheld the constitutionality of an act which transferred the discharge of charitable trusts from a city to a board composed in part of persons to be appointed by the courts. The court said: "The city is merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of government,—essentially a revocable agency,—having no vested right to any of its powers or franchises, . . . and therefore fully subject to the control of the legislature, who may enlarge or diminish its territorial extent or its functions, may change or modify its internal arrangement, or destroy its very existence with the mere breath of arbitrary discretion. . . . It is nothing to the purpose, then, to show that a city may act in certain particulars as a private corporation, may make contracts as such, and that it cannot impair the obligation of a contract entered into by it in that capacity. . . . When, therefore, the donors or testators of these charitable funds granted or devised them in trust to the municipality, they must be held to have done so with the full knowledge that their trustee so selected was a mere creature of the state, an agent acting under a revocable power. . . . No one, I think, can doubt that it was entirely competent for that authority to vest the entire management and control of all municipal affairs in just such a body as that constituted by this act. If they could do the greater they can do the less."

An act incorporating a city, and relinquishing to the corporation certain lands in trust for the use and benefit of the city, with power to sell and apply the proceeds to the erection of a jail and courthouse for the use of the county, the balance to be applied to the purposes of education, did not confer a vested right in the city to have the property so applied, and until the trust had been executed it was competent for the legislature to change or abolish it; and both trusts were in fact extinguished by the repeal of the charter, so that a trustee could not be appointed by the court to administer them. *Bass v. Fontleroy*, 11 Tex. 698.

Hagerstown v. Schner, 37 Md. 180, holds that even if a private individual or corporation would have a vested right to immunity from liability after the fall of the bar of the statute of limitations, which could not be defeated by the repeal of the statute of limitations or the extension of the limitation, a

municipal corporation would not have such a right. The action was *ex delicto* against the city for damages caused by a mob.

Lawrence v. Louisville, 96 Ky. 595, 27 L. R. A. 560, 24 S. W. 450 (an action against a city for damages for personal injuries caused by a defective bridge), however, holds that the right to plead the statute of limitations after the fall of the bar is a vested right which cannot be taken away by a subsequent repealing statute. The opinion does not recognize or consider the question whether there is any distinction in this respect between actions against private individuals or corporations and municipal corporations.

Spaulding v. Andover, 54 N. H. 38, held that an act which attempted to divert to certain individuals a portion of a fund previously assigned by the legislature to a town was invalid as in violation of the Federal Constitution, art. 1, § 10, declaring that no state shall pass any law impairing the obligation of contracts. This case recognizes the distinction between the public and private characters of municipal corporations.

The legislature has power to direct that fines collected in the enforcement of city ordinances shall be applied to the support of incorporated homes for friendless women situated within the city. *Indianapolis v. Indianapolis Home for Friendless Women*, 50 Ind. 215. The court held that the home in question was so far a public institution that to appropriate the funds in question to its support was not an appropriation of money to a private purpose.

State ex rel. Board of Edu. v. Haben, 22 Wis. 660, denies the power of the legislature, without the assent of a city or its inhabitants, to divert money raised in a city by taxation for the erection of a high school building to the purchase of a site for a normal school.

The legislature may relieve a city from the trust to hold for public use as a park land the title of which is in the city, and authorize a sale of the land free from the trust. *Brooklyn Park Comrs. v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70.

The control of city parks is a matter of purely local concern, as held and owned by the city not in its political or governmental capacity, but in a quasi-private capacity, in which the municipal authorities act for the exclusive benefit of the corporation whose interests they represent. *State ex rel. Wood v. Schweickardt*, 109 Mo. 496, 19 S. W. 47.

The legislature has power to regulate the use of piers and wharves in the city of New York, although the same are the property of

The judgment brought up for review by this appeal directed the issue of a writ of peremptory mandamus to enforce the payment by the treasurer of the town of Glastonbury of an order drawn upon him by vote of the commissioners for the Connecticut river bridge and highway district for 3-100 of the sum of \$500, required to meet expenses incurred by the board for the ordinary support and maintenance of the highway under their charge. In behalf of the town it is contended that it cannot thus be compelled to contribute, at the dictation of officials not of its own choosing, to the cost of maintaining a highway which is wholly outside of its territorial bounds.

It has undoubtedly been the general policy of the state to leave the expense of public improvements for highway purposes to the determination of the municipal corporations

within the limits of which the highways may be situated, and to charge them only with such obligations as may be incurred in their behalf by officers of their own selection. But when the state at large or the general public have an interest in the construction or maintenance of such works, there is nothing in our Constitution, or in the principles of natural justice upon which it rests, to prevent the general assembly from assuming the active direction of affairs by such agents as it may see fit to appoint, and apportioning whatever expenses may be incurred among such municipalities as may be found to be especially benefited, without first stopping to ask their consent. *Norwich v. Hampshire County Comrs.* 13 Pick. 60; *Rochester v. Roberts*, 29 N. H. 360; *Philadelphia v. Field*, 58 Pa. 320; *Simon v. Northrup*, 27 Or. 487, 30 L. R. A. 171, 40 Pac. 560. As

the corporation. *New York v. Fulton Market Fishmongers' Assn.* 3 How. Pr. N. S. 491.

No principle is better established or more fundamental in its character than that a municipal corporation, being organized for political purposes, is constantly subject to the control of the legislature, and is liable at all times to have its public powers, rights, and duties modified, changed, or abolished as the legislature may deem proper. *Frederick v. Groshon*, 30 Md. 436, 98 Am. Dec. 591. This case held that the power or privilege conferred upon a town to open and widen a creek vested in the town no rights beyond the interference of the legislature, and that it might be absolutely abolished by the legislature. The action was to restrain the city from appropriating land after the power had been abrogated.

In *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 70, 35 L. ed. 943, 12 Sup. Ct. Rep. 142, it was held that an act of the legislature incorporating a waterworks company, which provided that the city should be allowed to use water for municipal purposes free of charge, and in consideration thereof the franchise and property of the company should be exempt from taxation, did not constitute a contract within the protection of the clause of the Federal Constitution forbidding the impairment of the obligation of contracts. The opinion says that the authorities are full and conclusive to the point that the municipality, being a mere agent of the state, stands in its governmental or public character in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed, or revoked without the impairment of any constitutional obligation, while with respect to its private or proprietary rights and interests it may be entitled to the constitutional protection. The case seems to assume that the matter in question pertains to the governmental or public, rather than to the private or proprietary, character of the city.

As contra-distinguished from a private corporation, municipal or public grants of franchises are always subject to the control of the legislative power for the purpose of amendment, modification, or entire revocation. *Memphis v. Memphis Water Co.* 5 Helsk. 495.

This case held that the power of a city to erect waterworks to supply the city and its inhabitants with water was one of the powers subject to amendment, modification, limitation, or revocation by the legislature, and that the power in question had been impliedly abrogated by an act incorporating a private corporation with exclusive power to erect waterworks in the city, which was passed before the city had taken any steps under the power conferred 48 L. R. A.

upon it, other than causing maps, estimates, etc., to be made, preparatory to commencing the actual construction of waterworks. The opinion says that the question to what extent, if at all, the legislature can interfere with interests acquired and vested in the due exercise of its corporate powers by a public corporation is not necessary to be examined or determined.

The exclusive right to regulate, improve, and lease wharves, conferred upon a city by statute, is a private right of the corporation, and not subject to divestiture without due legal process and compensation therefor, as contradistinguished from a public right, which may be abrogated by the state at its pleasure. *Elierman v. McMalns*, 30 La. Ann. 190, 31 Am. Rep. 218.

St. Louis v. Shields, 52 Mo. 351, upheld the constitutionality of an act repealing all former acts which in any manner authorized municipal corporations to collect a wharfage or tonnage tax, so far as concerned a city which was a party to the action, and which had been authorized by a previous act to apply all net receipts from wharfage to the credit of the wharf funds, and had issued bonds, as security for which the revenues to be derived from the wharfage were pledged. The courts said this decision was put upon the ground that the legislature can alter or repeal at will all the acts giving power to municipal corporations, unless the language of the act is clear that they parted with that power, and that if the law impairs the rights of the bondholders they are the proper parties to apply for relief.

East Hartford v. Hartford Bridge Co 10 How. 511, 13 L. ed. 518, holds that an act discontinuing a ferry did not violate the provision of the United States Constitution forbidding the states to pass any law impairing the obligation of contracts, although the legislature had previously granted the franchise to the town. This decision rests upon the ground that, in view of the public character of the state and the town (the parties to the grant of the franchise) and the subject-matter, there was nothing in the nature of a contract, though there might have been if the grantee of the privilege had been an individual or a private corporation, instead of a public corporation.

Benson v. New York, 10 Barb. 223, holds that the grant of a franchise to a municipal corporation to maintain a ferry creates a vested right which cannot be taken away by the legislature, first because it is protected by the provision of the Federal Constitution prohibiting the states from impairing the obligation of

against legislation of this character, American courts generally hold that no plea can be set up of a right of local self-government, implied in the nature of our institutions. *People ex rel. Wood v. Draper*, 15 N. Y. 532, 543; *People ex rel. McLean v. Flagg*, 46 N. Y. 401-404; *Com. v. Plaisted*, 148 Mass. 375, 2 L. R. A. 142, 19 N. E. 224.

The Constitution of Connecticut was ordained, as its preamble declares, by the people of Connecticut. It contemplates the existence of towns and counties, and without these the scheme of government which it established could not exist. It secured to these territorial subdivisions of the state certain political privileges in perpetuity, and, among others, the election by each county of its own sheriff, and by each town of its own representatives in the general assembly, and its own selectmen, and

such officers of local police as the laws might prescribe. It secured them because it granted them, not because they previously existed. Towns have no inherent rights. They have always been the mere creatures of the colony or the state, with such functions, and such only, as were conceded or recognized by law. *Webster v. Harwinton*, 32 Conn. 131. The state possesses all the powers of sovereignty, except so far as limited by the Constitution of the United States. Its executive and judicial powers are each distributed among different magistrates, elected some for counties, and some for the state at large; but its whole legislative power is vested in the general assembly. Our Constitution imposes a few, and only a few, restrictions upon its exercise, and except for these the general assembly, in all matters pertaining to the domain of legislation, is as free and untram-

contracts, and, second, because of the sacredness of vested rights. It says franchises of this description are partly of a public, and partly of a private, nature. So far as the accommodation of passengers is concerned they are *publici juris*; so far as they require capital and produce revenue they are *privati juris*. The opinion distinguishes this case from *East Hartford v. Hartford Bridge Co.* 10 How. 511, 13 L. ed. 518, upon the ground that the franchise in that case was claimed by a town, which is at most but a quasi-corporation, differing essentially from a chartered city, and that the grant was made to the town during the pleasure of the legislature, and not in fee. The opinion on this point was, however, *obiter* as shown by *Darlington v. New York*, 81 N. Y. 164, 88 Am. Dec. 248.

Police Jury *v.* Shreveport, 5 La. Ann. 661, held that a provision of an act incorporating a town, giving the municipal authorities the exclusive right to establish ferries across a river, did not create a contract or vested right in that corporation which the legislature could not change or annul. The court says the corporation of a town is established for public purposes alone, and to administer a part of the sovereign power of the state over a small portion of its territory. It is created by the legislature, and is entirely subject to legislative control.

A city has no vested right to the privilege conferred upon it by a provision of the act incorporating it, giving it the exclusive right to fix license rates for the sale of spirituous liquors. *Sloan v. State*, 8 Blackf. 361.

The legislature may take from a city the power conferred by its charter to grant licenses to sell spirituous liquors, notwithstanding that the receipts from such licenses are appropriated to the support of paupers. *Gutsweller v. People*, 14 Ill. 142.

A town acquires no vested rights under a statute by virtue of which the expense of maintaining a bridge is apportioned between certain towns, to have such towns contribute, which cannot be devested by a subsequent statute. *Weymouth & B. Fire Dist. v. Norfolk County Comrs.* 108 Mass. 142.

Davock v. Moore, 103 Mich. 120, 28 L. R. A. 783, 63 N. W. 424, while conceding that the property which a municipal corporation acquires in the exercise of its corporate powers is protected from legislative interference as vested rights, holds that the legislature may change, modify, or altogether take away a particular source of revenue,—*e. g.*, a liquor tax.

The power or franchise of a village to grant licenses to grocers to sell spirituous liquors is 48 L. R. A.

not a vested right which cannot be impaired or taken away by the legislature. The court says that the power conferred by the charter is wholly political. *People v. Morris*, 18 Wend. 325.

Aberdeen v. Saunderson, 8 Smedes & M. 663, and *Aberdeen Female Academy v. Aberdeen*, 13 Smedes & M. 645, hold that a provision of a charter of a town granting it the sole power to grant liquor licenses, and to appropriate the money arising therefrom to city purposes, created a vested interest in the avails of the exercise of the franchise which cannot be devested by the legislature so long as the franchise exists, although the legislature has power to destroy the franchise itself. In the latter case the decision seems to rest upon the ground that the franchise is both public and private in character; 4, *e.*, that the power to grant a license was given for public purposes, and may have been intended as a municipal and police regulation, but that the fund itself arising from the license is for the private advantage and emolument of the town.

Williamson v. New Jersey, 130 U. S. 189, 82 L. ed. 915, 9 Sup. Ct. Rep. 463, upholds the power of the legislature to repeal an act providing that a poor farm belonging to a city and situated in a township should at all times be liable and subject to taxation by the township. The court says that such a grant of the power of taxation does not form a contract between the state and the township, within the protection of the clause of the Federal Constitution against impairing the obligation of contracts.

Bowdoinham v. Richmond, 6 Me. 112, 19 Am. Dec. 197, held that a town acquired a vested right to have a new town contribute a proportionate part of the expense of maintaining the paupers of the original town at the time of the division, and that the legislature had no power to impair that right.

The species of property which shall be the subject of municipal taxation or exemption is a matter purely within the legislative discretion, and a city charter is not a contract between the state and the city securing to the latter the absolute power of taxation beyond the control of modification by the legislature. *Richmond v. Richmond & D. R. Co.* 21 Gratt. 604.

A city is entirely under the control of the legislature, and its charter may be repealed or modified by the legislature, and it has no vested right to tax particular property for municipal purposes, which may not be taken away by the legislature. *State Bank v. Madison*, 3 Ind. 43.

A judgment that a town shall be assessed for the erection and maintenance of a bridge in

meled as the people would themselves have been, had they retained the law-making power in their own hands, or as they are in adopting such constitutional amendments from time to time as they think fit. *Pratt v. Allen*, 13 Conn. 119, 125; *Booth v. Woodbury*, 32 Conn. 118, 126. It has not infrequently, from early colonial days, made special provision for particular highways or bridges, and in several instances, by the appointment of agencies of its own to construct or alter them at the expense of those upon whom it thought fit to cast the burden. 1 Col. Rec. p. 417; 5 Col. Rec. p. 80; 13 Col. Rec. p. 601; 14 Col. Rec. pp. 605, 630; 1 Private Laws, 282, 285. By legislation of this nature the city of Hartford was recently compelled to contribute a large sum for a separation of grades at the Asylum street

railroad crossing, and we held the act to be not unconstitutional. *Woodruff v. Callin*, 54 Conn. 277, 6 Atl. 849; *Woodruff v. New York & N. E. R. Co.* 59 Conn. 63, 83, 20 Atl. 17. That so many laws of this general description have been enacted by the general assembly, both before and since the adoption of our Constitution, is, of itself, entitled to no small weight in determining whether they fall within the legitimate bounds of what that instrument describes as "legislative power." *Maynard v. Hill*, 125 U. S. 190, 204, 31 L. ed. 654, 656, 8 Sup. Ct. Rep. 723; *Wheeler's Appeal*, 45 Conn. 306. One of those to which reference has been made (1 Private Laws, p. 285) required the town of Granby to build and maintain a bridge across the Farmington river, half of which was in the town of Windsor, and was adjudged to be valid by this court, notwith-

an adjoining town does not vest in the latter a right to have the former contribute to the cost of erection and maintenance, which cannot be taken away by the legislature. *Underhill v. Essex*, 64 Vt. 28, 23 Atl. 617.

But *Stratford v. Sharon*, 61 Vt. 126, 4 L. R. A. 499, 17 Atl. 793, 18 Atl. 308, held that a town, by recovering a judgment for contribution against another town under a statute providing for contribution between the towns in the construction of bridges, acquired a vested right.

Layton v. New Orleans, 12 La. Ann. 515, holds that a provision of the statute consolidating municipalities, that the debt of the consolidated municipality should be borne by the respective constituent municipalities in proportion to the debts which they had incurred before the consolidation, did not create a vested right in such constituents, and that the legislature might change its policy, and direct that the taxes should be equal and uniform within the entire limits of the consolidated municipality.

The opinion of Judge Beck, in *Dubuque v. Illinois C. R. Co.* 39 Iowa, 56, denies the right of the legislature to release a railroad company from municipal taxes already levied, upon the ground that the city had a valid legal claim against the railroad company for the amount of the assessment, which was within the constitutional provisions against depriving persons of property without due process of law and impairing the obligations of contracts. The opinion says that the right of a city to hold property, and the binding nature of obligations entered into with it, are protected by those constitutional guaranties. A municipal corporation, though a public and political institution, deriving its life and powers from the state, possesses a private and proprietary character, and, as such, may acquire and hold property and make contracts. It is protected in its property by the same constitutional guaranties that extend over natural persons, and rights held by it in that character are beyond legislative control and interference. In reply to the argument of counsel that "rights" exercised by a municipal corporation, which, like the right to collect taxes, can never be exercised by a private person or corporation, are necessarily public and subject to the legislative control, the opinion says that rights cannot be classified or distinguished as public and private; that rights held by political corporations, as to every element inhering therein which is necessary to create a right, differ in no respect from rights secured by the law to private persons, and that while such rights

may be subject to control that cannot be exercised over the rights of an individual, they cannot be taken away or impaired by any power in the state. The point of the opinion seems to be that while the powers of a municipal corporation may be distinguished as public and private, and that while the powers of a municipal corporation are conferred by the legislature and may be taken away by the same authority, a right acquired by the exercise of a power while in existence cannot be affected by the abrogation of the power. For instance, the power under which the levy was made may be taken away by the legislature, but the property right in the liability for the taxes cannot be taken away. The opinion on this point must be regarded as merely expressing the view of the judge who wrote it, as none of the other judges concurred with him on this point.

Upon the general question as to the authority of the legislature over city streets, see note to *Iron Mountain R. Co. v. Bingham* (Tenn.) 4 L. R. A. 622.

Upon the question as to the power of the legislature to vacate or discontinue city streets, see note to *Moffitt v. Brainard* (Iowa) 26 L. R. A. 821.

The plenary control of the legislature over the streets has been generally upheld. Thus:

The legislature may authorize the construction of railroads along streets without the consent of municipal authorities. *State ex rel. Jacksonville v. Jacksonville Street R. Co.* 29 Fla. 590, 10 So. 590.

The legislature may grant to a street railway the right to run through the streets and squares of a city without compensation to it. *Savannah & T. R. Co. v. Savannah*, 45 Ga. 602.

Clinton v. Cedar Rapids & M. River R. Co. 24 Iowa, 455, upholds the right of the legislature to authorize a railroad to construct its road through streets, the fee of which was in a city, without the consent of, or compensation to, the city. The opinion says that the city holds the fee in trust for the public, not for the people of the city alone, but the general public as well. It says a city by its constituent act may be authorized to acquire property for a market house, a public hall, or the like, and that of that kind of property the city cannot be deprived by the legislative act, except it be taken for public use, and if so taken the city is entitled to compensation.

The legislature may grant to a street railroad company the right to lay its tracks in the streets of a city without the consent of the municipal authorities, notwithstanding that the city charter confers upon the city the super-

standing then, as now, the General Statutes provided that bridges over rivers dividing towns should be built and maintained at their joint cost. *Granby v. Thurston*, 23 Conn. 416. There is no principle of free government or rule of natural justice which demands that the support of highways and bridges shall be imposed only on those territorial subdivisions of the state in which they are situated. If it be required of them, it is only by virtue of a statute law, which the legislature can vary or repeal at pleasure. *Chidsey v. Canton*, 17 Conn. 475, 478. The burden is one that the legislature can put on such public agencies as it may deem equitable, and transfer from one to another, from time to time, as it may judge best for the public interest. *Dow v. Wakefield*, 103 Mass. 267; *Agawam v. Hampden County*, 130 Mass. 528; *Mobile County v. Kimball*, 102 U. S. 691, 703, 26 L. ed. 238, 241; *Washer v. Bullitt County*, 110 U. S. 558, 28 L. ed. 249, 4 Sup. Ct. Rep. 249.

The defendant urges that taxation and representation are indissolubly connected by

the underlying principles of free government, and that this—the commission which directs the affairs of the bridge district and makes requisitions on the towns for such funds as it deems necessary not having been selected by them—is a sufficient defense against the payment of the order which has been drawn upon him, since it can be paid only out of moneys raised by town taxation.

Taxes can, indeed, under our system of government, only be imposed by the free consent of those who pay them, or their representatives, and for purposes which they approve. But the inhabitants of these towns were represented in the general assembly by which the laws now brought in question were enacted. The legislative power, after defining the general purposes of taxation, to confer upon local public corporations the right to determine the amount of the levy within the territory under their jurisdiction, is unquestionable; and in its exercise it is immaterial whether the corporations to which that function is entrusted or between which it is shared be called counties or

vision of the public streets. *Jersey City v. Jersey City & B. R. Co.* 20 N. J. Eq. 360.

People v. Kerr, 27 N. Y. 188, upheld the right of the legislature to authorize a railroad company to construct its road through the streets of New York without the consent of or compensation to the city. This decision rests upon the ground that the fee of the streets acquired by the city under the act of 1813, § 118, was held in trust for the public use of all the people of the state, and not as a corporate or municipal property.

New Orleans, M. & T. R. Co. v. Ellerman, 105 U. S. 166, 26 L. ed. 1015, held that the charter of New Orleans and a statute of Louisiana authorizing the city to erect and maintain wharves within its limits, and to collect wharfage, did not prevent the legislature from granting to a railroad company the authority to inclose and occupy for its purposes and uses a portion of the levee and batture, and maintain the wharf it had theretofore erected on its property within those limits, or from exempting it from the supervision and control which the municipal authorities exercised in the matter of public wharves.

New Orleans, M. & C. R. Co. v. New Orleans, 26 La. Ann. 478, holds that the legislature had no power to grant a railroad company the right to construct and maintain a depot upon public squares, the title of which in fee was vested in a city. The court says that after a careful consideration of the question it has come to the conclusion that a municipal corporation may own property to and over which the legislature has, while such corporation exists, no right of control in opposition to or independently of the will or consent of the corporation. That a municipal corporation possesses two classes of powers and two classes of rights, public and private. In all that relates to one class it is merely the agent of the state and subject to its control; in the other it is the agent of the inhabitants of the place, and is not subject to the absolute control of the legislature, its creator. Among this latter class is the right to acquire, hold, and dispose of property.

Portland & W. Valley R. Co. v. Portland, 14 Or. 184, 38 Am. Rep. 209, 12 Pac. 265, holds that the title which a city has in its streets or public places is not private property in the 45 L. R. A.

sense that it cannot be taken for public use without just compensation, but it is public, and the power of regulating the use thereof resides in the legislature. The power of the legislature over property dedicated to a public use is not absolute. It may regulate the use of the property or promote its improvement, but cannot divert it or subject it to any use clearly inconsistent with the contract of dedication. The act involved in this case granted a railroad the right to use for its depot buildings and tracks property dedicated by the owner to public use as a levee or public landing and subsequently deeded to the city by the dedicator.

People ex rel. New York v. Brooklyn Bd. of Assessors, 111 N. Y. 505, 2 L. R. A. 148, 19 N. E. 90, held that a landing place in Brooklyn, owned by the city of New York and used by it as an incident to its ferry franchise, was exempt from taxation under the principle that property of a municipality acquired and held for governmental and public uses and used for public purposes is not a taxable subject within the purview of the tax laws. The court says it does not desire to express an opinion on the question whether there is in principle a distinction between taxation of the property of a municipality strictly devoted to public use, and property which it owns, though not acquired for a public use, although it may be held on the general trust applicable to all property of the corporation, but the acquisition or holding of which has no connection with the public functions of the municipality.—Illustrating by supposing that the city of New York had acquired a building lot in Brooklyn. The opinion says that the ferry franchise in connection with which the landing place was used was conferred for a public use, and that that fact is clearly recognized in all the charters.

A municipal corporation has no proprietary rights in streets, levees, or other public grounds within its territorial limits, but whatever rights it has in them are held merely in trust for the public. *St. Paul v. Chicago, M. & St. P. R. Co.* 63 Minn. 330, 34 L. R. A. 184, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458.

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towns, school districts or bridge districts. When a levy is voted, the action is corporate action, deriving its obligatory force wholly from the authority of the state. Towns cannot tax their inhabitants for any purpose except by virtue of statute law. That law for many years required them annually to tax for moneys to be paid over to the state treasurer for state expenditures. It now requires them to tax, as occasion may require, for moneys to be paid over to the county treasurer for county expenditures. It can equally require any town or towns to tax for moneys to be paid over to the treasurer of a bridge or highway district in which they are included, for district expenditures. *Kingman, Petitioner*, 153 Mass. 566, 12 L. R. A. 417, 27 N. E. 778.

It has been suggested that in colonial times it was the right of the inhabitants of every town themselves to order the municipal duties assigned to them, and choose the officers by whom only it could be placed under a pecuniary obligation, and that this is one of those rights and privileges "derived from our ancestors," to "define, secure, and perpetuate" which our Constitution was adopted, and to which its preamble refers. If it can be said that such a right ever existed, it was not one of the nature of those which were described by the framers of the Constitution. They were speaking of rights personal to the individual, as a citizen of a free commonwealth, civil as distinguished from political, and belonging alike to each man, woman, and child among the people of Connecticut. Such of them as they deemed most essential they proceeded to specify in the Declaration of Rights, and here we find asserted (art. 1, § 2) that "all political power is inherent in the people, and all free governments are founded on their authority," and subject to such alterations in form, from time to time, "as they may think expedient." If there were any absolute right in the inhabitants of our towns to regulate their town finances and affairs, which was superior to all legislative control, it would be a great "political power." It would create an *imperium in imperio*, and invest a certain class of our people—those qualified to vote in town meetings—with the prerogative of defeating local improvements which the general assembly deemed it necessary to construct at the expense of those most benefited by them, under the direction of agents of the state, unless the work were done and its cost determined under town control. No set of men can lay claim to such a privilege under the Constitution of Connecticut.

The defendant further insists that the act of June 28th is void because, in § 4, it requires payments from the town treasuries without providing the necessary means; the authority given to raise the necessary funds in the annual tax levy being of no avail, because the bridge district is not required to submit any estimate of the amount needed for the ensuing year before the time for laying the tax. There is no substance to this objection. So far as concerns the principal

and interest of any bonds that may be issued, each town is expressly directed to pay to the district annually 25 cents for each \$1,000 of its grand list, until enough has been thus received to satisfy its proportionate share. As to the ordinary expenses of maintenance, the commission is to draw orders on each town from time to time for such sums as it may determine as the proportion of such town under the provisions of the act. The rule for ascertaining this proportion is that previously laid down in the same section, and it is to be presumed that the commission will make such reports to each town before its annual town meeting as will enable it to lay all taxes necessary to meet its probable expenses for the succeeding year. As to those of the first year, there is nothing on the record to indicate that the share of any town could have been large enough to cause it the slightest embarrassment.

No valid exception can be taken to this rule of apportionment, according to which the expenses of the bridge district are to be distributed among the several towns.

The acts of 1895, under which the present action has arisen, both refer to, and in a sense rest upon, the act of 1887. That was designed to secure the perpetual maintenance of the Hartford bridge as a free highway at the expense of those towns to which it might be found to be of especial benefit. The duty of ascertaining which towns would be thus benefited was intrusted to the superior court. It might have been undertaken by the legislature itself, but it was entirely proper to make it the subject of proceedings of a judicial character, to be instituted by the state. *Salem Turnp. & C. Bridge Corp. v. Esser County*, 100 Mass. 282. This duty was fulfilled, and since the date of the final decree in that cause there has been, and there could be, no material change in any of the conditions by which it was determined. Whatever towns were most benefited in 1889 by the perpetual maintenance of a free bridge must be most benefited by it in 1895. This was purely a question of proximity. Hartford is the natural market of all the neighboring towns lying within easy driving distance. From several of these she is separated by a navigable river, which is outside of her boundaries as well as of theirs. Ferries had been tried as a means of communication, and found inadequate. A toll bridge had then been established, and with the same result. The next step, naturally, was to provide for a free bridge. Four towns east of the river have been judicially found to derive a special benefit from this, and, while the proportionate benefits accruing to each, as well as those to Hartford, may vary from time to time, with changes in population and industrial or social conditions, some benefit, and some especial benefit, to each of the group, must, in the nature of things, always be felt. On this point they were fully heard before a competent tribunal, which, after due notice to every town in the state, and long consideration, selected them out of all the rest.

Complaint is made because, while, by the

decree of the superior court, Glastonbury was charged with 25-210 of the cost of erecting and maintaining a bridge at this point, and this proportion was reaffirmed by the general assembly in the act of May 24, 1895, by that of June 28, 1895, it was cut down to 3-100, and other changes made, with the result of reducing the assessment of every town except Hartford, the burden thrown upon which was largely increased. There is no reason why the relative amount of benefits, which each of the five towns, as compared with the rest, derives from the bridge, may not vary from one period of time to another, and any such variation might present an equitable ground for making a corresponding change in its proportionate assessment for the expenses of construction or maintenance. That what was the proper share of each was determined in 1889 by a judicial proceeding did not preclude a readjustment for due cause, in 1895, by a legislative proceeding; nor did the act of May 24, 1895, put it out of the power of the general assembly to reconsider its action, as was in effect done by the act of June 28. *Situate v. Weymouth*, 108 Mass. 128. We are bound to presume that there was due cause for making the apportionment finally determined on, for it is certain that there might have been. A comparison of the censuses of the United States for 1880 and 1890, between which dates the proceedings under the act of 1887 were brought to a conclusion, shows that while, during the intervening decade, the population of Hartford, East Hartford, and Manchester had been largely increased, that of Glastonbury and South Windsor had suffered a substantial loss. The organization of modern society is such as to foster the growth of cities and their suburbs, at the expense of country towns dependent for their prosperity on agricultural pursuits. The street railways, from the taxes paid by which the treasury of the bridge district was to be in part supplied, run from Hartford to the towns across the river, and from their inhabitants a large part of the fares collected may be derived. In view of all these matters the general assembly may well have concluded, when by the act of June 28 they were about to supply the necessary machinery for carrying into effect the main object of the act of May 24, that Hartford, with its rapidly increasing business and population, ought in fairness to relieve the lesser towns in the bridge district of part of the burden to which they were subject under previous legislation.

Nor is it of any importance that in 1893 the state had taken the maintenance of the bridge upon itself. This was merely a gratuitous act, with no element of a contract, and gave rise to no vested rights, except such as might accrue from obligations on the part of the state subsequently assumed by virtue of its provisions.

It is contended that such an obligation was contracted in favor of the Berlin Iron Bridge Company, and was impaired by the legislation of 1895. If so, this legislation would be so far forth invalid, as against that

company, under article 1, § 10, of the Constitution of the United States. The result would be that the contract made between it and the bridge commissioners, acting under the act of 1893, would remain in force, but not that the state could not compel the towns especially benefited by its execution to pay for the benefits received. In fact, however, the pleadings show that the bridge company, availing itself of the remedy tendered by the act of May 24, 1895, presented its claim for breach of contract to the commission appointed to examine it, and pending this action has accepted their award, and discharged the state from all demands. This, at all events, left the towns or their representatives in no position to raise this objection on constitutional grounds. In mandamus proceedings, matters occurring after the suit is brought can be properly considered in determining whether the writ shall be made peremptory.

The defendant also urges that the act of June 28 violates the 14th Amendment of the Constitution of the United States, in that it deprives the town of Glastonbury of property without due process of law, and denies to it the equal protection of the laws. No right, as against a state, to the equal protection of the laws, is secured to its municipal corporations by this amendment, which can limit in any way legislation to charge them with public obligations. Nor have their inhabitants, in their capacity of members of such corporations, any greater rights or immunities. *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 93, 35 L. ed. 943, 948, 12 Sup. Ct. Rep. 142. No property of the town of Glastonbury has been or is to be taken. *Booth v. Woodbury*, 32 Conn. 118, 130; *Chicago, B. & Q. R. Co. v. Otos County*, 16 Wall. 667, 676, 21 L. ed. 375, 381. A duty to lay taxes for public purposes has been imposed, and for reasons already stated it was competent to the general assembly to create that duty, as it was created. Their proceedings were due proceedings. The process by which it is now sought to compel the defendant to pay the sum in controversy is due process. The town can found no claim, under the Constitution of the United States, any more than under that of Connecticut, to such right of local self-government as precludes the general assembly from exacting this payment, notwithstanding the demand comes from another municipal corporation, the bridge district, in choosing whose members or directing whose affairs it has had no share. *Giozza v. Tiernan*, 148 U. S. 657, 662, 37 L. ed. 599, 601, 13 Sup. Ct. Rep. 721.

We have spoken of the bridge district as a municipal corporation, although it may not answer the common-law definition of that term, since not composed of the inhabitants of any territory as such. In modern times corporations, both public and private, have often been constituted by a union of other corporations. Such were the United States of America after the Declaration of Independence, and until the adoption of their present Constitution. Such are the various

counties of this state, once quasi-corporations and now full corporations, the constituents of which have always been the several towns within their boundaries. The power of the bridge district over the towns composing it is no less than it would have been had their inhabitants individually been made its members. The district and the towns are alike agencies of the state for governmental purposes, and, whether they be styled public or municipal corporations, their relations to it and to each other are the same, and equally subject to modification at its pleasure.

The defendant having refused to pay an order lawfully drawn upon him in behalf of the bridge district the writ was properly issued against him. There was no necessity for making the several towns or the bridge district parties defendant. The bridge district was in effect the relator, no town other than Glastonbury had any legal interest in the controversy, and Glastonbury itself had none in this suit, by which it was charged with no wrong, and in which the only remedy sought was one to compel the performance of a statutory duty incumbent on its treasurer as such. The writ of mandamus must run singly to the party who is bound to do the particular act commanded. *Farrell v. King*, 41 Conn. 453. While not necessary parties, the superior court might and, no doubt, would, have summoned in any or all of the five towns, or the bridge district, or admitted any of them as interveners, had application to that effect been made; for each had a vital interest in the questions of law on which the case must turn. Gen Stat. §§ 884, 887, 890. No order of this nature, however, having been sought from any quarter, their absence can furnish no ground of appeal.

There is no error in the judgment appealed from.

Torrance and Fenn, JJ., concur. Andrews, Ch. J., and Hamersley, J., dissent.

Andrews, Ch. J., dissenting:

I deem it clear and certain that the duty which the act referred to authorized the relators to perform was a town duty. Nowhere in the act are relators made state officers and charged with state duties. But, on the contrary, they are spoken of as town officers set to transact town affairs. The maintenance of the highway of which the relators have the care cannot be regarded as anything other than a town duty without imputing to the legislature the intent to inflict on these towns the monstrous injustice of making their inhabitants liable to pay the damages caused by the nonfeasance or a misfeasance of a duty not imposed on them by law. The relators are totally unlike the commissioners appointed in the case of the Asylum street railroad crossing. In that case the state in the exercise of its sovereign authority appointed its own officers to abate a nuisance dangerous to human life, for the existence of which the three corporations 48 L. R. A.

named were jointly responsible. *Woodruff v. Catlin*, 54 Conn. 295, 6 Atl. 849; *Woodruff v. New York & N. E. R. Co.* 59 Conn. 63, 20 Atl. 17.

The relators, although appointed to transact town affairs, are—six of them—not inhabitants of Glastonbury. They were not elected by the inhabitants of that town, nor has that town any control over their conduct. And from so much of the opinion as holds that the order of the relators is obligatory on that town through the town treasurer, I wholly dissent.

It would be admitted without dispute that it would be incompetent for the legislature to engage in the performance of the affairs of a private corporation by officers of its own appointment. The legislature chartered the New York, New Haven, & Hartford Railroad Company, and may alter or repeal that charter at pleasure. But the legislature cannot appoint a superintendent or a general manager of the affairs of that company without its consent, for whose acts or negligence the corporation should be liable. Such an appointment, if by any possibility the legislature should ever make one, would probably be held void as not being a legislative act. But if held valid it could only be on the ground that, as the legislature might put an entire end to the existence of that corporation, it could do the same thing by piecemeal or by indirection.

The difficulty with the appointment of these commissioners is not with the power of the legislature to establish agencies for the execution of governmental functions, nor with its power to provide for the maintenance of certain public highways through the state, as distinguished from municipal agencies, and for the cost of such maintenance by taxation of the inhabitants of those localities most directly interested in such maintenance. The real difficulty is with the power of the legislature, under the provisions of the state Constitution, to give the whole execution and control of duties and powers assigned to towns, to persons in whose selection the towns have no agency, direct or indirect, and over whose conduct they have no control.

It will be a surprising doctrine to the people of this state, even if only suggested, that the Constitution by the grant of legislative power has conferred on the legislature the authority to take from them the management of their local concerns and the choice of their own local officers. It would be hardly more surprising to them to be told that by adopting the Constitution they had granted to their own representatives the legal authority to take away their liberties altogether.

The building and repair of highways has always been one of the principal duties of a town. In Ludlow's Code of 1650 it was ordered that each town should every year choose one of its inhabitants as surveyor to take care of the highways, with power to call out the persons fit for labor for as many days as might be necessary to keep the same in repair. Subsequently the work was provided for by town taxation, and the over-

sight committed to the selectmen, who were specially charged with mending and repairing the bridges and roads used by the stage that carried the mails. From 1643 to the present time the duty and the corresponding powers in reference to the support of highways has been recognized as essentially a corporate duty belonging to the towns to be performed by town officers (*New Haven v. Sargent*, 38 Conn. 53, 9 Am. Rep. 360; *Suffield v. Hathaway*, 44 Conn. 521, 26 Am. Rep. 483); and it cannot now be maintained that such burden can be imposed on towns while all the powers necessary for their performance are committed to persons not officers or agents of the town, without holding that the inhabitants of the several towns may be held responsible to the whole extent of their property for the performance of every corporate duty, without the power of selecting or controlling the persons who are charged with the performance of such duties.

The legislature has appointed the relators, and has authorized them to perform a town duty respecting a highway. If the legislature may do this, it may appoint the same or other commissioners to perform any or all other town duties. There is no argument which will sustain the former which will not sustain the latter. And if this is the law,—that the legislature in this state may take to itself the entire and exclusive government of a town through officers of its own appointment,—then this judgment is correct; and if the legislature may not do so, then this judgment is erroneous. Stated broadly and nakedly, the question in this case can be nothing short of this: Is or is not town government in this state a mere privilege conceded by the legislature in its discretion, and one which may be withdrawn at any time at its pleasure? While the majority of the court do not assert so extreme a view, yet the argument of the majority opinion involves the theory of the existence in the legislature of this plenary and sovereign right. And unless such right exists that argument fails.

It is true that in some decisions the courts of this state have spoken of towns possessing no inherent, original, or reserved powers, but only such powers as have been delegated to them and which may be regulated and controlled by the legislature. It is from these expressions that the claim is made that towns are nothing but mere agencies which the state employs for the convenience of government, clothing them from time to time with a portion of its sovereignty, but recalling the whole or any part thereof whenever the necessity or the usefulness of the delegation is no longer apparent. In those cases where these expressions have been used they may not have been inappropriate. In none of them was the actual exercise by the legislature of any such power the subject of the decision. Such expressions, however, are very seldom true in anything more than a general sense. They never are, and in this state, never can be, literally accepted in practice. There are also cases the conclusion in which is not consistent with the ex-

istence in the legislature of the power claimed, and one in which the conclusion is antagonistic. *Farrell v. Derby*, 58 Conn. 234, 7 L. R. A. 776, 20 Atl. 460; *Taylor v. Danbury Public Hall Co.* 35 Conn. 430; *Burlington v. Schwazeman*, 52 Conn. 181, 52 Am. Rep. 571.

The people of this state, when they formed the present Constitution, found the whole of its territory occupied by those municipal corporations called towns, each embracing all the inhabitants of a certain portion of the territory. These corporations were governed by their own inhabitants in town meetings, and their affairs were managed by officers chosen by themselves, and who were always inhabitants of the town. And they provided in that instrument that the rights and duties of all corporations should remain as if the Constitution had not been adopted, except so far as therein restricted or limited. Art. 10, § 3. They also provided (art. 6) that electors should only be admitted from the inhabitants of a town and by the selectmen and town clerk. And by articles 3 and 4, that meetings by the electors for the choice of state officers should be held in the several towns and carried on by town officers. And by article 3, that the house of representatives should consist of representatives from each town, being electors and residents in that town, and that town representation should be substantially equal, and that no town should be abolished or deprived of its representation without its own consent. And by art. 10, § 2, that each town should annually elect selectmen and such other officers of local police as the laws may prescribe.

The relation of the towns in this state to the state government is different from that in other states. Prior to the adoption of the Constitution the state government consisted mainly of an assembly of delegates from the towns; and those towns had been uniformly treated as entitled to local self-government. While it could not be said that an act of that assembly vesting the functions of a town meeting or the duties of selectmen in a commission appointed by the assembly would be unconstitutional,—strictly there was in those days no constitution,—yet everyone familiar with our history knows that such an act would have been regarded as revolutionary, and that its passage was practically impossible.

This right of the inhabitants of a town to themselves order the municipal duties assigned to the town was plainly one of those "rights and privileges derived from their ancestors" which the Constitution was adopted "in order more effectually to define, secure, and perpetuate." By the several articles of the Constitution above mentioned, that instrument intended to make sufficient provisions to that end. It did guarantee the perpetual existence of the several towns, with selectmen to manage their local affairs, and a town clerk to record their doings at town meetings, although it left the variety and duties of the officers of the local police subject to legislative change.

In studying these parts of the Constitu-

tion we should always keep in mind that the terms used had a settled meaning before it was adopted. So far as it relates to the form of administration the Constitution is in the main no more than a recognition and re-enactment of an accepted system. The rights preserved are ancient rights, and the municipal bodies recognized in it and required to be perpetuated were already existing, with known elements and functions. And when the Constitution guarantees the perpetual continuance of towns it means towns with the same essential characteristics which towns at that time exercised; for if these essential characteristics do not remain, the town as known to the Constitution does not remain. It is the town as it then actually existed with which the Constitution deals.

Let us, then, ascertain what a town was as then existing. In that way only can we give to these provisions of the Constitution respecting towns their full and true effect. The form of words by which a town corporation was created sufficiently appears in a single instance. In the year 1779 Southington was incorporated, and the record, abbreviated, is that, "upon the memorial of the inhabitants of the Society of Southington by their agents shewing that . . . and praying to be incorporated into a distinct town . . . it was: Resolved by this Assembly that the memorialists (i. e., the inhabitants of the territory named) with all the lands lying within the following limits and bounds . . . be and the same are hereby incorporated into a distinct and separate town with all the powers and privileges that other towns by law have and do enjoy." 2 State Records, 429. For all the general purposes of municipal administration the state was divided only into towns. And what the town was as an actual living entity is shown by the statutes then in force. Statutes of 1808: *Titles, Towns, Town Meetings, Town Clerk, Selectmen, and Highways*. The towns were substantially the only territorial subdivisions used. Counties as municipal corporations or agencies did not exist. They were the mere territorial limits within which the jurisdiction of the county courts was exercised, and they were named and designated in connection with the establishment of such courts. 2 Col. Records, 35. And the courts administered the construction as well as the management of the jails and courthouses, as well as the other matters pertaining to the maintenance of such courts. Statutes 1808: *Title, Gaols*. Counties had no powers except such as were exercised by the courts and no officers except those appointed by the courts and a sheriff appointed by the general assembly. Towns are the only subdivision mentioned in the Constitution, save that the general assembly is required to appoint a sheriff in each county who shall serve for three years.

These statutes and rules respecting towns were a necessary result from the origin, formation, and history of the peculiar form of government in this state. In stating that history, in order to have it as connected as possible, some slight repetition will be made.

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In 1633-34 a strong dissent developed in some prevailing notions of government in the infant colony of Massachusetts Bay. The opposition was strongest in the towns of Dorchester, Newtown, and Watertown. In 1631 Watertown had protested against paying a tax assessed by the board of assistants on the ground that they could not be taxed, save by their own consent. All these towns were foremost in insisting on a general government based on town representation. From these three towns, induced largely by dissatisfaction with the ecclesiastical and centralizing views of the dominant party in the Bay, the pioneers of Connecticut came. By 1636 three towns or plantations were established in Connecticut, and were called Dorchester, Newtown, and Watertown, but shortly after called Windsor, Hartford, and Wethersfield. In March of that year the general court of Massachusetts named eight persons "to govern the people at Connecticut for the space of a year." At the end of that year the three towns on their own behalf appointed committees and magistrates who, as a general court, directed the affairs common to the three towns, and so until January 14, 1638-39. At this time the essential features of town government became fixed, and have never since been changed. They were: A town meeting composed of all the inhabitants exercising all power; an executive board for the general management of town affairs; and a constable for the service of the town warrants and the conduct of the necessary physical force,—all chosen by the town meeting.

The "Fundamental Orders," or Constitution of 1639, was a combination and confederation entered into by the inhabitants and residents of Windsor, Hartford, and Wethersfield, "to associate and conjoin ourselves to be as one public state or commonwealth," and to be "guided and governed in our civil affairs" according to such laws as shall be made in the manner provided. The Orders provided that each year there should be held two general courts composed of deputies from each town chosen by "all that are admitted inhabitants in the towns."

To said general courts was committed the supreme power of the commonwealth,—i. e., they only shall have power:—(1) To make and repeal laws; (2) To grant levies for the commonwealth; (3) To admit freemen only those already admitted inhabitants by the towns; (4) To dispose of lands undisposed of, not belonging to some particular town; (5) To discipline either towns or magistrates or any other person for any misdemeanor, and "to deal in any other matter that concerns the good of the commonwealth."

This power, exclusive and permissive, given to the general court, developed to the unlimited extent which afterwards characterized it—not so much from this (the tenth order) as from the eighth order, which provided that Windsor, Hartford, and Wethersfield should each have power to send four of their freemen as their deputies to every general court, "which deputies should have the power of the whole town to give their votes

and allowance to all such laws and orders as may be for the public good and unto which the said towns are to be bound." The power which any one of said general courts might exercise was unlimited, but the power was that of the several towns exercised by its deputies for the purpose of binding the towns by all laws and orders made for the public good. For this purpose the inhabitants of the towns as self-governing bodies did "associate and conjoin themselves to be as one public state or commonwealth," and did "for ourselves and our successors,—i. e., inhabitants of each town,—and such as shall be adjoined to us at any time hereafter,—i. e., towns hereafter admitted,—enter into combination and confederation together" to be governed by such laws as are made in accordance with the fundamental orders; and as a further means by which each town might protect itself against unequal treatment by the confederacy the final order prohibits the levy of any tax on the towns unless the amount of the whole tax to be paid by each town is apportioned by a committee consisting of an equal number out of each town. Five years later Farmington was admitted and the order provided: "They also—the inhabitants—are to have the like liberties as the other towns upon the river for making orders among themselves." 1 Col. Records, 134.

About the same time Southampton on Long Island was admitted. Owing to its separation by the sound from the jurisdiction of Connecticut, and the greater difficulties of participating in the doings of the general court, as well as the doubt whether its inhabitants were included among those subject to the power of the original towns, a formal combination was negotiated by which the town of Southampton, as the then river towns had already done, did "by their said deputies for themselves and their successors associate and join themselves to the jurisdiction of Connecticut." 1 Col. Records, 566.

In 1662 fortified by the charter of Charles II. in their claim of jurisdiction, the general court admitted by simple vote the town of Southold. L. I., and the following year ordered that Southold "shall have and enjoy the same privileges as Southampton doth by virtue of their combination." 1 Col. Records, 386, 406.

The Fundamental Orders consummated the union of independent and self-governing bodies for the purposes of their own better government and of extending their jurisdiction. The combination provided for an exercise of power, limited only by the fact that the governing body could last but six months, and must consist of deputies from each town, clothed with the whole power of the town; but by the very terms of the combination each town must continue a self-governing body; and from that time on the power of local self-government was recognized as necessarily involved in the existence, as well of the original towns who had associated and unjoined themselves to be as one state, as of those described as such towns "as shall be

adjoined to us at any time hereafter." The Fundamental Orders were adopted January 14, 1639-39. The first general court was held in May, 1639. The second in September. There was an adjourned meeting of this court held in October; and in this the existing self-governing power of the towns was recognized. "The towns of Hartford, Windsor, and Wethersfield, or any other of the towns within this jurisdiction, shall each of them have power to dispose of their own lands undisposed of, . . . as also to choose their own officers and make such orders as may be for the well ordering of their own towns, being not repugnant to any law here established." 1 Col. Records, 36. That this declaration was not regarded as a law necessary to give towns power not before possessed is certain, because if it were so, such law would have been passed at the first court held in the preceding May, which held several sessions, or the illegal acts previously passed by the towns would have been validated; because a law necessary to enable a town to exercise any power must have been approved in Ludlow's Code, adopted in 1650; and because if a law were necessary to enable towns to dispose of their own property it was equally necessary to have such a law to authorize them to establish and define the duties of their principal officers. Now, the office and duty of townsmen (not known as selectmen until 1691 or later) had been established in the several towns, with power defined, by a town vote prior to the adoption of the Fundamental Orders (Hartford Town Records, January 1, 1638-39); and these votes remained unchanged, except by town meetings, for many years afterwards. In fact, the towns after, as well as before, the "Constitution" of 1639 conducted by town meeting their own affairs and chose their own officers, and continued so to do until the Constitution of 1818; the only interruption being an edict of Sir Edmund Andros, during his brief usurpation, which strictly defined the duties of selectmen, and prohibited any town meeting except the necessary annual one for their choice. 3 Col. Records, 429.

In 1818 the town was a territorial and municipal corporation exercising the rights of local self-government through a town meeting and officers of its own choosing. It had existed with these rights from a time prior to the combination of the first towns under a joint jurisdiction. It had been continuously the main instrument by which all the operations of government were set in motion and carried on; and when the provisions of the Constitution speak of "towns" they speak of that kind of a municipal corporation whose character, rights, and privileges had been thus defined and settled for nearly two centuries.

After a struggle of more than thirty years the general assembly yielded to the general demand that the people have an opportunity to frame a Constitution for their own government; that is, embody in one fundamental plan "their supreme, original will,

in respect to the organization and perpetuation of a state government; the division and distribution of its powers; the officers by whom those powers are to be exercised, and the limitation necessary to restrain the action of each and all for the preservation of the rights, liberties, and privileges of all . . . to which the legislature, as well as every other branch of the government, and every officer in the performance of his duties, must conform." *Opinion of the Judges*, 30 Conn. 593. For this purpose in May, 1818, a resolution was passed, recommending to the people to assemble in their respective towns, at their usual place of holding town meetings, and, having chosen their presiding officer, to elect as many delegates as said town now chooses representatives, to meet in convention in the following August, and when so convened, if by them deemed expedient, to "proceed to the formation of a Constitution of civil government for the people of this state." A copy of which Constitution when so formed was to be transmitted by said convention forthwith to each town clerk, to be by him submitted to the voters in his town, assembled at such time as said convention might designate for their approbation and ratification. Said Constitution, "when ratified and approved by such majority of said qualified voters convened as aforesaid as shall be directed by said convention, shall be and remain the supreme law of this state." *Journal Const. Conv.* p. 5. The committee which framed this resolution in their report say that "from resolutions adopted in many towns and petitions from . . . citizens in others" they can entertain no doubt of a general manifestation of a desire for "the establishment of a constitutional compact," and that the political happiness heretofore enjoyed "is to be ascribed to other causes rather than to any peculiar intrinsic excellence in the form and character of the government itself. Destitute of fundamental laws defining and limiting the powers of the legislature, the citizen has no security against encroachments on his most sacred rights and violations of the first principles of a free government, except what may be found in the dependence of that body on the frequency of popular elections. Yet even these boasted barriers against arbitrary power may at any time be prostrated by the legislative will." *J. H. Trumbull's Notes on Const. Conn.* 43.

Upon the ratification by a majority of the people of the state of the Constitution formed by the delegates from each town appointed for that purpose in town meetings, the former government by general assembly was finally and forever dissolved. The people in the exercise of their sovereignty established a new government in three separate and independent departments, whose powers were to be exercised, and exercised only, in accordance with their "supreme original will embodied in the Constitution." As declared in its preamble the main object in establishing this Constitution by the people was "in order more effectually to define,

secure, and perpetuate the liberties, rights, and privileges which they have derived from their ancestors." This purpose was accomplished, first by the declaration of certain principles of free government which were made a fundamental condition on which all powers to each department of government were granted; and, second, by incorporating into the framework of the government established such provisions as were deemed apt and necessary to preserve the most essential of their ancient privileges. Among these the one cherished above all others was the right and privilege of local self-government as represented in the towns, the town meeting, and the town officers. The town was the germ from which all government in Connecticut has developed, and under the Constitution, as this court has recently said, "The annual town election is the single entrance to our whole system of state government." *O'Flaherty v. Bridgeport*, 64 Conn. 165, 29 Atl. 466. Through all its history it had played the most conspicuous part: with all the arbitrary power from time to time exercised by the general court, the ordering of town affairs through its own officers had never been disturbed. The suppression of the town meeting was associated with tyranny under the usurpation of Andros, and its maintenance was by common consent deemed both the source and protection of that sturdy independence and respect for law which had ever characterized our people. It was to be expected that when the delegates from the towns met in convention to form a constitution that should perpetuate their ancient rights and privileges a local self-government would not fail to be secured; and so we find this principle embodied in the whole framework of the new government.

When article 8 provides that electors should only be admitted from the inhabitants of a town and by the selectmen and town clerk of the several towns, the perpetual existence of the several towns, with an executive board to manage their affairs and a town clerk to record the doings at town meetings, is guaranteed. The same is true when article 3 prohibits any meeting of the electors for the choice of state officers except in the towns and when carried on only by town officers; and the same article in providing that the house of representatives should consist of representatives from each town, being electors residing in that town, and that town representation shall be substantially equal, and that no town should be abolished or deprived of its representation without its consent, not only established a legislative department where the people . . . incorporators of town corporations are represented in the lower branch, and as individuals in the upper branch, but guaranteed the right and privilege in the inhabitants of each town to remain, so long as they will, a town corporation.

The legislature may regulate the conduct of the town corporations, may determine the local duties to be assigned to them,—and in that sense the towns derive their powers

from the legislature,—but the possession of some local duties and powers, the administration of such duties by themselves or their own officers, is inherent in the town, which the Constitution makes the basis of the new government, and the legislature has no power to destroy this town. The Constitution assumes the existence of towns as local municipalities, and contemplates that they shall continue as they have hitherto been. It does not expressly provide that every portion of the state shall have a town organization. It names certain officers who are to be chosen by the inhabitants of the towns, and confers on the inhabitants the right to choose these officers, but it does not define their duties, nor preclude the legislature from establishing new offices and giving the incumbents the general management of the municipal affairs. If, therefore, there are no restraints imposed upon the legislative discretion beyond those specifically stated, the towns of this state might be abolished and their people subjected to the rule of commissioners appointed at the state capitol. The people of these towns might be kept in a sort of pupillage for any period of time or to any extent the legislature might choose. And it assumes either an intention that the legislative control should be constant and absolute, or, on the other hand, that there are certain fundamental principles in our general framework of government which were within the contemplation of the people when they agreed upon the Constitution, subject to which the delegation of authority to the several departments of government was made. That this last is the case appears too plain for serious controversy. The implied restrictions upon the power of the legislature as regards local governments, though their limits may not be as plainly defined as express provisions might have made them, are nevertheless equally imperative in character; and whenever a question arises that is clearly within them, there is no alternative but to bow to their authority.

Article 10, in providing that each town shall annually elect selectmen and such officers of local police as the laws may prescribe, guarantees the management of town affairs by town officers of their own choice. By directing the selectmen—the more modern name for the ancient townsmen, to whom had been committed the important affairs of the town since the first settlement of the river towns—to be elected by each town annually, the direction that all officers and agents of the town shall derive their appointment from the town is affirmed by an implication so absolute as not to be escaped; otherwise every officer and agent of the town except selectmen and the local police prescribed by law may be appointed by the legislature. The town clerk is certainly not a selectman; if he is an officer of local police he is not such an one “as the laws may prescribe.” His title comes directly from the Constitution. Yet no one would have the hardihood to claim that the next legislature may appoint every town clerk for a term of twenty years. The selectmen must be elect-

ed by the towns annually, because they are the ordinary and permanent agents of the town, and unless this provision means that all these agents must derive their authority from the town, then the legislature may direct that the town duties appertaining to selectmen, as well as every function of a town, shall be performed by special town agents to be appointed by the legislature. I do not understand the majority of the court to justify such legislation; plainly it would be void, but it would be void only because the Constitution in placing a town beyond the power of the legislature to destroy takes under its protection the right (without which the towns of the Constitution cease to be municipal corporations, and become something unknown to our laws) of self-government through its own officers and agents in all those matters included by law within its municipal powers and duties.

This right of local self-government is assured by the provisions of articles 3, 6, and 10 of the Constitution. It enters into the whole framework of the government. Because of its existence the continuance of the body of electors, the election of state officers, the constitution of the house of representatives, were made dependent on the towns and subject to the specific provisions mentioned. A guaranty so bulwarked should be more potent than any naked restriction. When the Bill of Rights forbids the taking of private property for public use without compensation it forbids the taking of such property for any but a public use, and the guaranty implied is not less sacred than the guaranty expressed.

When, therefore, the legislature had included within the municipal duties of Glastonbury and the four other towns named the maintenance of the highway described, it could not appoint the agents who on behalf of the town were to exercise those duties and powers. “The theory of the Constitution is that the several . . . towns . . . are of right entitled to choose whom they will have to rule over them; and that this right cannot be taken from them and the electors and inhabitants disfranchised by any act of the legislature, or of any or all of the departments of the state government combined.” *People ex rel. Bolton v. Albertson*, 55 N. Y. 56. “Local self-government having always been a part of the English and American systems we shall look for its recognition in any such instrument. And even if not expressly recognized, it is still to be understood that all these instruments are framed with its present existence and anticipated continuance in view.” *Cooley Const. Lim.* 6th ed. 47; *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *People ex rel. McCagg v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278. “The right of local self-government cannot be taken away because all our constitutions assume its continuance as an undoubted right of the people and as an incident to republican government.” *Cooley, Const. Lim.* 6th

ed. 207. "In the examination of American constitutional law we shall not fail to notice the care taken and the means adopted to bring the agencies by which power is to be exercised as near as possible to the subjects upon which the power is to operate. In contradistinction to those governments where power is concentrated in one man, or one or more bodies of men, whose supervision and active control extend to all the objects of government within the territorial limits of the state, the American system is one of complete decentralization, the primary and vital idea of which is that local affairs shall be managed by local authorities and general affairs only by the central authority." *Id.*, 233; *Ordronaux, Const. Legislation*, 62.

This opinion has been drawn out further than was intended. The question of local self-government as an ingredient essential to constitutional administration has been set forth so clearly in the language of Judge Cooley, in *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, already cited, a case in which the legislature had undertaken to appoint commissioners to govern the city of Detroit, that I quote the passage in full. After reviewing the history of local and municipal government in various states he said: "In view of these historical facts and of these general principles the question recurs whether our state Constitution can be so construed as to confer upon the legislature the power to appoint for the municipalities the officers who are to manage the property, interests, and rights in which their own people alone are concerned. If it can be, it involves these consequences. As there is no provision requiring the legislative interference to be upon any general system, it can and may be partial and purely arbitrary. As there is nothing requiring the persons appointed to be citizens of the locality, they can and may be sent in from abroad, and it is not a remote possibility that self-government of towns may make way for a government by such influences as can force themselves upon the legislative notice at Lansing. As the municipal corporation will have no control, except such as the state may voluntarily give it, as regards the taxes to be levied, the buildings to be constructed, the pavements to be laid, and the conveniences to be supplied, it is inevitable that parties from mere personal considerations shall seek the offices and endeavor to secure from the appointing body, whose members in general are not to feel the burden, a compensation such as would not be awarded by the people who must bear it, though the chief tie binding them to the interests of the people governed might be the salaries paid on the one side and drawn on the other. As the legislature could not be compelled to regard the local political sentiment in their choice, and would in fact be most likely to interfere where that sentiment was adverse to their own, the government of cities might be taken to itself by the party for the time being in power, and municipal governments might easily and naturally become the spoils of

party, as state and national offices unfortunately are now. All these things are not only possible, but entirely within the range of probability, if the positions assumed on behalf of the state are tenable. It may be said that these would be mere abuses of power, such as may creep in under any system of constitutional freedom; but what is constitutional freedom? Has the administration of equal laws by magistrates freely chosen no necessary place in it? Constitutional freedom certainly does not consist in exemption from governmental interference in the citizen's private affairs; in his being unmolested in his family, suffered to buy, sell, and enjoy property and generally to seek happiness in his own way. All this might be permitted by the most arbitrary ruler, even though he allowed his subjects no degree of political liberty. The government of an oligarchy may be as just, as regardful of private rights, and as little burdensome as any other; but if it were sought to establish such a government over our cities by law it would hardly do to call upon a protesting people to show where in the Constitution the power to establish it was prohibited; it would be necessary, on the other hand, to point out to them where and by what unguarded words the power had been conferred. Some things are too plain to be written. If this charter of state government which we call a constitution were all there was of constitutional command; if the usages, the customs, the maxims that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests; the precepts which have come from the revolutions which overturned tyrannies; the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so,—if a recognition of all these were to be stricken from the body of our constitutional law a lifeless skeleton might remain, but the living spirit; that which gives it force and attraction; which makes it valuable and draws to it the affections of the people; that which distinguishes it from the numberless constitutions so-called which in Europe have been set up and thrown down within the last hundred years, many of which in their expressions have seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give,—this living and breathing spirit which supplies the interpretation of the words of the written charter would be utterly lost and gone.

"Mr. Justice Story has well shown that constitutional freedom means something more than liberty permitted; it consists in the civil and political rights which are absolutely guaranteed, assured, and guarded in one's liberties as a man and a citizen; his right to vote, his right to hold office, his right to worship God according to the dictates of his own conscience; his equality with all others who are his fellow citizens—

all these guarded and protected and not held at the mercy and discretion of any one man or of any popular majority. Story, *Miscellaneous Writings*, 620. If these are not now the absolute right of the people of Michigan [this state] they may be allowed more liberty of action and more privileges, but they are little nearer to constitutional freedom than Europe was when an imperial city sent out consuls to govern it. The men who framed our institutions have not so understood the facts. With them it has been an axiom that our system was one of checks and balances; that each department of the government was a check upon the others, and each grade of government upon the rest; and they have never questioned or doubted that the corporators in each municipality were exercising their franchises under the protection of certain fundamental principles which no power in the state could override or disregard. The state may mould local institutions according to its views of policy or expediency; but local government is matter of absolute right, and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty, where the state not only shaped its government, but at discretion sent in its own agents to administer it; or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control of their local affairs or no control at all."

In this state we are not obliged to invoke the underlying principle of American con-

stitutional law in order to protect the inhabitants of our towns in their right to local self-government; the express provisions and necessary implications of our own Constitution plainly guarantee that right. Therefore, the private act by which the legislature undertook to appoint these relators to execute the powers and perform the duties committed by the public act to the town of Glastonbury and the four other towns as town corporations violates a clear mandate of the Constitution, and to that extent is void.

I think there is error in the judgment of the superior court.

Hamersley, J., dissenting:

I dissent from the decision of a majority of my colleagues, and cannot but believe that a different conclusion would have been reached had it seemed to them as clear as it seems to me that the legislation in question necessarily involves the appointment of the relators by the legislature, not as state officers, but as town officers; not to perform duties directly in behalf of the state, but duties by the very terms of the statute assigned to the towns as the local municipal duties of a town corporation.

I dissent from the opinion as announced by Judge Baldwin, and concur in the opinion of Chief Justice Andrews.

The decision in this case was affirmed by the Supreme Court of the United States under the name of *Williams v. Eggleston*, in 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

W. T. WALTERS *et al.*

v.

CHARLESTON MILLS *et al.*

John H. MONTGOMERY *et al.*, Petitioners,
Appts.,

v.

City of CHARLESTON *et al.*, Respts.

(99 Fed. Rep. 825.)

1. A purchaser of land of a corporation on foreclosure, who, before the sale is approved or he has complied with his bid, voluntarily pays a claim for taxes, without knowledge of any dispute as to its validity, and is denied credit therefor when completing his purchase, may be subrogated to the claim for such part of the taxes as the property was clearly subject to; but the court will not require a receiver of the property to recognize such voluntary payment of that part of the taxes which

was in dispute, or to assume the burden and responsibility of litigation upon it.

2. A purchaser at a sale under foreclosure is not such a party to the suit as to entitle him to bring in a new party or to raise new issues, although he becomes subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase, with the right to be heard upon all questions thereafter arising which affect his bid and are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by such decree.

(Waddill, District Judge, dissents.)

(February 6, 1900.)

A PPEAL by intervening petitioners from a decree of the Circuit Court of the United States for the District of South Carolina refusing to return to a petitioner money paid by him as taxes upon property which he had purchased at a sale in a suit for foreclosure of a mortgage thereon. *Modified.*

Before *Simonton*, Circuit Judge, and *Paul* and *Waddill*, District Judges.

Statement by *Simonton*, Circuit Judge:

This case comes up on appeal from the circuit court of the United States for the

NOTE.—For subrogation to lien for taxes in case of foreclosure of mortgage, see also *Ran-kin v. Coar* (N. J.) 11 L. R. A. 661.

For subrogation of persons paying tax, see, in general, note to *Bibbins v. Clark* (Iowa) 29 L. R. A. on page 282; also *Ferguson v. Quinn* (Tenn.) 33 L. R. A. 688; and *Mercantile Trust Co. v. Hart* (C. C. App. 8th C.) 35 L. R. A. 352.

48 L. R. A.

district of South Carolina. In order to a complete understanding of the case, it is necessary to state the facts somewhat in detail:

On 8th February, 1888, there was incorporated the Charleston Cotton Mills, a corporation organized for the purpose of manufacturing cotton cloth in the city of Charleston, South Carolina. It erected a mill building on its lands, and owned real estate adjacent thereto, on which were a cotton-warehouse and residences for its operatives. In March, 1896, it became embarrassed, ceased operations, and finally, under decrees for foreclosure, its property was sold under two mortgages executed by it,—the one to secure certain bondholders, and the other to secure a debt due to O. H. Sampson & Co. O. H. Sampson & Co. purchased the parcel of realty mortgaged to them. The bondholders through a committee purchased the mill site, buildings, and machinery. On 6th April, 1897, the Charleston Mills was incorporated under a general law, composed of the bondholders of the Charleston Cotton Mills and new stockholders. To this corporation the committee of bondholders conveyed all the property purchased by them under the foreclosure proceedings. The new company expended large sums of money in providing new machinery and repairing that purchased at the sale, and engaged in the business of manufacturing cotton goods.

The Constitution of South Carolina adopted 4th December, 1895, authorized cities and towns to exempt from all taxes, except those for school purposes, manufactories established within their limits; the exemption to be for five years; the exempting ordinance to be ratified by a majority of the qualified electors of the municipality. Article 8, § 8. In 1896 the city council of Charleston, under this authority, passed an ordinance exempting for five years from taxation, except for school purposes, all manufactories established after the ratification of this ordinance by the qualified voters of Charleston, within the corporate limits of said city, and doing business therein, employing ten hands, and having a paid-up capital of \$10,000, with this proviso: "Provided, however, that should any manufactory entitled under this ordinance to such exemption from taxes fail in business, and be reorganized or convey its plant and property to another person, firm, or new company or corporation, the exemption of said plant or property shall be continued or extended for the five years from the original establishment of said manufactory, and no longer." This ordinance was ratified by popular vote on the 4th Tuesday in April, 1896.

The Charleston Mills set up a claim for exemption under this ordinance, and so notified the city authorities. On 19th November, 1898, pending this claim for exemption on the part of the Charleston Cotton Mills, Walters and others filed their bill for foreclosure in the circuit court of the United States for the district of South Carolina against the Charleston Mills, praying sale and foreclosure of its property; and under it C. O.

Witte, Esq., was appointed receiver. On 13th December, 1898, the city council of Charleston filed its petition in the cause, setting forth that the Charleston Mills was indebted to it for municipal taxes in the sum of \$3,356.52, and that they were unpaid, and, recognizing that the property of its debtor was in the hands of a receiver of that court, and so out of reach of an execution, prayed that provision be made for these taxes out of the first moneys coming into the hands of the receiver. After that an order for the sale of the property under a decree for foreclosure was had. The property was sold for \$100,000, and was bid in by John H. Montgomery for himself and others, who organized themselves into a corporation in due form of law, under the name of the Vesta Mills. Before he complied with his bid,—indeed, the day after the sale,—Mr. Montgomery paid the state and county taxes due upon the property of the Charleston Mills, and also paid, without protest or exception, the amount of the taxes claimed by the city council of Charleston, and took full acquittance and discharge therefor. When he was ready to comply with his bid, he produced the receipted tax bill for state and county purposes, and asked the special master that it be received as so much cash. This was assented to. He then produced the tax receipt of the city council, and made a similar request. This was refused, the special master (knowing that the claim was disputed) not feeling himself authorized so to receive it without the decision and order of the court. Thereupon it was agreed between them that the matter be brought before the court. Accordingly Mr. Montgomery and the Vesta Mills filed their petition in the cause, setting forth the matters above stated; "that Mr. Montgomery now has been informed that the liability of the property of the Charleston Mills to general municipal taxes is denied;" that, wholly ignorant of this, on the day the property was sold he paid the city taxes upon it, securing thereby a remission of all penalties, and also in order to anticipate a levy on the property under execution; that, having so paid this tax, he sought credit therefor in completing the terms of sale, and that the special master declined to recognize the payment of the taxes made to the city; "that thereafter your petitioners arranged with the said special master to pay into his hands the purchase money for the property bought at said sale, including the amount of the city taxes aforesaid (the said special master not feeling himself authorized to allow such reduction without the decision and order of the court); but that it was at the same time agreed that the said matter of the city taxes should be forthwith brought to the attention of the court in this case, so that the said court could decide whether or not the city taxes were by law due and payable and a lien upon the property of the Charleston Mills, and that if the said taxes were decided by the said court to have been so due and payable, and a lien as claimed, then the said amount should be refunded to your petition-

ers by the special master, as having been already paid on account of the purchase money; but that, if the said court should decide that the taxes were not due and payable, then, by proper order of this court, the city council of Charleston should be directed, after proper hearing and adjudication, to refund and repay into the registry of this court the amount of city taxes paid to it by the said John H. Montgomery, to wit, the sum of \$3,076.02." The petition prayed that a copy of it be served on the city council of Charleston and on C. O. Witte, special master, and that the court would afford relief. The city council of Charleston answered the complaint, stating, in effect, that the tax on the Charleston Mills was due and unpaid, and that execution had been issued therefor in the sum of \$3,356.52; that it was stayed by the proceedings in the circuit court, and that petition had been filed for its payment under the order of court; that afterwards Mr. Montgomery paid the sum of \$3,076.02, and obtained a receipt in full; "that the said payment was made freely and voluntarily, and for the purpose of obtaining remission of the penalties." The answer denies in toto the exemption claimed for the Charleston Mills, and adds that this honorable court has no jurisdiction to adjudicate the matters set forth in said petition, as between John H. Montgomery and the said city, for the reason that it is simply an attempt on the part of the said John H. Montgomery to recover money from the city council of Charleston in a matter entirely foreign and outside of the purpose and purport of the bill filed herein. The answer of the special master admits the offer of Mr. Montgomery to deduct the amount paid to the city, and insists that the Charleston Mills are exempt from taxation.

The matters set out in the petition and answers, with testimony, were heard by the circuit court. The court was of the opinion that the city council of Charleston, having received satisfaction in *pais*, was no longer a party to the controversy, and declined, under these circumstances, to pass upon the validity of the exemption. To this action on the part of the court, exception was taken, an appeal was allowed, and the cause is here on several assignments of error directed to the reasons given by the court for its action, and ending with the following: "Because his honor should have held that the city taxes were a lien on the property purchased, legally, and payable by the seller, and that under the law, and in accordance with the agreement made at the time of settlement with the receiver and special master, referred to and set out in the record, the portion of said purchase money so paid twice—to wit, the sum of \$3,076.02, by the purchaser—should be repaid him; it being against the law and equity and good conscience to have such sum retained by said special master and receiver."

Messrs. Smythe, Lee, & Frost, for appellants:

The petitioners were the purchasers, under the decree of the court, of property sold

by its receiver under its decree. The purchaser thus became a quasi-party to the proceedings, with the right to bring his suit in the main cause, and prosecute his rights against all parties to the said cause.

2 Dan. Ch. Pl. & Pr. p. 1052, note 5; *Gordon v. Saunders*, 2 McCord Eq. 165; *Dunham v. Minard*, 4 Paige, 441; *Dorsey v. Campbell*, 1 Bland Ch. 363; 12 Am. & Eng. Enc. Law, p. 229.

The original bill in the main cause was a creditor's bill. An order had been filed directing creditors to come in and prove their claims. In accordance with this order the city council of Charleston filed its intervening petition setting up its lien for taxes.

By this act the city council of Charleston became a party to the case.

Hack v. Chicago & G. S. R. Co. 23 Fed. Rep. 356; *Ex parte Jordan*, 94 U. S. 248, 24 L. ed. 123; *Wright v. Herlong*, 16 S. C. 620; *Wardlaw v. Erskine*, 21 S. C. 361; *Gee v. Humphries*, 49 S. C. 256, 27 S. E. 101; *Bethia v. McKay*, Cheves, Eq. 97; 2 Dan. Ch. Pl. & Pr. p. 1212; *Chesnut v. Fire & Marine Ins. Co.* 2 Hill, Eq. 84.

The receiver and special master appointed by the court had a perfect right to expect instruction from the court.

Gluck, Receivers, § 45, p. 130; *Cammack v. Johnson*, 2 N. J. Eq. 163; *Missouri P. R. Co. v. Texas & P. R. Co.* 31 Fed. Rep. 862, 4 Inters. Com. Rep. 434.

The city council of Charleston had not the right to withdraw its petition, and thus retire from the case.

An order dismissing the pleading will not be granted, if such dismissal will be injurious to the rights of the other parties to the case.

Bethia v. McKay, Cheves, Eq. 93; 1 Dan. Ch. Pl. & Pr. p. 790, and note, p. 793; *Bank of the State v. Rose*, 1 Rich. Eq. 292; *Foster*, Fed. Pr. p. 434.

The court can construe the ordinance, even if the city is not a party.

De Treville v. Smalls, 98 U. S. 517, 25 L. ed. 174; *Sherry v. McKinley*, 99 U. S. 498, 25 L. ed. 330; *Van Brocklin v. Tennessee*, 117 U. S. 179, *sub nom.* *Van Brocklin v. Anderson*, 29 L. ed. 854, 6 Sup. Ct. Rep. 670; *Philadelphia Asso. for Relief of Disabled Firemen v. Wood*, 39 Pa. 73; *Denegre v. Gerac*, 35 La. Ann. 952; 25 Am. & Eng. Enc. Law, p. 731; *Sharp v. Speir*, 4 Hill, 76; *Beaty v. Knowler*, 4 Pet. 152, 7 L. ed. 813; *Conway v. Cable*, 37 Ill. 82, 87 Am. Dec. 240; *Thompson v. Roe*, *ex dem.* *Carroll*, 22 How. 422, 16 L. ed. 387.

Money paid by a person to prevent an illegal seizure of his person or property by an officer claiming authority to seize the same, or to liberate his person or property from illegal detention by such officer, may be recovered back in an action for money had and received, on the ground that the payment was compulsory or by duress or extortion.

Lamborn v. Dickinson County Comrs. 97 U. S. 185, 24 L. ed. 928; *Union P. R. Co. v. Dodge County Comrs.* 98 U. S. 543, 25 L. ed. 197; *Little v. Bowers*, 134 U. S. 547, 33

L. ed. 1016, 10 Sup. Ct. Rep. 620; *Torbitt v. Louisville* (Ky.) 4 S. W. 345; *Louisville v. Anderson*, 79 Ky. 334, 42 Am. Rep. 220; *Murray v. Moorer*, Cheves, L. 113; *Hopkins v. Mazzyck*, 1 Hill, Eq. 251; *Lowndes v. Chisolm*, 2 M'Cord, Eq. 455, 16 Am. Dec. 667; *Broun v. Boyce*, 4 Rich. L. 385; 25 Am. & Eng. Enc. Law, p. 469; *Ætna Ins. Co. v. New York*, 153 N. Y. 340, 47 N. E. 593.

When it is contrary to the rule of *ex æquo et bono*, that the city should retain the money illegally collected, the court will order its return.

Culbreath v. Culbreath, 7 Ga. 67, 50 Am. Dec. 378; *Stotsenburg v. Fordice*, 142 Ind. 490, 41 N. E. 313, 810; *Laurence v. Beaudien*, 2 Bail. L. 647, 23 Am. Dec. 155; *Galveston v. Sydnor*, 39 Tex. 236.

Money paid under a mistake of fact can be collected back again.

Glenn v. Shannon, 12 S. C. 572.

The ordinance in this case was an ordinance of the city of Charleston, of which Mr. Montgomery, a citizen of the city of Spartanburg, could not be presumed to have knowledge.

2 Pom. Eq. Jur. § 854; *Haven v. Foster*, 9 Pick. 112, 19 Am. Dec. 357.

Mr. Montgomery was acting, not for himself, but as agent for other parties who afterwards organized the Vesta Mills. As such agent he had no authority to pay an illegal tax, and, even assuming that Mr. Montgomery had knowledge, which he did not, the principals for whom he acted were not chargeable with that knowledge, and the payment cannot be considered as a voluntary payment by them.

Ætna Ins. Co. v. New York, 153 N. Y. 341, 47 N. E. 593.

Mr. W. A. Holman, with **Mr. George S. Legare**, for appellee City Council of Charleston:

The city council of Charleston was not a party to the original proceedings, and only came into the case by filing its petition praying that funds arising from the sale of the property of the Charleston Mills be applied first to the satisfaction of its claim for taxes. The property of the Charleston Mills then being *in custodia legis*, the city could not enforce its execution for taxes against such property, and it was therefore proper that the city council should file its petition addressed to the court, praying that its claim for taxes be recognized and declared a first lien, and be paid accordingly.

Montgomery paid the taxes due as claimed by the said city council of Charleston. The object and purpose of the petition filed by the city council of Charleston was thus fully met when said taxes were paid, and there was nothing upon which the court could make any adjudication in respect to the matter, and this ended the whole case in so far as the city council of Charleston was involved or concerned, and terminated its connection therewith.

Shipp v. Williams, 22 U. S. App. 380, 62 Fed. Rep. 4, 10 C. C. A. 247; *Wetherby v. Stinson*, 18 U. S. App. 714, 62 Fed. Rep. 173, 10 C. C. A. 243.
48 L. R. A.

An action will not lie to recover the amount of taxes illegally assessed and voluntarily paid.

Dunnell Mfg. Co. v. Newell, 15 R. I. 233, 2 Atl. 766; *Louisville v. Anderson*, 79 Ky. 334; *California v. San Pablo & T. R. Co.* 149 U. S. 308, 37 L. ed. 747, 13 Sup. Ct. Rep. 876.

When the taxes were paid to the city by the appellant, John H. Montgomery, there was no substantial controversy between any of the parties in so far as the city was concerned; and this court will not now pass upon or consider the validity of the law under which such assessment was made, or whether the Charleston Mills was liable therefor.

California v. San Pablo & T. R. Co. 149 U. S. 308, 37 L. ed. 747, 13 Sup. Ct. Rep. 876.

Where a tax is paid voluntarily and without protest, the same cannot be recovered back under any circumstances, whether the law under which such tax is collected is legal or illegal.

Peebles v. Pittsburgh, 101 Pa. 304, 47 Am. Rep. 714; *Bucknall v. Story*, 46 Cal. 589, 13 Am. Rep. 220; *Phelps v. New York*, 2 L. R. A. 626, 112 N. Y. 216, 19 N. E. 408; 18 Am. & Eng. Enc. Law, 1st ed. p. 220; *Little v. Bowers*, 134 U. S. 547, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620.

Mr. Henry A. M. Smith, also for appellees:

A mere volunteer is not favorably regarded in equity. The assistance of the court is very reluctantly given him.

Fonblanque, Eq. 349; *Jefferys v. Jefferys*, Craig & P. 141.

One of the principles lying at the foundation of subrogation in equity is that the person seeking subrogation must have paid the debt under some necessity to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditor.

Ætna L. Ins. Co. v. Middleport, 124 U. S. 534, 31 L. ed. 537, 8 Sup. Ct. Rep. 625; *Sheldon*, Subrogation, § 240; *Gadsden v. Brown*, Speers, Eq. 41; *Hedges v. Dixon County*, 150 U. S. 191, 37 L. ed. 1048, 14 Sup. Ct. Rep. 71; *Prairie State Bank v. United States*, 164 U. S. 231, 41 L. ed. 416, 17 Sup. Ct. Rep. 142; *McNeil v. Miller*, 29 W. Va. 480, 2 S. E. 335; *Suppiger v. Garrels*, 20 Ill. App. 625.

Mr. J. N. Nathans for Charleston Mills et al.

Simonton, Circuit Judge, delivered the opinion of the court:

In discussing this case, these facts must be kept in mind: That under the Walters bill the property of the Charleston Mills had been put into the hands of a receiver, and under an order of the court, had been sold. That pending the suit the city council of Charleston had presented its claim for the tax of 1898, and had prayed that it be paid out of funds in the hands of the receiver. That anterior to the suit the Charleston Mills had set up its claim to exemption from the tax. That the petitioner, John H. Mont-

gomery, was the highest bidder at the sale. That the day after the sale he paid to the city the sum of \$3,076.02 in full of its claim against the Charleston Mills. That, in settlement of his bid, Mr. Montgomery demanded credit for this payment, which demand the special master did not recognize, and refused to admit, except under the instruction of the court. Thereupon John H. Montgomery and the Vesta Mills, a corporation for which he had been acting, filed their petition praying that the court pass upon the validity of the tax, and, if it be declared valid, that the money paid by Montgomery on account thereof be refunded to him out of the purchase money, and, if it be declared invalid, that the city council be instructed to return it to him.

If the tax be valid, he, in effect, claims the equity of subrogation; that is, having paid the tax, he stands in the place of the city council, and is entitled to the money paid to it. He was under no obligation whatever to pay the tax, nor was any proceeding threatened against the property of which he was the prospective owner. The city council had already submitted itself to the court, and had asked that it be paid out of funds in the control of the court; in effect transferring its claim from the property to these funds. Its hand was stayed, and any attempt by execution to collect its claim would have been in contempt of court. *Re Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785. Mr. Montgomery was not bound to pay the tax, and he had an unquestionable right to demand that it be satisfied before complying with his bid.

In *Gadsden v. Brown*, Speers, Eq. 37, David Johnson, Chancellor, lays down the law of subrogation, and his language has received the unqualified approval of the Supreme Court of the United States in *Hedges v. Dixon County*, 150 U. S. 191, 37 L. ed. 1044, 14 Sup. Ct. Rep. 71; and in *Prairie State Bank v. United States*, 164 U. S. 231, 41 L. ed. 416, 17 Sup. Ct. Rep. 142. "The doctrine of subrogation," says the chancellor, "is a pure, unmixed equity, having its foundation in the principles of natural justice, and, from its nature, never could have been intended for the relief of those who were in a condition in which they were at liberty to elect whether they would or would not be bound."

In *Ætna L. Ins. Co. v. Middleport*, 124 U. S. 534, 31 L. ed. 537, 8 Sup. Ct. Rep. 625, the Supreme Court says: "One of the principles lying at the foundation of subrogation in equity, in addition to the one already stated, that the person seeking this subrogation must have paid the debt, is that he must have done this under some necessity to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditor." The same case adopts this language of Sheldon, Subrogation, § 240: "The doctrine of subrogation is not applied for the mere stranger or volunteer who has paid the debt of another, without any assignment or agreement for subrogation, without being under any

legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own." And in *Suppiger v. Garrels*, 20 Ill. App. 625, it is said: "A stranger, within the meaning of this rule, is not necessarily one who has nothing to do with the transaction out of which the debt grew. Anyone who is under no legal obligation or liability to pay the debt is a stranger, and, if he pays the debt, a mere volunteer."

A mere volunteer is not favorably regarded in equity. *Fonblanque, Equity*, 349. *Volenti non fit injuria*. Apart from this, the creditors of the Charleston Mills, to whom the proceeds of sale belong, and who must suffer by any diminution of them, repudiate the act of Mr. Montgomery, and deny all liability for the tax. Nor is this position without plausibility. The Constitution of South Carolina of 1895 gave authority to municipalities to grant exemption from taxation to manufacturers for five years, upon certain conditions. The city council of Charleston fulfilled these conditions, and by ordinance exempted from taxation all manufacturing establishments after the 4th Tuesday in April, 1896, within the corporate limits of said city, and doing business therein, employing ten or more hands, and having a paid-up capital of \$10,000. The Charleston Mills, having over \$50,000 capital, and employing more than ten hands, was established April 6, 1897, within the corporate limits of Charleston, and doing business therein, and thus may be said to come within the words of the ordinance, and would be entitled to the exemption, unless precluded by the proviso. This proviso is in these words: "Should any manufactory entitled under this ordinance to such exemption from taxes fail in business, and be reorganized or convey its plant and property to another person, firm, or a new company or corporation, the exemption of said plant or property shall be continued or extended for the five years from the original establishment of said manufactory, and no longer."

The mill and a large part of the plant owned by the Charleston Mills were formerly the property of the Charleston Cotton Mills, which failed, was put up for sale, and its mill house and plant were purchased by persons who subsequently formed the Charleston Mills. But the Charleston Cotton Mills was incorporated and established February 8, 1888,—anterior to the constitutional provision, and anterior to the ordinance of 1896. It therefore can, with much plausibility, be said not to have been one of the manufactories referred to in the proviso of the ordinance, as it was not a manufactory entitled under the ordinance of 1896 to such exemption from taxes, and so the Charleston Mills may not be affected by that proviso. Under these circumstances the creditors may well complain of the action of John H. Montgomery, and, as far as they can, repudiate the same. There can exist here no equity of subrogation.

The petitioner again sets up an equity of

mistake. He knew nothing of the claim of exemption set up by the Charleston Mills, nor had he any knowledge of the petition of the city council in the main cause. There is no question that a court of equity will relieve a party from the consequences of a mistake of fact,—sometimes of a mistake of law, if the matter be executory. But it will grant such relief only when the mistake is mutual, material, and not caused by the negligence of the party seeking relief. Foster, Fed. Pr. § 2. Mr. Story, in his *Equity Jurisprudence*, vol. 1, § 146, says: "It is not, however, sufficient in all cases, to give the party relief, that the fact is material, but it must be such as he could not, by reasonable diligence, get knowledge of when he was put on inquiry; for if, by such reasonable diligence, he could have obtained knowledge of the fact, equity will not relieve him, since that would be to encourage culpable negligence. Thus, if a party has lost his cause at law from the want of proof of a fact which by ordinary diligence he could have obtained, he is not relievable in equity; for the general rule is that if a party becomes remediless at law by his own negligence, equity will not relieve him."

In the case at bar Mr. Montgomery, before the sale was approved, before he had complied with his bid, and, under the rules of the court, before he could comply, paid off this claim. A question to his counsel would have informed him of the course taken by the city council in applying to the court for its claim. A question put to the special master selling the property would have put him in the possession of the fact that the claim of the city was denied. The fact that he was a stranger in the community, with no opportunity theretofore of knowing the laws of the municipality, should have put him doubly upon his guard, and have induced inquiry before action. Instead of this, consulting no one, asking no question, relying upon his own knowledge, he paid off a claim, not his own or which could affect him, anticipated and forestalled the action of the court, and, in so far as lay in his power, decided the controversy of the creditors with the city against them. The petitioner cannot set up this equity. Nor can he, under it, obtain relief from the city council. Asking no questions, making no protest, threatened with no proceedings, of his own motion he paid this sum in full of the tax.

In *Little v. Bowers*, 134 U. S. 548, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620, there had been a controversy between the Central Railroad Company of New Jersey and the city of Elizabeth relative to its taxes. The decisions of the courts of New Jersey were against the railroad company, and by writ of error the case was carried to the supreme court. Pending the writ of error the taxes in dispute were paid. This ended the case, notwithstanding that the appellants insisted that there was no right to the tax in the city of Elizabeth. In that case the Supreme Court quote with approval the language of Chief Justice Shaw in *Preston v. Boston*, 12 Pick. 7: "Where, therefore, a party not liable

to taxation is called on peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress, and not voluntarily, and, by showing that he is not liable, recover it back as money had and received." But, say the court, this rule does not apply when no attempt has been made by the treasurer to serve his warrant, no demand personally made on the company, nothing done to show an intent to use the legal process; when all that appears is that the company was charged with the tax on the tax list; that it was delinquent; that, before any active steps were taken to enforce collection, the company presented itself at the treasurer's office, and, in the usual course of business, paid in full everything against it, under protest.

In *Robinson v. Charleston*, 2 Rich. L. 319, 45 Am. Dec. 739, the plaintiff had been called upon to pay, and had paid, a tax imposed by the city council of Charleston, which the court, in *Charleston v. State ex rel. Adger*, 2 Speers, L. 719, had decided unlawful. He brought his action to recover it back. It was dismissed. Says the court: "In the case under consideration, the plaintiff paid his money without objection or reservation. He could have tendered the sum really demandable, and have gone on and submitted to legal proceedings against him, and in such proceedings he must have succeeded. . . . In waiving his legal right, he may be regarded as having voluntarily given so much money to the city council for the privilege of letting his slaves work in the city without molestation. Like many others who have not complained, he may not have thought the tax wrong at the time, and may have regarded it . . . as the price of protection and profitable employment." In *Peebles v. Pittsburgh*, 101 Pa. 304, 47 Am. Rep. 714, it was held that an assessment for municipal improvements, voluntarily paid, cannot be recovered back, although the payment was under protest and the law authorizing the assessment was subsequently adjudged unconstitutional. Many cases are cited in the opinion.

The petitioner cannot rely upon his want of knowledge. The means of knowledge were within his touch. He sought none, used none. His own ignorance suggested inquiry. This cannot avail him. Under these circumstances the court below refused to entertain the petition. It was of the opinion that the city council of Charleston was not properly a party to the petition. But, even admitting that it was a party, how could the court pass upon the question of the validity or invalidity of this tax, when the action of the petitioner precluded absolutely any question? The creditors and the corporation wished the question decided. At the threshold the court was met by the fact that a decision was unnecessary, and could not be made, as the tax was already paid. *California v. San Pablo & T. R. Co.* 149 U. S. 308, 37 L. ed. 747, 13 Sup. Ct. Rep. 876; *Little v. Bowers*, 134 U. S. 558, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620.

Exception was taken and error assigned to

the ruling of the circuit court that the city council was not a party before it. When the main case was pending, the city council, pursuing the course most advisable under the circumstances, intervened in the cause, and presented its petition that the tax claimed by it be paid by the receiver. The only means of paying the tax was out of the proceeds of sale. Before this petition was answered, before it could be heard, before the only funds out of which it could be paid (the proceeds of sale) were realized, Mr. Montgomery forestalled the action of the court, and paid the tax, satisfying the claim of the city. Thenceforward there was no controversy. There was nothing upon which the petition or the court could operate, and the whole thing fell to the ground. *San Mateo County v. Southern P. R. Co.* 116 U. S. 141, 29 L. ed. 591, 6 Sup. Ct. Rep. 317; *Kimball v. Kimball*, 174 U. S. 163, 43 L. ed. 934, 19 Sup. Ct. Rep. 639. The sole purpose of the intervention was accomplished, and the connection of the city council with the case, due solely to this intervention, ceased. When, therefore, the present petitioner filed his petition the city council was practically out of the court; and he endeavored to bring it in again, not upon an issue necessarily or incidentally arising out of the main case and the issues there involved, but to protect himself from an improvident act on his part. A purchaser at a sale under foreclosure is not a party to the suit for all intents and purposes. By his bid he makes himself a party to the proceedings, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase, and with a right to be heard on all questions thereafter arising affecting his bid, which are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by such decree. *Kneeland v. American Loan & T. Co.* 136 U. S. 95, 34 L. ed. 379, 10 Sup. Ct. Rep. 950. But this does not authorize him to bring in a new party, or to raise new issues.

The court below, having reached the conclusion that the city council was not a party to the suit, declined to pass upon the question of the validity of the exemption claimed by the Charleston Mills, in the absence of the city council. This is assigned as error. That the appellant considered the city council a necessary party is shown by his seeking to make it a party. By his prayer he demonstrated the necessity. He sought reimbursement for his outlay in paying this tax,—from the receiver if the claim for exemption was invalid, and from the city council if the claim for exemption was valid. Indeed, under the well-known principle of equity “that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit” (*Osborn v. Bank of United States*, 9 Wheat. 842, 6 L. ed. 204), the city council was a necessary party. It is said, however, that it was competent for the court to go on and decide this question, as between the receiver and Mr. Montgomery, without the presence of the city. Cases are cited in 43 L. R. A.

which a course like this was pursued. Thus, courts frequently pass upon the validity of acts of the legislature, and construe acts whose validity is not disputed, in questions between citizen and citizen, without requiring or deeming it necessary to make the state a party. This is perfectly true, and the rule exists because of the impossibility of making the state a party without imperiling the jurisdiction of the court. See *Osborn v. Bank of United States*, 9 Wheat. 842, 6 L. ed. 204. In cases arising under tax titles from municipalities, the municipality has no interest in the result of the action; for its interest had ceased, and the purchaser had taken under the rule of *caveat emptor*. But in the present case there is no question of the invalidity of the ordinance. The question made is one in which the city council had a direct, immediate pecuniary interest involving the right to \$3,076.02. One of the alternatives relied on by the petitioner is that, when he paid the money to the city sheriff, it was a gratuitous act; that the money was received in violation of the contract of exemption made by the city with the Charleston Mills, under which the former exempted the latter from taxation for five years; that under these circumstances, *ex æquo et bono*, the city must return it. The other alternative is that there was no such contract of exemption. The petitioner, standing in court, claims that one or other—the receiver or the city council—must make him whole. To sustain him, both of these parties must be before the court. The conclusion reached by the circuit court in dismissing the petition is affirmed.

Waddill, District Judge, dissenting:

I am unable to concur with the reasoning or in the result reached by the majority in this case. The appellant John H. Montgomery was a purchaser at a judicial sale, and, after making his purchase (imprudently, it may be, but in good faith), paid the taxes due on the property for the year 1898 to the city of Charleston. The special master, from whom he purchased, refused to allow him, in making settlement, a credit for the taxes thus paid; and he thereupon, in good faith, paid the same again to the special master, who brought the amount into court. The court, in my judgment, should at least have determined the question of whether the taxes were due to the city. If due, the fund was not prejudiced by payment of the same to the city, and the amount paid to the special master should be refunded. If the taxes were, as a matter of fact, due, the city will have received the same from this purchaser at a judicial sale, and the court by this decision will take the same money, and give it to the lien creditors, who, confessedly, would not be entitled to the amount if the city was. A purchaser at a judicial sale is neither a volunteer nor a stranger to the proceedings. The city council having, prior to the sale, intervened to have this question of the right to its taxes for that year settled, the city and the purchaser were before the court, and subject to its jurisdiction in the matter of

the determination of their rights in the premises.

A petition for rehearing having been filed, the following response was afterwards handed down:

Per Curiam:

The opinion of the court having been filed in this case, affirming the conclusions reached by the circuit court, the appellant has filed a petition for rehearing. This petition has been carefully considered. The cause was fully argued before this court by able and exhaustive briefs and oral arguments. No new point has been presented, and no change has been effected in the mind of the court in the general principles set forth in the opinion. It cannot see why the receiver should be instructed to recognize the voluntary payment of the claim of the city council made by Mr. Montgomery, while the validity of the claim is denied, and we think with reason, by the creditors of the Charleston Mills. Nor would it be proper to order the receiver to indemnify Mr. Montgomery for his voluntary payment, and to assume the burden and responsibility of litigation upon it with the city council of Charleston.

The prayer of the petition, therefore, will not be granted.

But the petition for rehearing brings to the attention of the court a fact which has been overlooked in the case, and which was not considered. The ordinance of the city council of Charleston exempts manufacturing companies from all municipal taxes, except taxes for school purposes. When he paid the claim of the city council, Mr. Montgomery paid the entire claim, in which was included a tax for school purposes. The Charleston Mills was certainly liable for this school tax. To this extent Mr. Montgomery is clearly entitled to be repaid. Provision for such repayment should have been made for him. It is therefore ordered that the circuit decree appealed from be *modified* in this respect. The cause is remanded to the circuit court, with instructions in this respect to modify its decree, and to order that, out of the funds in court, repayment be made to John H. Montgomery of so much of the claim of the city council paid by him as embraces the tax for school purposes. The costs of this court will be paid, one half by the appellant, and the other half out of funds in the hands of the receiver and special master.

ARKANSAS SUPREME COURT.

ARKANSAS FIRE INSURANCE COMPANY, *Appt.*,

v.

J. B. WILSON *et al.*

(.....Ark.....)

1. Whether or not an accepted offer to purchase insured property constitutes a breach of a condition in the policy against change of ownership is a question for the court, and not for the jury.
2. The acceptance of a proposition to buy real property, which is definite in nothing except the amount to be paid, does not defeat insurance thereon, under a policy providing that it shall be void if the interest of the assured becomes other than "the entire, unconditional, unencumbered, and sole ownership."

(March 3, 1900.)

APPEAL by defendant from a judgment of the Circuit Court for Faulkner County in favor of plaintiffs in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

Statement by Wood, J.:

This suit was brought by appellees to recover on a fire insurance policy. The defense was that the policy was void because of a violation of a provision of the policy

that if the property be unoccupied for more than fifteen days consecutively, the policy would be void unless agreement therefor was indorsed on the policy; also, because of a violation of the provision that if the interest of the assured became other than the entire, unconditional, unencumbered, and sole ownership, the policy should be void unless agreement therefor was indorsed on the policy.

The answer enumerates four particulars in which this provision was violated, namely: "First, that the property had been placed in the hands of a receiver, and was burned while in his hands; second, that at the July term, 1896, of the Faulkner circuit court, judgments had been rendered against Wilson which were liens on the property; third, that Wilson had sold the property before the fire; fourth, that at the April term, 1897, of the Faulkner probate court a judgment had been rendered against Wilson, as administrator, which was a lien on the property." The cause was submitted to a jury, who, after hearing the evidence and the instructions of the court, rendered a verdict in favor of the plaintiffs (appellees). Judgment was entered, and this appeal duly prosecuted.

Mr. J. H. Harrod for appellant.

Messrs. John G. B. Simms, E. A. Bolton, J. T. Young, and Sam Frauenthal, for appellees:

The placing of this property in the hands of the receiver in no wise changed, altered, abridged, or encumbered the interest of J. B.

NOTE.—For executory agreement to sell, as a change of title or interest in property, see *Forward v. Continental Ins. Co.* (N. Y.) 25 L. R. A. 637; and *Erb v. German-American Ins. Co.* (Iowa) 40 L. R. A. 845.
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Wilson in this property, and in no way violated this clause in the policy.

Aceney v. Home Ins. Co. 71 N. Y. 396, 27 Am. Rep. 60; *Terpenning v. Agricultural Ins. Co.* 14 Hun, 299; 1 May, Ins. § 276; *German Ins. Co. v. Churchill*, 26 Ill. App. 206; *Haight v. Continental Ins. Co.* 92 N. Y. 51; *Phœnix Ins. Co. v. Union Mut. L. Ins. Co.* 101 Ind. 392.

An agreement to sell the property would not be such a change in the interest or ownership, nor would any such agreement executed by Wilson in writing, to sell this property, be a change in the interest or ownership of the property, until such proposed sale was carried out by the execution of some legal conveyance of the property.

Grable v. German Ins. Co. 32 Neb. 645, 49 N. W. 713; *Kempton v. State Ins. Co.* 62 Iowa, 83, 17 N. W. 194; *Hill v. Cumberland Valley Mut. Protection Co.* 59 Pa. 474; *Biddle, Ins.* § 206; *Richards, Ins.* § 147; *Ayres v. Hartford F. Ins. Co.* 17 Iowa, 176, 85 Am. Dec. 553.

No executory contract would affect his interest or ownership, and certainly no parol contract within the statute of frauds (as this is) would affect his title, interest, or ownership.

Keatts v. Rector, 1 Ark. 421; *Purcell v. Coleman*, 4 Wall. 513, 18 L. ed. 435; *Lester v. Foxcroft*, 1 Colles, P. C. 108; 1 White & T. Lead. Cas. in Eq. Am. notes, pt. 2, p. 1027; *Peckham v. Balch*, 49 Mich. 179, 13 N. W. 506.

Wood, J., delivered the opinion of the court:

The propositions upon which appellant relies for a reversal are: First, that the conditions of the policy were broken, and the policy thereby forfeited, and upon the undisputed facts the court should have directed a verdict for defendant; second, that the court erred in not declaring that the evidence showed a sale of the property by Wilson to Dunaway; third, that the court erred in not giving the sixth instruction asked by defendant; fourth, that the court erred in refusing to permit the defendant to introduce in evidence the judgments against Wilson; fifth, that the court erred in refusing to allow defendant to read in evidence the transfer of the policy to Kincheloe; sixth, that the court erred in directing the jury to find a special verdict as to whether there had been a sale of the property. We will consider these in the order named.

It is contended that the policy was forfeited by a sale of the property to one Dunaway. The proof upon this proposition was substantially as follows: Dunaway testified that he bought the property from Wilson; that he wrote Mr. Wilson a letter making him an offer for the property, and received in answer the following letter:

Pettus, Ark., May 6, 1897.

Mr. J. G. Dunaway.

Kind Sir:—

I will take your proposition in regard to my place at Conway. I would have written 48 L. R. A.

to you sooner, but I saw Mr. Collier and Bolton and Young, and they advised me to wait until I heard from the Building & Loan. So I will be up to Little Rock about next Sunday or Monday, and I will stop and see you, if you are in. I told your pa that I would let you have the place at your figures. So I will see you soon.

Yours, truly,

[Signed] J. B. Wilson.

He says that he paid Wilson \$2.50 on the property when he bought it; that this payment was made on the 13th of May, 1897,—two days before the fire; that on the 12th of November, 1897, Wilson tried to get him to take the money back that he had paid. He did not take possession or exercise any control over the property. On May 17, 1897, he wrote Wilson the following letter:

May 17, 1897.

J. B. Wilson, Esq., Pettus, Ark.

Dear Sir:—

I suppose that you have heard before this that your house was burned on last Friday night. I believe pa wrote me, so I guess this will break into our trade. There was a mistake or two in the deed, anyway; and I had prepared new deed for you to sign, but will not send it now, until matters are settled. I understand that you have \$1,500 insurance on it; so, if you can get that, it will, no doubt, help you out. Pa stated that there was a man by the name of Jones in the house at the time, and that it was not known how the fire caught. Please bring the deed in with you when you come.

Yours, truly,

J. G. Dunaway.

Dunaway says that he supposed he used the language "your house was burned," in the letter, just hurriedly, in writing same. He says that he had written a deed for the property, and Wilson had consented to the terms of it, but had never signed and returned it; that the proposition he made Wilson was to give him \$100, and assume the mortgage that the building and loan association held, and that was the proposition he answered in the letter of May 6th. Dunaway said that he never wrote the building and loan association a letter agreeing to assume the Wilson mortgage, and never told anyone representing it that he would assume the mortgage, but considered that he had assumed it; that he never took any receipt for the \$2.50 he paid Wilson at the time of the trade, and never tried to enforce specific performance. Wilson, on this point, testified: That he never sold the house to Dunaway; that he borrowed \$2.50 from Dunaway, but did not accept it as payment for the house. He and Dunaway were just talking about a trade. He offered to pay the \$2.50 at one time when there were no witnesses, and at another time when he took witnesses with him, but Dunaway would not take it.

At plaintiffs' request the court instructed the jury as follows: "The court instructs the jury that if you believe from the evi-

dence that the defendant did insure the plaintiffs' frame building, on the lot described in the policy, for \$1,500, against direct loss by fire from September 29, 1894, to September 29, 1897, and that said building was between said dates totally destroyed by fire, and that no condition contained in the policy of insurance was violated, then you will find for the plaintiffs the amount for which said building was insured by said policy." And at the defendant's request, on this point, as follows: "(3) You are instructed that if you find from the evidence that at any time after the issuance of the policy, and before the fire, the interest of Mr. Wilson in the insured property became other than entire, unconditional, unencumbered and sole ownership, you will find for the defendant, except the mortgage of the plaintiff building and loan association." But refused to grant defendant the following requests: "(5) You are instructed that the evidence shows that Wilson sold the property to Julian and Sharp Dunaway, and that such sale forfeited the policy, unless you find that the defendant's agreement or consent was indorsed on the policy, or was otherwise given. (6) If you find from the evidence that after the issuance of the policy, and before the fire, Julian and Sharp Dunaway made to J. B. Wilson a written offer to buy the property insured, for \$100, and assuming the mortgage to the building and loan association, and that J. B. Wilson before the fire accepted the offer, in writing, you are instructed that this avoided the policy unless defendant consented thereto, and plaintiffs cannot recover in this action."

The instruction given at plaintiff's request was proper, as was also No. 3 given at the request of the defendant. No. 5 was properly refused. The evidence, at most, only showed an executory contract for the sale of the property. There was no sale, but only an offer on the one side, and an acceptance of such offer on the other, but the absolute sale could not take place until the execution and delivery of a deed to the property. But as to whether or not the written offer of Dunaway to buy the property, and the acceptance thereof by Wilson, constituted a breach of the policy which barred recovery, was a question for the court, and not for the jury. The offer was shown to have been in writing, and the acceptance was in writing. Judge Parsons, in his chapter on the "Interpretation and Construction of Contracts," lays it down as the very first rule "that what a contract means is a question of law." 2 Parsons, Contr. 8th ed. pp. 492, 610, and authorities cited. The court, then, should have granted appellant's request No. 6, *supra*, if an executory contract of that kind would avoid the policy, under the provision that "the policy should be void if the interest of the assured became other than the entire, unconditional, unencumbered, and sole ownership." This is the real and only serious question in the case. In proceeding to a discussion of this provision of the policy we must remember that such clauses are always and justly construed, when there is

any doubt about the intent, with the utmost strictness against the insurer, and always with reference to their only legitimate object; i. e., the protection of the insurer against risks that are materially different from those which he has undertaken. *Smith v. Phoenix Ins. Co.* 91 Cal. 323, 13 L. R. A. 475, 27 Pac. 738. As Judge Dillon expresses it: "The object of the insurance company, by this clause, is that the interest shall not change so that the assured shall have a greater temptation or motive to burn the property, or less interest and watchfulness in guarding and preserving it from destruction by fire." *Ayres v. Hartford F. Ins. Co.* 17 Iowa, 176. We think there is sufficient ambiguity in the condition under consideration to invoke the application of the rule that courts do not favor forfeitures under such provisions. *Chandler v. St. Paul F. & M. Ins. Co.* 21 Minn. 85, 18 Am. Rep. 385; *Symonds v. Northwestern Mut. L. Ins. Co.* 23 Minn. 491; *Hoffman v. Aina F. Ins. Co.* 32 N. Y. 405, 414, 88 Am. Dec. 337; *Catlin v. Springfield F. Ins. Co.* 1 Sumn. 434-440, Fed. Cas. No. 2,522; *McAllister v. New England Mut. L. Ins. Co.* 101 Mass. 558, 3 Am. Rep. 404; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 103.

It is a matter of nice discrimination to determine whether the word "interest," as used in the condition, is synonymous with the word "title," or whether it means that and something besides. The authorities generally establish the rule that, where the condition is against any change in the legal title, an executory contract of sale is not a violation of the condition; so that if the word "interest," as used in this provision, meant "title," there would be no difficulty in reaching the conclusion that the policy was not forfeited. *Smith v. Phoenix Ins. Co.* 91 Cal. 323, 13 L. R. A. 475, 27 Pac. 738; *Kempton v. State Ins. Co.* 62 Iowa, 83, 17 N. W. 194; *Grable v. German Ins. Co.* 32 Neb. 645, 49 N. W. 713; *Washington F. Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149; *Home Ins. Co. v. Bethel*, 142 Ill. 537, 32 N. E. 510; *Masters v. Madison County Mut. Ins. Co.* 11 Barb. 624; *Hill v. Cumberland Valley Mut. Protection Co.* 59 Pa. 474; *Brouning v. Home Ins. Co.* 71 N. Y. 508, 27 Am. Rep. 867. What, then, does the word "interest," in the provision, "if the interest of the assured be or become other than the entire, unconditional, unencumbered, and sole ownership of the property," etc., mean? Is it synonymous with "title"? In *Gibb v. Philadelphia F. Ins. Co.* 59 Minn. 267, 61 N. W. 137, the provision was, "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance," etc. The facts, as they pertained to this provision, were that the assured had made a contract in writing whereby he sold and agreed to convey to the grantee the insured premises, by deed of warranty, on prompt and full performance by her of the agreement, which was that she (grantee)

was to pay therefor the sum of \$2,500—\$300 cash, and \$1,000 in instalments of \$50 every sixty days thereafter until paid; the balance to be paid in assuming a certain mortgage. The grantee was to have possession of the premises until default in payment, and in case of default she agreed to surrender possession on demand, and that the agreement should be void at the option of the vendor. She (the grantee) entered into possession of the buildings and premises, and occupied the same until the time of the fire, and made all her payments during that time, and was not in default in any manner upon said contract. Upon these facts, the court ruled that there was a forfeiture of the policy. In *Germond v. Home Ins. Co.* 2 Hun, 540, a policy of insurance provided that if the property should be sold or conveyed, or the interest of the parties therein changed, it should be null and void. After the issuing of the policy the owner contracted, under seal, to sell the property covered thereby to one S., who paid part of the purchase price. In an action upon the policy it was held that such contract of sale and payment constituted a change of interest in the property insured, and rendered the policy void. These cases are relied upon by the learned counsel for appellant to support its contention for a forfeiture of the policy, and, indeed, they are more nearly in point than any others we have been able to find. In the Minnesota case there is a very marked difference in the language of the provision from that in the case at bar. That provision is, "if any change," etc., "take place in the interest, title, or possession." Here the grammatical arrangement and punctuation (a comma being used between the words "interest" and "title") would indicate clearly that "interest" and "title" were intended to represent different ideas,—were not used synonymously,—while in the provision of the policy under consideration, "if the interest of the assured be or becomes other than the," etc., "sole ownership," there is nothing to indicate that the word "interest" was used in any other sense than as synonymous with "ownership" or "title." The New York case, however, on this point, is perfectly analogous, and directly decides, under the facts of that case, that the policy was forfeited. But if we concede, upon the authority of these cases, that the word "interest" is not used synonymously with "title," the question still remains, Was there such a change of interest, under the facts of this case, as, in the contemplation of the parties, worked a forfeiture? In the Minnesota case, above, there could be no question about that, for the reason that the grantee had gone into and was in possession at the time the loss occurred, and had fully

complied with the terms of the contract, which was definite as to the manner and time of performance. Likewise, in the New York case the contract was under seal, and, we may therefore assume, was definite and certain in its terms. A part of the purchase price had been paid,—how much is not stated. In both cases the courts might very well have concluded that the contracts to convey conferred rights on the grantee therein, capable of enforcement according to their terms, which materially changed the status of the insurer and the insured towards each other, as to the risks to the premises, which such condition is intended to protect against. Not so under the facts here. Dunaway had made a proposition by letter to buy the premises, which is definite in nothing except the amount he was to pay. Wilson accepted the proposition. There was no proof as to when the contract was to become executed. Dunaway says he paid \$2.50 on the purchase price just two days before the fire occurred, and that the money was paid when the trade was made. Wilson denies that the \$2.50 was paid as purchase money. But it is evident that, under the indefinite executory contract (if we may so call it) for the sale of the property, the same was not to be performed until after the loss occurred, because a part of that performance on the part of Dunaway involved, in addition to the payment of \$100, the assumption of a mortgage; and, of course, the deed was not to be executed and delivered and possession taken by Dunaway until the purchase money was paid. At least, such would be the presumption in the absence of proof to the contrary. Under such circumstances the loss by fire would necessarily fall on Wilson. He still had the insurable interest in the property. He could not after the fire, have compelled Dunaway to take the place. *Wells v. Calnan*, 107 Mass. 514, 9 Am. Rep. 65, and authorities cited. Both parties seem to have recognized the fact that the letters were simply an offer by the one to buy, and an agreement by the other to sell at some time in the future, when the purchase money should be paid and the deed made and delivered. Before that time came both recognized that the consideration had failed, and the contract was not enforceable. We are of the opinion that the alleged contract for the sale of the premises did not in any manner affect the risk which the parties to the contract of insurance contemplated and provided against in the condition named. Hence the court did not err in refusing to grant appellant's request for instruction numbered 8. The other grounds urged for reversal are not well taken.

The judgment of the Faulkner Circuit Court is therefore in all things affirmed.

DELAWARE SUPREME COURT.

Nathan LIEBERMAN, Appt.,

v.

FIRST NATIONAL BANK of Wilmington
et al.

(.....Del.....)

1. The published reports of a bank, purporting to show its resources and liabilities, but not made to induce a person to sign the bond of an employee of the bank, will not relieve such surety, who relied upon them, from liability because the reports failed to show previous defalcations by such employee, which he had concealed by false entries.
2. Statements made by the cashier of a bank without authority, for the purpose of inducing a person to become a surety on the bond of a teller, will not bind the bank so as to relieve the surety if the statements are not true.
3. Concealment of the defalcation of a bank teller prevents the running of the statute of limitations in favor of the surety on his bond, as well as in his own favor, until the discovery of the defalcation.

(January 19, 1900.)

A PPEAL by plaintiff from a decree of the Chancery Court in favor of defendants in a proceeding brought to enjoin the enforcement of executions under judgments upon bonds given by the teller of the defendant bank upon which plaintiff was surety. *Affirmed.*

The facts are stated in the opinion.

Mr. Benjamin Nields, for appellant:

If the false statements made by the cashier, or the false statements made by the bank, which complainant believed to be true and thereby became surety, were negligently or carelessly made without knowing whether the same were true or false, such statements are held in equity to be fraudulent representations.

The false statements made by the cashier, or the false statements made by the bank, upon which statements complainant relied and became surety, are in equity fraudulent representations, notwithstanding the cashier and the directors may have believed them to be true.

2 Brandt, Suretyship, 2d ed. § 422; 2 Pom. Eq. Jur. §§ 887, 888.

Any contract, of however solemn character, may within certain limits be rescinded for constructive, and a *fortiori* for actual, fraud.

1 Bigelow, Fraud, p. 411.

In order to sustain an action for deceit there must be proof of fraud.

Derry v. Peek, L. R. 14 App. Cas. 337; *Arkwright v. Newbold*, L. R. 17 Ch. Div.

NOTE.—As to liability of surety on bond of bank employee, see *McShane v. Howard Bank* (Md.) 10 L. R. A. 552; *Walden Nat. Bank v. Birch* (N. Y.) 14 L. R. A. 211; *Westervelt v. Mohrenstecher* (C. C. A. 8th C.) 34 L. R. A. 477; and *First Nat. Bank v. Briggs* (Vt.) 37 L. R. A. 845.
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320; *Smith v. Chadwick*, L. R. 9 App. Cas. 193.

In a suit in equity for the rescission or avoidance of a contract, it is only necessary to prove that there was misrepresentation. Notwithstanding it may have been honestly made, the contract, having been obtained by misrepresentation, cannot stand.

Derry v. Peek, L. R. 14 App. Cas. 337; *Reese River Silver Min. Co. v. Smith*, L. R. 4 H. L. 64; *Rawlins v. Wickham*, 3 DeG. & J. 304; *Central R. Co. v. Kisch*, L. R. 2 H. L. 99; *Redgrave v. Hurd*, L. R. 20 Ch. Div. 1; *Graves v. Lebanon Nat. Bank*, 10 Bush, 23, 19 Am. Rep. 50; *Deposit Bank v. Hearne*, 20 Ky. L. Rep. 1019, 48 S. W. 160; *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552; *Holden v. New York & E. Bank*, 72 N. Y. 286.

The facts in this case clearly warrant the court in determining, not only that the complainant could avoid the bond on the ground of misrepresentation, but that the facts constitute fraud which would be a ground of action, and a *fortiori* a ground of defense.

1 Bigelow, Fraud, p. 509; *Townsend v. Williams*, 117 N. C. 330, 23 S. E. 461; *Solomon v. Bates*, 118 N. C. 311, 24 S. E. 478; *Tate v. Bates*, 118 N. C. 287, 24 S. E. 482; *Cole v. Cassidy*, 138 Mass. 437, 52 Am. Rep. 284.

The right of the First National Bank to proceed on said bonds, or either of them, is barred by the statutes of this state.

Martin v. Talley, 72 Ala. 23.

The cause of action having accrued more than two years before the execution was issued, the execution is such an action as comes within the terms of the statute, and is barred.

Grimshaw v. Wilmington, 5 Del. Ch. 183.

Equity will not enlarge the legal liability of a party who is under no moral or equitable obligation. Equity will not hold a surety liable where he is discharged at law.

United States v. Price, 9 How. 83, 13 L. ed. 56; *Hunt v. Rhodes*, 1 Pet. 1, 7 L. ed. 27; *Wright v. Russell*, 3 Wils. 530; *Simpson v. Field*, 2 Cas. in Ch. 22; *Waters v. Riley*, 2 Harr. & G. 310, 18 Am. Dec. 302; *Harrison v. Field*, 2 Wash. (Va.) 136; *Weaver v. Shryock*, 6 Serg. & R. 262; *Kennedy v. Carpenter*, 2 Whart. 361; *Dixon v. Vandenberg*, 35 N. J. Eq. 47; *Pickersgill v. Lahens*, 15 Wall. 140, 21 L. ed. 119; *United States v. Marks*, 3 Wall. Jr. 358, Fed. Cas. No. 15-722; *Fielden v. Lahens*, 6 Blatchf. 525, Fed. Cas. No. 4,773; *Pratt v. Northam*, 5 Mason, 95, Fed. Cas. No. 11,376.

A surety cannot, either at law or in equity, be bound farther than he is bound by the very terms of his undertaking.

Miller v. Stewart, 4 Wash. C. C. 28, Fed. Cas. No. 9,591; *Leggett v. Humphreys*, 21 How. 66, 16 L. ed. 50; *Weaver v. Shryock*, 6 Serg. & R. 262; *Getty v. Binass*, 49 N. Y. 385, 10 Am. Rep. 379; *Bank of Wilmington v. Wollaston*, 3 Harr. (Del.) 91; *Sparks v. Farmers' Bank*, 3 Del. Ch. 274.

The statute of limitations commences running in favor of a surety or guarantor from the time he is liable to suit; and this may or may not be at the same time the principal becomes so liable.

1 Brandt, Suretyship, § 143; *State use of St. Louis County v. Dailey*, 4 Mo. App. 172; *United States v. Babbitt*, 95 U. S. 334, 24 L. ed. 480; *People v. Burkhart*, 76 Cal. 606, 18 Pac. 776; *The Governor v. Stonum*, 11 Ala. 679.

Mr. Lewis O. Vandegrift, for appellees:

"Concealed fraud" is a good replication to such a plea of the statute of limitations.

Sparks v. Farmers' Bank, 3 Del. Ch. 274; *Bradford v. McCormick*, 71 Iowa, 129, 32 N. W. 93; *Boone County v. Jones*, 54 Iowa, 699, 2 N. W. 987, 7 N. W. 155; *Bailey v. Glover*, 21 Wall. 342, 22 L. ed. 636; *Kirby v. Lake Shore & M. S. R. Co.* 120 U. S. 130, 30 L. ed. 569, 7 Sup. Ct. Rep. 430; *Reynolds v. Hennessey*, 17 R. I. 174, 20 Atl. 307, 23 Atl. 639; *Knodgrass v. Branch Bank*, 25 Atl. 161, 60 Am. Dec. 505.

What estops the principal estops the surety.

McCabe v. Raney, 32 Ind. 309; *Com. v. Krudig*, 2 Pa. 448; *Zent v. Heart*, 8 Pa. 337; *Wayne v. Commercial Nat. Bank*, 52 Pa. 343; *Amherst Bank v. Root*, 2 Met. 522; *Weston v. Sprague*, 54 Vt. 395; *Charles v. Hoskins*, 14 Iowa, 471, 83 Am. Dec. 378; *Pendleton v. Bank of Kentucky*, 1 T. B. Mon. 181; *Sparks v. Farmers' Bank*, 3 Del. Ch. 274; *Bradford v. McCormick*, 71 Iowa, 129, 32 N. W. 93; *Boone County v. Jones*, 54 Iowa, 699, 2 N. W. 987, 7 N. W. 155.

To plead any statute in this case is against good conscience, and therefore equity will not permit such a plea.

Reynolds v. Hennessey, 17 R. I. 174, 20 Atl. 307, 23 Atl. 639; *Sparks v. Farmers' Bank*, 3 Del. Ch. 274; *Com. v. Kendig*, 2 Pa. 451; *Bond v. Hopkins*, 1 Sch. & Lef. 413, Appx.

The statute of limitations is a good shield, but it should not be used to protect fraud.

Chambers v. Fennemore, 4 Harr. (Del.) 376.

Reports to the Comptroller of the Currency are not made or published for the benefit of those persons likely to become sureties on the bonds of the officers of the bank.

Ashuelot Sav. Bank v. Albee, 63 N. H. 152.

Connivance on the part of the bank—the corporation—would be the only thing that would discharge the surety.

Sparks v. Farmers' Bank, 3 Del. Ch. 301; *United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. ed. 199; *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. ed. 47; *Taylor v. Bank of Kentucky*, 2 J. J. Marsh. 565; *Phillips v. Bosnard*, 35 Fed. Rep. 99.

There was no concealment of the bank's condition intended by the published statements, because it was not known that anything was wrong.

Wayne v. Commercial Nat. Bank, 52 Pa. 343; *Ashuelot Sav. Bank v. Albee*, 63 N. H. 152.

Representations by the cashier were not 48 L. R. A.

within the course of the business intrusted to him, nor near it, within the authority conferred upon him.

American Surety Co. v. Pauly, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552.

The recital and condition of the bonds are amply broad to cover any duty the bank should choose to assign to Smith as teller.

Minor v. Mechanics' Bank, 1 Pet. 46, 7 L. ed. 47; *New York v. Kelly*, 98 N. Y. 467; *Detroit Sav. Bank v. Ziegler*, 49 Mich. 157, 43 Am. Rep. 456, 13 N. W. 496.

Mere delay of the creditor to proceed against the principal is not sufficient to discharge the surety.

Hunt v. Bridgham, 2 Pick. 584, 13 Am. Dec. 458.

The only limitation of the appellant's liability as surety was Smith's employment by the bank, his payment and delivery to it, at the end of his employment, of all money and property in his hands, and otherwise fully complying with the terms of the bonds.

Bank of Wilmington v. Wollaston, 3 Harr. (Del.) 96; *Sparks v. Farmers' Bank*, 3 Del. Ch. 289.

If the statutes of limitations ever were applicable, the bar of the statutes was raised by Smith's acknowledgment of the debt.

Burlcigh v. Stott, 8 Barn. & C. 36; *Channell v. Ditchburn*, 5 Mees. & W. 494; *Boone County v. Jones*, 54 Iowa, 699, 2 N. W. 991, 7 N. W. 155; *Zent v. Heart*, 8 Pa. 341; *Com. v. Kendig*, 2 Pa. 452; *Chambers v. Fennemore*, 4 Harr. (Del.) 374; *Newlin v. Duncan*, 1 Harr. (Del.) 204, 25 Am. Dec. 66; *Robinson v. Burton*, 1 Houst. (Del.) 540.

There is no difference in the liability of principal and sureties on an official bond.

Harris v. Clap, 1 Mass. 308, 2 Am. Rep. 27; *Wyman v. Robinson*, 73 Me. 384, 40 Am. Rep. 360.

Lore, Ch. J., delivered the opinion of the court:

Nathan Lieberman, the appellant, one of the sureties on two official bonds of Peter T. E. Smith, late paying teller of the First National Bank of Wilmington, has appealed in this case from the decree of the chancellor made December 3, 1898, which dissolved a preliminary injunction granted by the late Chancellor Wolcott November 6, 1893, restraining the bank from collecting the amount of certain defalcations of Smith, made by him while acting as teller of the said bank. The bonds bore date, respectively, November 1, 1879, and July 6, 1885. Each bond was in the penal sum of \$15,000, and set forth that said Smith had been duly elected and chosen teller of the bank during the pleasure of the board of directors; that each was conditioned for the faithful discharge of the duties of his office as teller of the said bank. Annexed to each bond was a joint and several warrant of attorney to enter judgment thereon. During the life of the first bond, between November 1, 1879, and July 6, 1885, Smith fraudulently abstracted funds of the bank to the amount of \$11,650. During the life of the second bond, between July 6, 1885, and July 5, 1891, he so ab-

stracted \$27,750. These defalcations were fraudulently concealed by false entries made by Smith on the books of the bank. The defalcations were discovered about February 18, 1893, and a full confession was made by Smith. Upon the 24th day of February, 1893, judgment was entered in the superior court of the state of Delaware on each of said bonds; said judgments being No. 299 to February term, 1893, on the bond of November 1, 1879, and No. 301 to the said term on bond of July 6, 1885. On the latter judgment, execution was issued October 19, 1893, and thereunder the goods and chattels of Lieberman were taken in execution, and were about to be advertised and sold, when further proceedings were restrained by the preliminary injunction of November 6, 1893.

The chief assignments of error relied on and urged in the brief and argument in behalf of the appellant were (1) that the bonds were void as to Lieberman because he was induced to become surety thereon by fraudulent representations of the respondent; (2) that, at the time of the entry of the judgments, action on the bonds was barred by the statute of limitations.

1. The appellant contends that under the evidence in this case there is clear proof that immediately before complainant became surety on the bond of November 1, 1879, he had a conversation with George D. Armstrong, cashier of said bank; that Armstrong then told him that he would run no risk in becoming surety for Smith, as he was "a good, reliable, honest man, and his accounts are all straight, and as paying teller he cannot take anything," and that he had read the published statements of the bank, showing its then resources and liabilities; that immediately before complainant became surety on the bond of July 6, 1885, he had a further conversation with George D. Armstrong, cashier of the bank; that Armstrong then told him that Smith's books and everything were straight, and that "there was no risk whatever in going on his bond again;" and that he had read the statements of the bank, with its then resources. Complainant avers that he was induced to become surety for Smith because of such statements made to him by the cashier, and by the published reports of the bank, showing its resources and liabilities, immediately before he became surety; that these reports were made and published pursuant to an act of Congress, and the cashier, who made oath thereto, and the directors, who certified to the correctness thereof, did so under the authority conferred upon them, and in discharge of a duty imposed upon them by law; that, from the facts thus proved, the bonds signed by the complainant are void as to him because he became surety thereon by reason of such fraudulent representations of the respondent. It nowhere appears in the testimony that Armstrong, the cashier, was authorized by the bank in any way to make representations in this matter of surety on Smith's bonds, or that it was in the line of his duty as cashier to do so. Any statements made by him to Lieberman as to

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Smith's honesty, the condition of his books and accounts, and the probable risk to his surety could, therefore, in no wise bind the bank. Lieberman took them at his own risk, as the individual judgments of Armstrong. The supreme court of Kentucky, in *Graves v. Lebanon Nat. Bank*, 10 Bush, 23, 19 Am. Rep. 50, held that published reports of the assets and liabilities of a national bank, under the acts of Congress, which were false, but which, under the proof, induced a person to become surety on the official bond of the cashier of the bank, made the bond void as to such surety, and relieved him from liability thereon. The contrary doctrine is maintained in *Ashuelot Sav. Bank v. Albee*, 63 N. H. 152, where, after reviewing the *Graves Case*, the court says: Such "report was not due to persons considering the question of becoming sureties of the treasurer. It was a duty imposed by statute for the benefit of depositors, and not to enable a reader of the published reports to determine whether the treasurer was a man whose official bond he could safely sign." This reason applies with equal force to the case now before us. It is difficult to perceive upon what principle of law or equity such published reports of the bank can be held as an inducement to Lieberman to become surety on Smith's bond. They were not made by the bank for that purpose. Their publication from time to time had no relation to such suretyship, nor did they disclose upon their face whether Smith was honest or dishonest. If Lieberman saw fit to draw from such reports the conclusion that he could safely become surety on Smith's official bond, it was unquestionably his own volition, and without participation of the bank, and for which the bank should not be held responsible. There seems to be, therefore, nothing either in the statements of the cashier, Armstrong, or in the published reports of the bank, that would relieve Lieberman of his liability as surety on the bonds.

2. The main and most important question in this case is raised by the statute of limitations. The statute relating to bonds of this character is as follows: "No action shall be brought upon any bond given to the president, directors, and company of any bank, or to any corporation, by any officer of such bank or corporation, with condition for his good behavior or for the faithful discharge of the duties of his station, or touching the execution of his office, against either principal or sureties, after the expiration of two years from the accruing of the cause of such action; and no action shall be brought, and no proceeding shall be had, upon any such bond or upon any judgment thereon, against either principal or sureties, for any cause of action accruing after the expiration of six years from the date of such bond." Rev. Laws, p. 889, § 11. No question in this case arises under the last clause of the law, as the evidence shows that all the defalcations occurred within six years from the date of the bond under which they are claimed in each case. We have, therefore, only to deal with the two years' limitation

in the first clause. Judgment was entered February 24, 1893. Three items of defalcation under the bond of July 6, 1885,—*viz.*, April 11, 1891, \$500; July 2, 1891, \$500; July 3, 1891, \$1,500; amounting to \$2,500,—are within the two years, and would not be affected by the statute in any event. The residue of the defalcations are without the two years. Does the statute of limitations bar recovery, as claimed by the appellant? It was shown in the evidence that Smith had fraudulently abstracted \$4,600 of bank funds at the date of the first bond, November 1, 1879; that under that bond he so abstracted \$11,650, and under the bond of July 6, 1885, \$27,750; that all these peculations were fraudulently concealed by entries and alterations so skilfully made by him on the books of the bank as to escape detection until he made disclosure of the same about February 18, 1893; that during all that time he was a capable and trusted officer of the bank, enjoying the confidence of his employers and of the community. The respondent contends that the bar of the statute is removed by the concealed fraud of Smith.

The question whether the fraudulent concealment of the existence of the cause of action will hinder the operation of the statute of limitations is one which has been much discussed, and upon which there has been a radical difference of opinion. On one side it is said that the statute in plain terms fixes the time when action shall be brought after the cause of action accrues; that the cause of action accrues when the act is done and the fraud is consummated, and from that time, and not from the time the plaintiff discovered it, the statute interposes as a protection; that while courts of equity may make an exception in cases of fraud, because they are not strictly bound by the statute, yet for courts of law to do the same is to except from the law cases which are plainly within its terms. On the other side it is said that the statute must be expounded reasonably, so as to suppress, and not to extend, the mischiefs it was intended to cure; that it was intended to suppress fraud by preventing unjust claims from starting up after a great lapse of time, when evidence by which they might be repelled was forgotten or had ceased to exist; that it should not, therefore, be so construed as to encourage fraud by enabling those who, through falsehood or deceit, have managed to keep one in ignorance of the fact that he had a cause of action, to take advantage of their own wrongdoing, under a plea of the statute. "We think," says the court in *Reynolds v. Hennessy*, 17 R. I. 174, 20 Atl. 307, 23 Atl. 639, "the latter position is best sustained by reason and authority. It is certainly in the line of justice and morality, and the only objection to it is that it introduces an exception into the statute." The same objection lies to claims in favor of the government, and to cases of new promise. The statute does not take away the debt, but simply affects the remedy. Hence, if one by fraud conceals the fact of a right of action, it is not ingrafting an exception on the statute
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to say that he is not protected thereby, but it is simply saying that he never was within the statute, since its protection was never designed for such as he. By fraud he has put himself outside of its pale. Whether this be taken as an exception, or only a limitation of the statute, it rests upon sound reason and just policy. *Ibid.*; *Bree v. Holbech*, 2 Dougl. 655 (Lord Mansfield); *South Sea Co. v. Wymondsell*, 3 P. Wms. 143. Such a construction has been so frequently applied to the statute that it is now said to have the weight of authority in its favor. Massachusetts, Maine, New Hampshire, Pennsylvania, Illinois, Indiana, and Texas are among the states supporting this view, while the contrary has been held in New York, Virginia, North Carolina, South Carolina, and New Jersey. In *First Massachusetts Turnp. Corp. v. Field*, 3 Mass. 201, 3 Am. Dec. 124, Chief Justice Parsons uses this language: That, where "the delay of bringing the suit is owing to the fraud of the defendant, and the cause of action against him ought not to be considered as having accrued until the plaintiff could obtain the knowledge that he had a cause of action. If this knowledge is fraudulently concealed from him by the defendant, we [the court] should violate a sound rule of law if we permitted the defendant to avail himself of his own fraud." The reason given by Lord Redesdale in *Hovenden v. Annesley*, 2 Sch. & Lef. 634, why the statute should not operate as a bar where fraud has been concealed by one party until it has been discovered by the other, is "that the statute ought not, in conscience, to run; the conscience of the party being so affected that he ought not to be allowed to avail himself of the length of time." Whatever may be the conflict in courts of law upon this point, it is, without controversy, the settled doctrine in courts of equity. Angell, *Limitations of Actions*, § 183; *Coster v. Murray*, 5 Johns. Ch. 522.

But it is insisted that, while this rule prevails against the person who committed the fraud, a different rule exists in favor of innocent sureties, who had no knowledge of, and did not participate in, such fraud; that while Smith, who fraudulently concealed his peculations, would not be suffered to shield himself behind the statute, Lieberman, his surety, who is innocent of fraud, has a right to set up the statute as his protection. In cases like this, is there any such distinction between the liability of principal and surety? In *Charles v. Hoskins*, 14 Iowa, 473, 83 Am. Dec. 378, which was an action against sheriff's sureties for wrongful seizure of goods under an execution, the court says: "The governing principle is that the liability of the surety is dependent upon that of the principal." In *Zent v. Heart*, 8 Pa. 337, which was an action against a surety on a promissory note barred by the statute, where the principal had paid interest within six years, Chief Justice Gibson held that "the decisions at length have settled that the payment of one is the acknowledgment by both, wherever it has been made during their joint responsibility,—in other words before it has

been severed by the death of one of them." In *Boehmer v. Schuylkill County*, 46 Pa. 452, which was an action against sureties on a county treasurer's bond, where the defense was that the county commissioners had exceeded their power in borrowing the money which came into the treasurer's hands, and that the money so received was not within the bond, the court (Chief Justice Woodward) says: "In so far as the principal is liable by the mere force and terms of the bond, the surety is bound with him." In *Patterson's Appeal*, 48 Pa. 342, the sureties of an absconding assignee, who was trustee for the benefit of creditors, were held not entitled to credit on account which their principal could not claim, by reason of fraud. Strong, J., says: "The sureties stand in no better position than Smith, their principal. . . . The measure of his responsibility is the measure of theirs." In *Bradford v. McCormick*, 71 Iowa, 129, 32 N. W. 94, which was an action against the sureties of a justice of the peace for money collected and fraudulently concealed until the statute had run, the court says: "The statute in this case is pleaded by the sureties, and they have not been guilty of any fraud; but they, without doubt, we think, are bound by the fraudulent conduct of the principal defendant. The liability of a surety is dependent upon the liability of the principal. The ordinary rule is, if the principal is bound, so is the surety." This point has been directly adjudged in this state. In *Sparks v. Farmers' Bank*, 3 Del. Ch. 275,—a case against the sureties of a defaulting cashier of the bank,—the precise question was determined. The chancellor there held that the bank was entitled to collect of the sureties so much of the defalcations as occurred more than two years previous to the entering of the judgment on the bond, for the reason that "their equity to do so arises out of the fact that the defalcation was a fraud concealed from the bank, with respect to which a court of equity will not permit the statutory bar to be set up until the lapse of the prescribed term after discovery of the fraud." This case was argued by some of the ablest lawyers of the state. While it is true that the distinction between the liability of surety and principal in cases like this, where there is concealed fraud, does not seem to have been raised and dwelt upon by counsel for the sureties, still it is only fair to assume that the failure to do so did not arise from any lack of knowledge or research, but, rather, from lack of material for, and confidence in, such a defense. The case of *Grimshaw v. Wilmington*, 5 Del. Ch. 183, which was against the sureties of a defaulting treasurer of the city of Wilmington, has been urged as countervailing this doctrine. The chancellor, in his opinion, expressly excepts cases like the present out of his consideration, in the following language: "I shall not enter into a general discussion of the principle applicable to a case where a concealment of fraud has been proved to exist on the part of the defendant in a suit brought against him after the discovery of the fraud has been made, but not

within the period mentioned in the statute in that respect, to make him account for the amount of said fraud, because I am of the opinion that the principles adjudged in cases of that kind, where the statute of limitation has been pleaded as a bar to the cause of action, are not applicable to the case before me. . . . It is true . . . that where one person defrauds another of his just rights, and the fraud is concealed at the time of its commission, and not discovered within the period embraced by the statute of limitations, the party defrauded has a right to bring his action for the recovery of the amount of which he has been defrauded at any time within the proper legal period for bringing actions." The cases of *Hudson v. Bishop*, 32 Fed. Rep. 519; *United States v. Mark*, 3 Wall. Jr. 358, and of *Pratt v. Northam*, 5 Mason, 95, Fed. Cas. No. 11,376, relied upon by counsel for the appellant, do not seem to modify this principle relating to sureties.

It therefore seems to be established that, in cases on official bonds, concealed fraud on the part of the principal will deprive both principal and surety of the benefit of the statute of limitations; that the statute does not begin to run until the fraud is discovered. The reason seems to be that in such bonds the sureties guarantee the good conduct and faithfulness of the principal in the discharge of the duties of his office, and that, in equity and good conscience, they should not be exempt from liability for his misconduct and peculations because by fraudulent concealment he has prevented discovery until the time limited by the statute to bring action has expired. Any other construction would make the very frauds against which the sureties covenanted the means for relief from liability. The bond in such case, instead of securing the faithfulness of the officer, would tend to promote on his part skilful and fraudulent concealed peculations, and would be an inducement to fraud. If concealed fraud, which the principal undertakes not to perpetrate, deprives such principal of the protection of the statute, is it not equally reasonable that the undertaking of the surety that such fraud should not be perpetrated excludes the surety, also? The principal undertakes not to commit fraud. The surety guarantees that he shall not commit fraud. There would seem to be no substantial reason why their respective liabilities for such fraud should be different. It may seem hard that, by reason of the fraud of a principal, the liability of an innocent surety should be continued for many years after the expiration of the time named in the statute of limitations. The hardship would be greater if another equally innocent person should be made to suffer by such fraud in cases where the surety undertakes that the principal shall be faithful and honest in that very matter. The equities being equal as to innocence, the added burden of his obligation rests upon the surety.

"It is true that equity will not relieve against the bar of the statute, in favor of a party who has been in laches in not using

means within his power to discover the fraud." *Sparks v. Farmers' Bank*, 3 Del. Ch. 306. It must be remembered that in these bonds Lieberman undertook for the fidelity of Smith absolutely and at all events, and engaged unconditionally to make good his defaults. True it is, he contracted in view of the statute of limitations. It is equally true that he contracted in view of the law contained in adjudged cases in this state controlling the application of the statute. The rule is that "it is good faith, and not diligence, which is required of the creditor as a condition of his right to hold the surety; . . . but the creditor or obligee in a bond is not obliged, for the benefit of sureties, to watch the principal. It is because it is really impracticable for this to be done effectually and at all times, on the part of large institutions, that official bonds are required. To subject the responsibility of sureties to so indefinite a question as whether due diligence has been exercised by directors would render these securities worthless." *Id.* 302. Judge Thompson, in *Wayne v. Commercial Nat. Bank*, 52 Pa. 349, thus defines the diligence required in the officers of a bank: "I know of no positive duty resting on the officers of the bank to investigate with a view to inform a surety, in the absence of any inquiry or request of him to do so. Had such a request been made, and it had been denied or evaded, a different question might have been presented. . . . Neither the bank nor its officers knew or had reason to suspect, so far as we can learn, the defalcation afterwards discovered." Chief Justice Shaw tersely says in *Amherst Bank v. Root*, 2 Met. 540, that "negligence of directors and their agents is no excuse." In a case cited by the appellants (*Graves v. Lebanon Nat. Bank*, 10 Bush, 28, 19 Am. Rep. 50) the measure of diligence is thus defined: "The directors may have been negligent in the discharge of their duties, and this negligence may have enabled Mitchell for the time to misappropriate the funds of the bank, and to conceal its true condition by the false reports made to the Comptroller of the Currency, and by false entries upon the books of the association. But this negligence cannot avail the sureties, who covenanted that their principal should well and truly perform the duties of his position. . . . Their covenant is unconditional, and no failure of duty, upon the part of the directors of the association, short of actual fraud or bad faith, can be deemed sufficient to exonerate them from its performance." The testimony in this case discloses no such laches as

would discharge the surety. It shows that Smith was generally esteemed as an honest and capable officer; that the usual examinations of the condition of the bank from time to time were had both by the officers of the bank and by a government examiner; that no suspicion of the defalcations of Smith existed in the mind of anyone at any time prior to February, 1893; that Lieberman made no request for an examination of Smith's accounts; that the defalcations were therefore concealed by Smith, who was a skilled accountant. There is no claim that the bank did not exercise good faith towards the surety at all times.

A careful examination of this case discloses no ground for the relief of the surety. The decree of the chancellor in that respect is therefore affirmed. Inasmuch, however, as it appears from the entire record that certain errors have been inadvertently incorporated into the decree of the chancellor in respect to the date of the first bond, the duration of the defalcation under the second bond, and the allowance of interest on the penal sum of each bond, it is the judgment of this court that said surety is liable for the defalcations of said Smith, with interest from the date of each defalcation to the 3d day of December, 1898, the date of the decree of the chancellor in this case, provided the aggregate sum of the principal and interest ascertained to said date on each bond shall not exceed the penalty thereof; and the said surety is also further liable for interest on such aggregate sum so ascertained from the said 3d day of December, 1898, the date of said decree. And now, to wit, this the 10th day of January, 1900, it appearing to the court that on the 3d day of December, 1898, it was ascertained by the decree of the chancellor in this case that there was due on each of the said bonds a sum in excess of \$15,000, the penalty thereof: Now, therefore, it is ordered, adjudged, and decreed that the said First National Bank of Wilmington, the respondent, have liberty to collect on each of its judgments entered on each of the said bonds in the superior court of the state of Delaware, in and for Newcastle county, against Nathan Lieberman, the appellant, the sum of \$15,000, with interest thereon from the 3d day of December, 1898, the date of the said decree, and the date of the authoritative and legal ascertainment of the amount due on each of the said bonds. And it is further ordered that the appellant pay the costs in this case within three months, or attachment issue.

GEORGIA SUPREME COURT.

TRUST COMPANY OF GEORGIA *et al.*,
Plffs. in Err.,
v.

STATE of Georgia.

(.....Ga.....)

- *1. When an action is instituted in the name of the state for the purpose of preventing a violation of the provisions of par. 4, § 2, art. 4, of the Constitution (Civil Code, § 5800), the questions whether such action is well brought and is maintainable depend upon the pleadings and the evidence introduced in support thereof, and not upon the motives inspiring those at whose instance the governor was induced to order the suit to be filed, or the arguments presented to him to that end.
2. The remedy for such a purpose may be injunction, and it is not in every instance essential to resort to the harsher proceeding to forfeit a charter.
3. That portion of the above-mentioned paragraph of the Constitution which denies to the general assembly "power to authorize any corporation to buy shares or stock in any other corporation" is not absolute in its terms, but it was designed only to prevent the general assembly from authorizing one corporation to purchase shares or stock in another when doing so "may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly."
4. This clause of the Constitution applies to and includes all corporations, and consequently is applicable to street-railway companies, and enforceable as to them whenever they directly or indirectly violate its provisions.
5. Under the charter of the Trust Company of Georgia, that corporation has authority to buy the shares or stock of any other corporation, provided that in so doing it does not violate the provisions of the Constitution of this state.
6. Placing upon the word "competition," as used in this paragraph, the interpretation given to it in the case of *State v. Central of Georgia R. Co.* (decided at this term) 35 S. E. 37, and taking into view the evidence in the present record, the court erred in holding that the proposed purchase of stock would be violative of the constitutional provisions referred to, and in granting on that ground the injunction sought.

(February 27, 1900.)

ERROR to the Superior Court for Fulton County to review a judgment in favor of the state in a proceeding brought to prevent

*Headnotes by LEWIS, J.

NOTE.—As to right of corporation to deal in stock of other corporations, see *Buckeye Marble & F. Co. v. Harvey* (Tenn.) 18 L. R. A. 252, and *note*; *Cowling v. Zenith Iron Co.* (Minn.) 83 L. R. A. 508.

As to what constitutes competing railroads within prohibition against consolidation, see *State ex rel. Nolan v. Montana R. Co.* (Mont.) 45 L. R. A. 271, and *note on Restrictions on consolidation of parallel or competing railroads.* 48 L. R. A.

the consolidation of certain street-railway companies. *Reversed.*

The facts are stated in the opinion.

Messrs. King & Anderson and Lewis W. Thomas for Trust Company of Georgia, *Goodwin & Hallman* and *C. P. Goree* for Atlanta Railway & Power Company, and *Payne & Tye*, for Atlanta Railway Company, plaintiffs in error:

Suits to prohibit combinations and bringing about monopoly will not be entertained by the courts where they are inspired by rival interests.

People ex rel. Moloney v. General Electric R. Co. 172 Ill. 129, 50 N. E. 158; 3 Cook, Corp. § 913, p. 2231.

Quo warranto is the proper remedy; direct suit in the name of the state for injunction is not proper; and the proceeding should have been on the relation of the attorney general.

5 Thomp. Corp. §§ 6033, 6035, and *notes*; 27 Am. & Eng. Enc. Law, 1st ed. p. 410; High, Extr. Legal Rem. § 660; *Wheelcl v. State ex rel. Wiley*, 76 Ga. 644; *People v. Albany & V. R. Co.* 24 N. Y. 261, 82 Am. Dec. 295; *Hovelman v. Kansas City Horse R. Co.* 79 Mo. 632; *Prescott Nat. Bank v. Butler*, 157 Mass. 548, 32 N. E. 909.

Paragraph 4, § 2, art. 4, of the Constitution prohibits the legislature from authorizing corporations to purchase stocks, or make contracts, as therein specified. It is not self-acting, and legislation to vivify and make it effective is indispensable. Nor does it apply to companies not engaged in the same lines of business, so as to prohibit one of such companies from buying stock in the other; *e. g.*, a trust company and a street-railroad company, where the charter of the former authorizes it to buy stock in other companies.

Clarke v. Richmond & W. P. Terminal R. & Warehouse Co. 23 U. S. App. 597, 62 Fed. Rep. 333, 10 C. C. A. 387.

If the contract is limited as to time and place, and is not a general restraint upon freedom of trade or on the exercise of one's vocation, the court upholds it; otherwise it is declared invalid.

Rakestraw v. Lanier, 104 Ga. 188, 30 S. E. 735.

If prices are not raised above reasonable amounts, though contracts made to prevent competition, the same are not void.

Manchester & L. R. Co. v. Concord R. Corp. 66 N. H. 100, 9 L. R. A. 639, 3 Inters. Com. Rep. 319, 20 Atl. 383.

There must be real, substantial competition between the companies, to render the consolidation illegal. Incidental competition, or competition insignificant in amount when compared to the volume of business transacted by the companies, will not render the consolidation or combination illegal.

Kimball v. Atchison, T. & S. F. R. Co. 46 Fed. Rep. 888; *Cumberland Valley R. Co. v. Gettysburg & H. R. Co.* 177 Pa. 519, 35 Atl. 952; *People v. O'Brien*, 111 N. Y. 64, 2 L. R.

A. 255, 18 N. E. 692; *Alexander v. Car Floats Nos. 1, 3, 4, & 5*, 64 Fed. Rep. 888; *Rogers v. Nashville, C. & St. L. R. Co.* 62 U. S. App. 49, 697, 91 Fed. Rep. 317, 33 C. C. A. 517; *Cooke, Trade & Labor Combinations*, 120; *Manchester & L. R. Co. v. Concord R. Corp.* 66 N. H. 100, 9 L. R. A. 689, 3 Inters. Com. Rep. 319, 20 Atl. 383; *State v. American Cotton Oil Trust*, 40 La. Ann. 8, 3 So. 409.

It is not illegal for two corporations engaged in the same general line of business to consolidate.

Cameron v. New York & Mt. V. Water Co. 62 Hun, 269, 16 N. Y. Supp. 757, 133 N. Y. 336, 31 N. E. 104; *Holmes & G. Mfg. Co. v. Holmes & W. Metal Co.* 127 N. Y. 252, 27 N. E. 831.

The leasing of competing lines, or the bringing of them under one friendly management, does not violate such a provision as that in our Constitution.

State ex rel. Nolan v. Montana R. Co. 21 Mont. 221, 45 L. R. A. 271, 53 Pac. 623.

The question is one of mixed law and fact, and the jury on final hearing can settle the matter.

South Florida R. Co. v. Rhodes, 25 Fla. 40, 3 L. R. A. 733, 5 So. 633.

Street-railroad companies, from their very nature, do not fall within the provisions of statutes or constitutions prohibiting combinations to defeat competition, and such statutes and constitutional provisions do not apply to them.

Booth, Street Railways, § 429; *Gyger v. Philadelphia City Pass. R. Co.* 136 Pa. 96, sub nom. *Montgomery v. Philadelphia City Pass. R. Co.* 9 L. R. A. 369, 20 Atl. 399.

Hessrs. J. M. Terrell, Attorney General, *Gray, Brown, & Randolph*, and *Frasier & Hynds*, for defendant in error:

It is a part of the sworn duty of the chief executive of the state to enforce the laws, and to prevent violations of the same where it is brought to his knowledge that such violations have been or are about to be committed. Instituting the suit thus, in the discharge of his official duties, it is neither necessary to show the grounds which moved the governor to institute the suit, nor are such grounds germane to the questions raised thereby.

McDaniel v. Gate City Gaslight Co. 79 Ga. 61, 3 S. E. 693; *Alexander v. Searcy*, 81 Ga. 546, 8 S. E. 630; *Macon & B. R. Co. v. Gibson*, 85 Ga. 22, 11 S. E. 442; *People v. Milk Exchange*, 145 N. Y. 267, 27 L. R. A. 437, 39 N. E. 1062; *Mayo v. Renfro*, 66 Ga. 408; *Alexander v. State*, 56 Ga. 478; *Parker v. Hughes*, 25 Ga. 374; *Central R. & Bkg. Co. v. Macon*, 43 Ga. 605; *Atlanta v. Gate City Gaslight Co.* 71 Ga. 106.

The suit is properly brought in the name of the state.

State v. Southern P. R. Co. 24 Tex. 80; *State ex rel. Clapp v. Minnesota Thresher Mfg. Co.* 40 Minn. 213, 3 L. R. A. 510, 41 N. W. 1020; *Pennsylvania R. Co. v. Com. (Pa.)* 4 Cent. Rep. 495, 7 Atl. 368; 5 Thomp. Corp. § 6614; *Com. ex rel. Atty. Gen. v. Pittsburg & C. R. Co.* 58 Pa. 45; *State ex rel. Childs v.* 48 L. R. A.

American Sav. & Loan Asso. 64 Minn. 349, 67 N. W. 1; *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 530; *People v. Ballard*, 134 N. Y. 269, 17 L. R. A. 737, 32 N. E. 54; 2 Cook, Corp. § 635; *Louisville & N. R. Co. v. Com.* 97 Ky. 675, 31 S. W. 476.

The attorney general is the proper officer to bring this action in the name of the state, and an injunction and receiver is the appropriate remedy.

3 Pom. Eq. Jur. § 1093; *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 434; *Ang. & A. Priv. Corp.* § 734, p. 793; *Com. v. Fowler*, 10 Mass. 290; *People v. Milk Exchange*, 145 N. Y. 267, 27 L. R. A. 437, 39 N. E. 1062; *People v. Geneva College*, 5 Wend. 212; *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964; *State v. Moore*, 19 Ala. 514; 2 Morawetz, *Priv. Corp.* § 1043; *Beach, Monopolies & Trusts*, § 221; *Pennsylvania R. Co. v. Com. (Pa.)* 4 Cent. Rep. 501, 7 Atl. 374.

Article 4, § 2, ¶ 4, of the Constitution provides: "The general assembly of this state shall have no power to authorize any corporation to buy shares or stock in any other corporation in this state or elsewhere."

The clause of the Constitution in question is self-operative, and needs no legislation to enforce it.

Hamilton v. Savannah, F. & W. R. Co. 49 Fed. Rep. 424; *Central R. Co. v. Collins*, 40 Ga. 582; *Memphis & C. R. Co. v. Woods*, 88 Ala. 630, 7 L. R. A. 605, 7 So. 108; *Cook, Stock & Stockholders*, §§ 667-672; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *Langdon v. Branch*, 37 Fed. Rep. 449, sub nom. *Langdon v. Central R. & Bkg. Co.* 2 L. R. A. 120.

A constitutional provision is to be construed with reference to the principles of the common law.

6 Am. & Eng. Enc. Law, 2d ed. p. 931; *Cooley, Const. Lim.* 6th ed. 75; *State ex rel. Hovey v. Noble*, 118 Ind. 366, 4 L. R. A. 101, 21 N. E. 244.

The common law will be upheld in the absence of an apparent contrary intention.

McGinnis v. State, 9 Humph. 43, 49 Am. Dec. 697; *Cadwallader v. Harris*, 76 Ill. 370; *Brown v. Fifield*, 4 Mich. 322; *State v. Lash*, 16 N. J. L. 380, 32 Am. Dec. 397; *Moyer v. Pennsylvania State Co.* 71 Pa. 293.

The constitutional or statutory provision against the consolidation of competing railways includes any agreement whereby the roadbed, rolling stock, and equipment of one competing line are to be operated or controlled by another. The word is used in the sense of "join" or "unite," and is held to include leases by the one to the other.

6 Am. & Eng. Enc. Law, 2d ed. p. 825; *State ex rel. Leese v. Atchison & N. R. Co.* 24 Neb. 164, 38 N. W. 43; *Manchester & L. R. Co. v. Concord R. Corp.* 66 N. H. 100, 9 L. R. A. 689, 3 Inters. Com. Rep. 319, 20 Atl. 383; *Currier v. Concord R. Corp.* 48 N. H. 325; *Missouri P. R. Co. v. Owens*, 1 Tex. App. Civ. Cas. (White & W.) § 384, p. 163; *McCutcheon v. Merz Capsule Co.* 71 Fed. Rep. 787, 37 U. S. App. 586, 19 C. C. A. 108,

31 L. R. A. 415; *American Preservers' Trust v. Taylor Mfg. Co.* 46 Fed. Rep. 152; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 22 N. E. 798; *Pearson v. Concord R. Corp.* 62 N. H. 537; *Elkins v. Camden & A. R. Co.* 36 N. J. Eq. 5; *People v. North River Sugar Ref. Co.* 121 N. Y. 582, 9 L. R. A. 33, 24 N. E. 834; *Mallory v. Hanau Oil Works*, 86 Tenn. 598, 8 S. W. 396; *Langdon v. Branch*, 37 Fed. Rep. 449, sub nom. *Langdon v. Central R. & Bkg. Co.* 2 L. R. A. 120; *Hamilton v. Savannah, F. & W. R. Co.* 49 Fed. Rep. 412; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *East St. Louis Connecting R. Co. v. Jarvis* 92 Fed. Rep. 735, 34 C. C. A. 639; *Morrill v. Boston & M. R. Co.* 55 N. H. 531; *Gulf, C. & S. F. R. Co. v. State*, 72 Tex. 404, 1 L. R. A. 849, 2 Inters. Com. Rep. 335, 10 S. W. 81; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Clarke v. Central R. & Bkg. Co.* 50 Fed. Rep. 338, 15 L. R. A. 683; *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964.

A railroad company has no power to lease its road unless the power has been expressly conferred upon it.

Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950; *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964; *Black v. Delaware & R. Canal Co.* 24 N. J. Eq. 456; *Mills v. Central R. Co.* 41 N. J. Eq. 4, 2 Atl. 453.

To warrant a lease, both companies must have the requisite authority; the one to make and the other to take the lease.

East Line & R. River R. Co. v. Rushing, 69 Tex. 313, 6 S. W. 834; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 691, 40 L. ed. 856, 16 Sup. Ct. Rep. 714; *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 102, 24 Atl. 964; *Camden & A. R. Co. v. May's Landing & E. H. City R. Co.* 48 N. J. L. 559, 7 Atl. 523; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 309, 30 L. ed. 92, 6 Sup. Ct. Rep. 1094; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478.

The consolidation of competing roads is without authority of law as against public policy and as tending to monopoly, and is a public injury.

People ex rel. Peabody v. Chicago Gas Trust Co. 130 Ill. 268, 8 L. R. A. 497, 22 N. E. 798; *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102; *People v. North River Sugar Ref. Co.* 121 N. Y. 582, 9 L. R. A. 33, 24 N. E. 834, 54 Hun. 354, 5 L. R. A. 386, 7 N. Y. Supp. 406; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L. R. A. 145, 30 N. E. 279; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 184, 8 Am. Rep. 159.

Two lines of railroad need not be geographically parallel in order to be competing lines.

East St. Louis Connecting R. Co. v. Jarvis, 92 Fed. Rep. 735, 34 C. C. A. 639; *East Line & R. River R. Co. v. State*, 75 Tex. 434, 12 S. W. 690; *Gulf, C. & S. F. R. Co. v. State*, 48 L. R. A.

72 Tex. 404, 1 L. R. A. 849, 2 Inters. Com. Rep. 335, 10 S. W. 81; *Texas & P. R. Co. v. Southern P. R. Co.* 41 La. Ann. 970, 6 So. 888; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714.

The fact that rates of freight had not been raised, or that schedules had not been changed, or that there is no intention to do either, cannot affect the case.

Pearsall v. Great Northern R. Co. 161 U. S. 648, 40 L. ed. 839, 16 Sup. Ct. Rep. 705; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L. R. A. 159, 30 N. E. 279; *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 465, 43 N. W. 1102; *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 102, 24 Atl. 964.

A corporation cannot do any act, nor make any contract, not expressly nor impliedly authorized by its charter.

Central R. Co. v. Collins, 40 Ga. 582; *Hazlehurst v. Savannah, G. & N. A. R. Co.* 43 Ga. 13; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Marbury v. Tod*, 22 U. S. App. 267, 62 Fed. Rep. 342, 10 C. C. A. 393; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *Hamilton v. Savannah, F. & W. R. Co.* 49 Fed. Rep. 412; *Frederick v. Augusta*, 5 Ga. 561; *McLeod v. Savannah, A. & G. R. Co.* 25 Ga. 457; *Vernon Shell Road Co. v. Savannah*, 95 Ga. 389, 22 S. E. 625.

The bank has not only become an investor in the stock of other corporations not connected with its legitimate banking business, but it has by its own confession bought the entire stock of two railroad corporations.

It has transgressed all of the powers conferred upon it by its charter, and has embarked in a speculation to the amount of nearly twenty times its capital.

People ex rel. Peabody v. Chicago Gas Trust Co. 130 Ill. 268, 8 L. R. A. 504, 22 N. E. 798; *Hazlehurst v. Savannah, G. & N. A. R. Co.* 43 Ga. 13; *Thomas v. West Jersey R. Co.* 101 U. S. 82, 25 L. ed. 952.

Doubtful provisions of the charter are construed against the company.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 685, 40 L. ed. 853, 16 Sup. Ct. Rep. 714.

It is utterly without authority to make the purchase which it is admitted it has made; its ownership of the stock of these two railway corporations is illegal and void, *ultra vires*, and without authority of law; and the court should have appointed a receiver to take charge of all of these securities and dispose of them for the interest of those who are legitimately entitled to the proceeds, and, if the securities are out of the court's jurisdiction, then of the property.

Franklin Bank v. Commercial Bank, 38 Ohio St. 355, 38 Am. Rep. 594; *Franklin Co. v. Lewiston Inst. for Savings*, 68 Me. 46, 28 Am. Rep. 9; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 59, 35 L. ed. 68, 11 Sup. Ct. Rep. 478; *Columbian Athletic Club v. State ex rel. McMahon*, 143 Ind. 98, 28 L. R. A. 727, 40 N. E. 914; *Smith, Receivers*, 364, and note; *Stockton v. Central R. Co.* 50 N. J. Eq. 439, 25 Atl. 942.

Lewis, J., delivered the opinion of the court:

On the 1st day of July, 1899, certain citizens of Fulton county, Georgia, filed with the governor of the state a petition charging that certain corporations, namely, the Trust Company of Georgia, the Atlanta Railway Company, and the Atlanta Railway & Power Company (formerly known as the Atlanta Consolidated Street-Railway Company), had, by certain contracts and agreements, violated art. 4, § 2, par. 4, of the Constitution of the state, and were about to enter into other contracts in violation of this clause of the Constitution. They prayed for an executive order requiring the attorney general to bring such suits in the name of the state as might be necessary to set aside such contracts and have them declared null and void. His excellency, the governor, passed an order directing a suit to be brought as prayed for: and accordingly the attorney general filed, in the name of the state, a petition in the superior court of Fulton county against the corporations named. This petition alleged, in substance, that the Atlanta Railway Company for a number of years operated lines of street railroads extending from the central portion of the city of Atlanta, along Forsyth, Fair, Cooper, Richardson, and other streets, to McPherson Barracks, outside of the city, and in Fulton county, Georgia, in one direction, and by way of Forsyth, Church, Ellis, and other streets, to Decatur, in Dekalb county, Georgia, in another direction; also, another line running along Forsyth, Cooper, and other streets to Grant Park, in said city. The Atlanta Railway Company purchased this property at receiver's sale, the former owner being the Atlanta Traction Company. The Atlanta Railway & Power Company during the same time operated competitive lines of street railroad running on Decatur street and other streets in the city of Atlanta, to Decatur; also, along Alabama and Pryor streets and Georgia avenue to Grant Park, in the city of Atlanta; and also along Fair street and Park avenue to Grant Park. Said company also operated a line out Whitehall street, in said city, and had lately applied for a franchise running on and along various streets to McPherson Barracks, for the purpose of constructing a competing line with the Barracks line of the Atlanta Railway Company. It finally changed this franchise and constructed a line practically to Ft. McPherson. This company (the Atlanta Railway & Power Company) also owned and operated a line out Edgewood avenue to Inman Park, and, beyond Inman Park, to and along Euclid avenue, to Moreland Park and the county line, where it paralleled and finally crossed the tracks of the Atlanta Railway Company. It also operated other lines competing with the Atlanta Railway Company at many points. The notable places of competition were in the vicinity of Grant Park, at Decatur, Moreland Park, Edgewood, the intersection of Pryor and Ormond streets, Whitehall and Fair streets, Peachtree and Ellis streets, Ellis street and Courtland av-

enue, Houston and Hilliard streets, Irwin and Jackson streets, Irwin street and the Boulevard. A map was attached to the petition, showing the various routes of the lines operated by the two companies. The petition further charged that the Trust Company of Georgia had recently, contrary to the Constitution and laws of the state, bought up all the stocks and securities of the Atlanta Railway Company, for the purpose of causing said company to convey all its property to the Atlanta Railway & Power Company, or whatever new company should be organized, in order to control both systems of railway, and for the same purpose bought up all or nearly all of the stock of said power company, and is now practically the holder of all the stock of both companies. The trust company caused to be elected for the principal officers of the Atlanta Railway Company the same persons who were managers of the Atlanta Railway & Power Company, namely, Woodruff, elected president of each company; Hurt, superintendent of each company; and Glenn, the secretary of each company,—so that the Atlanta Railway Company passed under the complete management of the officers who controlled the other company. Practically all the stock and securities of both companies were held and owned by the Trust Company of Georgia, and the Atlanta Railway Company was operated by persons who controlled both the trust company and the Atlanta Railway & Power Company. The purpose of the managers of the trust company was to have the properties of both these corporations conveyed, so that one corporation would own, control, and operate both properties, to the destruction of competition between the two. The combination results in injury to property along the lines of the railways and at competing points, and with the exception of about 10 miles of tracks running along Walton and other streets to the Chattahoochee river, and lying mainly outside of the city limits, the other two lines of railway were the only two competing lines in the city. The petition alleges somewhat in detail that the effect of these contracts, which it attacks as illegal, has been to lessen competition at the various points named; that, since the reported combination of the two lines, the service and accommodations thereon have not been as satisfactory to the people generally, and especially to those patronizing the street railways. The petition charges that if the threatened illegal acts of the defendants were not enjoined, and the illegal combination be allowed to stand, the street-railway accommodations and facilities of the city of Atlanta, and the means of transportation for the people of Fulton and Dekalb counties, and of the cities of Atlanta, Decatur, Edgewood, and Oakland City, and the people of the state visiting this territory, will be placed in the sole control and power of one corporation, competition will be excluded, and the rates of fare controlled in the interest of those connected with the monopoly. One among the prayers of the petition was that

the trust company be enjoined "from voting said stock in the Atlanta Railway & Power Company, and said stock in Atlanta Railway Company," and that the two railway companies be enjoined from receiving the votes of said stock controlled by the trust company; that the Atlanta Railway & Power Company be enjoined from purchasing or acquiring the ownership, control, or operation of the lines of railway, franchises, and property of the Atlanta Railway Company, and that it be enjoined from selling its roads, railways, franchises, etc., to the Atlanta Railway & Power Company, or any other corporation, that will have the effect to defeat or lessen competition or to encourage monopoly; that the defendant corporations be enjoined from entering into any agreement whatever by which the properties of said two railway companies would be consolidated, merged, or combined; that a receiver be appointed by the court to take possession of the stocks and bonds of the Atlanta Railway Company, to hold, manage, and dispose of the same under the orders and direction of the court, in order that competition may be preserved, which was guaranteed to the public, and the public interests protected. There was a prayer that a restraining order be granted, restraining the defendant corporations from doing or performing the acts against which injunction was prayed until the final hearing of the cause. To this petition each of the defendant companies filed demurrers upon various grounds; and the trust company, the Atlanta Railway Company, and the Atlanta Railway & Power Company filed their answers, specifically answering the charges in the petition, denying its various allegations about defeating or lessening competition, or tending to defeat or lessen competition; denying that the two railway systems were competing lines, in the sense of the Constitution and laws of the state; and setting up advantages that would accrue to the public generally if the two systems were consolidated, and particularly in respect to the reduction of fares by transfer tickets from the lines of one to the other, which would often enable passengers to travel for one fare on various routes through the city, which would otherwise require the payment of two fares. In this way expense in the operation of these various lines would be greatly reduced, accommodations and conveniences to the traveling public increased, roads better equipped, etc.

At the September term, 1899, of the superior court of Fulton county, the case came on to be heard on the prayers above stated, for injunction, receiver, etc., before Judge John S. Candler, of the Stone Mountain circuit, who presided because of the disqualification of Judge J. H. Lumpkin, of the Atlanta circuit. Quite a volume of evidence was introduced, both in behalf of the plaintiff and defendants. The decision of the judge on the issues made by the demurrers and answers was reserved until November 7, 1899. He enjoined the Trust Company of Georgia from selling or transferring any of

the stock or bonds owned by it in and of the Atlanta Railway Company and the Atlanta Railway & Power Company, and from transferring any of the stock or bonds of the latter company to the Atlanta Railway Company, and from transferring the stock or bonds of either of the railway companies to any other company or association of persons the object of which transfer would bring about the consolidation of said street-railroad companies into one company. The Atlanta Railway & Power Company was enjoined from purchasing or in any way acquiring the possession or control of any of the stock or bonds of the Atlanta Railway Company, and the latter company was enjoined from purchasing or acquiring any of the stock or bonds of the Atlanta Railway & Power Company. Both companies were enjoined from taking up any of the tracks of their respective lines, or from discontinuing the running of reasonable schedules upon the same, without first obtaining the consent of the city or county authorities from whom they hold franchises, or without further order from the court, in cases where said lines of road are not located in the streets of any city or town, or where the public roads are not occupied under franchises granted by county authorities. The judge denied the prayer for the appointment of a receiver, and further provided in his judgment that as the interests of the two defendant street-railroad companies, as well as those of the public, may be subserved by the interchange of business between said roads, and by transfer of passengers from the lines of one road to those of the other, they were permitted to make any physical connections with the rails of each other, and enter into such traffic arrangement as may be necessary to enable each of said companies to grant transfers or interchangeable tickets over the lines of the other. To this judgment of the court the defendant companies, in their bill of exceptions, assign error.

1. It appears from the record that the defendants' counsel called upon the plaintiff or its attorneys to produce, upon notice which had been duly served, the contracts between the parties petitioning the governor to direct the suit brought, and also the contract under which the attorneys filing the suit were employed. In the bill of exceptions complaint is made that the court erred in not requiring the production of the papers called for. In the argument of the case here in behalf of plaintiffs in error, it is contended that the contracts made by the parties petitioning the governor would have disclosed that rival interests were actuating this proceeding, and that the contracts between counsel for defendant in error and their clients would have disclosed that their authority was limited to appearing before the mayor and council of Atlanta to prevent the removal of the tracks on Richard-street alone. It appears from the evidence that a petition was presented by the president of the Atlanta Railway Company to the city council of Atlanta, asking for the privilege of removing the tracks of that company

on Richardson street. This was protested against by certain citizens on that street, whereupon the application for removal of such tracks was withdrawn by the president of that company. It further appears that the names of those persons appearing in the petition presented to the governor for this suit were some of the citizens on that street. We think it was immaterial in this case to have entered into an investigation as to the motives of the parties who petitioned the governor for the institution of this suit, with the view of determining whether the cause of action was properly brought. That question—as to whether the action is well brought or maintainable—must necessarily depend upon the pleadings before the court trying the case, and the evidence introduced in support thereof. The court trying the issue has nothing to do with the motives actuating the parties who instigated the proceedings before the governor. The governor is presumed to take care of himself in such matters, and we do not think that his action is the subject-matter of review by the courts in a case that he has directed to be brought. We are inclined to the opinion that the attorney general has the power to institute suits necessary to the protection of the interests of the state (in a case, for instance, where the state's property is involved, or where public rights are jeopardized) without direction from the governor; but when directed by the governor, as in this case, to proceed, he has no discretion in the matter, but should obey the mandates of the chief executive. Whether or not the action is maintainable is dependent at last upon the pleadings and the evidence introduced in support thereof, and not upon the motives inspiring those at whose instance the governor was induced to order the suit filed.

2. Among the several grounds of demurrer, the main one that seems to be relied upon by counsel for plaintiffs in error is that the suit was improperly brought in the name of the state for injunction, but that quo warranto was the proper remedy for the wrongs complained of, and the proceeding should be on the relation of the attorney general. Upon this point neither the authorities in England nor in this country are entirely reconcilable; some holding that the remedy by injunction in favor of the state will not lie to restrain a corporation from the exercise of powers *ultra vires*, and others holding that this is the proper remedy. We have reached the conclusion that the sounder reasoning is in favor of allowing to the state relief by injunction whenever it is proceeding in the interest of the public to prevent a threatened injury. As harsh as the remedy by injunction is generally considered, it is certainly not as severe as would be a proceeding in the nature of quo warranto, instituted for the purpose of forfeiting the charter of a corporation. The one is instituted, not for the purpose of causing a destruction of the corporation, but to prevent it from entering into transactions violative of the public policy of the state, and to protect the interest of the public against a

threatened wrong. The other remedy, if enforced, would cause the death of the corporation,—thus forever preventing it from serving the public interests or meeting the public demands upon its business,—and often result in a wreckage of the property of its owners. We can, therefore, see no reason why, if the remedy for the wrongs threatened can be as well prevented by injunction, it would not be the more readily and properly applied, than the harsher one of forfeiture or confiscation. This question is discussed in 2 Cook, Corp. p. 1223, § 635. It is there recognized that the state has four remedies for relief against corporations exercising powers *ultra vires*: (1) The legislature may repeal the charter of the corporation, under the reserved right of the state to repeal; (2) or the state may institute a proceeding to forfeit the charter for misuser of powers; (3) or such proceeding may be only to oust the corporation from the exercise of the usurped power; (4) or, according to some authorities, a suit may be commenced in equity for an injunction restraining the corporation from committing the *ultra vires* acts. On page 1227, however, the author says: "It is very doubtful whether the state may file a bill in equity to enjoin a corporation from committing an *ultra vires* act. The remedy of the state is quo warranto." The author recognizes, however, considerable English and American authorities to the contrary. In this same connection he declares: "The state may enjoin a railroad corporation from purchasing a competing line in violation of the Constitution." We gather from the entire text that the author seems to conclude that the weight of authority is that the remedy of the state is by quo warranto, and not by bill in equity for an injunction; but we do not think all the authorities cited in support of the text fully sustain it. For instance, in the case of *Atty. Gen. v. Great Northern R. Co.* 1 Drew. & S. 154, it was held that the attorney general cannot enjoin a corporate act merely because it is *ultra vires*. Some injury to the public must be involved. The attorney general's suit, at the instance of a manufacturer, to enjoin one railroad from leasing its rolling stock to another, failed. This decision probably at last gives the clew by which apparent conflict of authorities on this subject may be reconciled, and we think it is the correct doctrine. The state has no right to an adjudication by the courts declaring void such contracts merely and solely for the reason that they are *ultra vires*, but she is entitled to this relief when injury to the public is involved.

This question was directly made in the case of *Louisville & N. R. Co. v. Com.* 97 Ky. 675, 31 S. W. 476. It was there held: "A court of equity has jurisdiction in an action by the state to enjoin a corporation from exceeding its chartered powers, or doing acts otherwise illegal and injurious to the public. Therefore the state may by injunction prevent a railroad company from consummating the purchase of a 'parallel or competing line' in violation of § 201 of the state

Constitution." This case was carried to the Supreme Court of the United States, and there the judgment was affirmed. See *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714. In *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 425 *et seq.*, this right of the state, acting through the attorney general, and the remedy by injunction, are clearly recognized. See headnotes 4 and 43. In that case an elaborate opinion was written, thoroughly discussing this subject, which will appear on pages 523 to 553, where the decisions both in England and this country are well considered and analyzed. It was there concluded that the English court of chancery entertains jurisdiction in such cases, and it was declared that the "English books leave little room for a denial of such jurisdiction." On page 532 it is stated: "We have not found this jurisdiction as directly and succinctly stated in American treatises as in English, although it is fully recognized by the best of our elementary writers." The author quotes from 2 Redf. Railways, the following principle: "Injunctions in courts of equity, to restrain railways from exceeding the powers of their charters, or committing irreparable injury to other persons, natural or artificial, have been common for a long time in England and this country." Says the court in the Wisconsin case above cited, on page 524, in speaking of the right to proceed by injunction: "It seems to proceed on the presumption that it may better serve the public interest to restrain a corporation than to punish it by penal remedies, or to forfeit its charter." In *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 631, it was decided: "The attorney general has the right, where the property of the sovereign or the interests of the public are directly concerned, to institute suit for their protection by an information at law or in equity, without a relator." See also *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964, where the court enjoined a lease, upon application of the attorney general, when its effect was to create a combination in transportation of coal, and to destroy competition in production and sale. See also *State v. Merchants' Ins. & Trust Co.* 8 Humph. 235, 254, where an insurance company was restrained from banking. We quote the following from 2 Pom. Eq. Jur. p. 1623, § 1093: "When the managing body are doing or are about to do an *ultra vires* act, of such a nature as to produce public mischief, the attorney general, as the representative of the public and of the government, may maintain an equitable suit for preventive relief." In a note to that text it is recognized that some of the cases seem to hold that the attorney general may thus interfere to restrain every *ultra vires* proceeding of a corporation, on the ground that the public and governmental rights must necessarily be invaded thereby. But it is declared, "The later decisions, however, have established the limitation as stated in the text."

As far as our investigation has extended in reviewing the authorities cited to the contrary in the text-books and by counsel for plaintiffs in error, we fail to find such conflict as seems to be contended for. For instance, in the case of *Atty. Gen. v. Tudor Ice Co.* 104 Mass. 239, 6 Am. Rep. 227, it was simply decided that there was no jurisdiction in equity of an information by the attorney general against a private trading corporation whose proceedings are not shown to have injured or endangered any public or private rights, and are objected to solely on the ground that they are not authorized by the act of incorporation, and are therefore against public policy. Gray, J., in his opinion in that case, on page 242, Am. Rep., page 230, draws a clear distinction between that case and modern English cases upon the subject. He says: "The modern English cases cited in support of this information were of suits against public bodies or officers exceeding the powers conferred upon them by law, or against corporations vested with the power of eminent domain, and doing acts which were deemed inconsistent with rights of the public." In *Atty. Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371, it was held that equity had no jurisdiction over offenses against a public statute, or to restrain a person from carrying on business of banking in violation of a certain act of the legislature; and a motion to enjoin by the attorney general was refused. But in the opinion delivered in that case, on page 377, it was stated that the acts complained of were too much in the nature of a criminal offense, penalty being prescribed therefor by the statute; and on pages 378-380 of the same opinion it appears that no public mischief was threatened in that case, and hence it was distinguished from several cases cited in which this remedy was recognized as a proper one in case public interests were involved. Our conclusion, therefore, both from reason and a decided weight of authority, is that the state, in her sovereign capacity, can appeal to the courts for relief by injunction, whenever either her property is involved, or public interests are threatened and jeopardized by any corporation—especially one of a public nature, like a railroad company—seeking to transcend its powers and to violate the public policy of the state. We think this court has clearly recognized this sovereign right of the state. As stated by Judge Warner in case of *Central R. & Bkg. Co. v. Macon*, 43 Ga. 642: "If the state had any interest in the controversy, it was in her sovereign capacity, as the representative of the whole people of the state, and should have appeared before the court in her sovereign capacity, by the appropriate mode of procedure in such cases." We are equally well satisfied of the correctness of the proposition that, if the state has no interest in the matter in controversy, she will not be heard to ask for such extraordinary relief, and she can have no interest unless her property rights or the public interests are involved. The allegations in the petition for such relief in this case are sufficiently full, clear, and explicit touching the rights of the public involved to give the court jurisdiction of the complaint, and we

therefore think there was no error in overruling the demurrer to the petition.

It is further contended by counsel for plaintiffs in error that the constitutional provision in question is not self-active, and that some legislation was necessary in order to give a court of equity jurisdiction to grant the extraordinary relief prayed for. This question was practically decided in the case of *State v. Central of Georgia R. Co.* (decided at this term) 35 S. E. 37, where it was held that the provision in the Constitution in question declared no new principle, but was simply the embodiment of the common law. In sustaining the jurisdiction of courts of chancery in such matters, both in England and this country, the decisions are really based upon the principles of the common law, and not upon special legislation prescribing the particular procedure that should be instituted in court in such cases. This will clearly appear by an investigation into the cases above cited.

3. It is further contended that under the Constitution (Civil Code, § 5800) the provision in relation to corporations buying shares or stock in any other corporation has no reference whatever to the effect of such purchases upon competition or monopoly, and that they are absolutely void, although they may have no tendency to defeat or lessen competition or to encourage monopoly. We think that this is an entire misconception of this provision in the Constitution. The prohibition against the legislative grant to corporations of power to buy shares of stock in another corporation is clearly qualified by that portion of the section cited which restricts such purchases only when they have the effect, or are intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly. This necessarily follows from the punctuation of the clause itself. That portion of it in relation to the purchase of shares or stock is only separated from the balance of the sentence by a comma, and the relative clause that follows with the words "which may have the effect," we think, was evidently intended to relate to what was said about shares and stock, just as much as to the words "contract or agreement." If the convention that framed the Constitution intended to enact an absolute prohibition against the purchase of shares or stock by one corporation from another, their meaning could have been made manifest and clear by a separation of the first clause, either by a period or semicolon from what followed; and, if such had been the purpose of the convention, the construction of the sentence, as to its punctuation, would evidently have been quite different. Besides, the view of an absolute prohibition of such a sale and purchase would be entirely inconsistent with the provision in the Constitution just preceding, embodied in § 5799 of the Civil Code. In that section the policy is indicated of encouraging "any existing road to take stock in or aid in the building of any branch road." Our view of this question has been the uniform construction placed upon this provision 48 L. R. A.

in the Constitution by the legislature after its adoption. One of the first charters granted by the legislature after the adoption of this Constitution will be found in Acts 1878-79, p. 196, where the power of a corporation to invest its money "in any good stocks" was granted. Various acts were passed by subsequent legislatures delegating to corporations the power of purchasing and selling stock. It is true, such acts would be void if clearly shown to be in violation of a constitutional provision; but we think the legislative construction in this matter was reasonable and proper, and, if there be any serious doubt as to what the convention meant by the words employed, the benefit should be given to the interpretation placed upon it by the legislative branch of the government, and acted on for over twenty years by the people of the state in transactions involving important rights. See *Pulaski County v. Thompson*, 83 Ga. 274, 275, 9 S. E. 1065. We are cited by counsel for plaintiffs in error to the decision of Judge Speer in the case of *Hamilton v. Savannah, F. & W. R. Co.* 49 Fed. Rep. 412. It will be seen in the opinion, on page 422, that Judge Speer indorsed a statement relating to this question, made by Mr. Walter G. Charlton, in which an analysis of the section of the Constitution under consideration was made, to the effect that what the provision meant was that the general assembly shall have no power to authorize any corporation to buy shares or stock in any other corporation in this state or elsewhere, which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses.

4. It was further contended by counsel for plaintiffs in error that street-railway companies, from their very nature, do not fall within the provisions of statutes or constitutions prohibiting combinations to defeat competition. From the language in § 5800, it was evidently the intent to apply the principle to all corporations; for it declares, "The general assembly of this state shall have no power to authorize any corporation to buy shares or stock," etc. There is certainly, then, nothing in the words to authorize the inference that street-railway companies were not contemplated, just as much as any other corporation. This construction of the Constitution was placed on it by the legislature under Acts 1890-91, p. 170, embodied in § 2184 of the Civil Code. There the power was given street-railroad companies to lease or sell their roads, franchises, and other property to any other corporation for street-railroad purposes; but it is stipulated that the act shall not be construed to authorize any such company to sell, lease, or otherwise dispose of any of its property or franchises so as to defeat or lessen competition or to encourage monopoly. The only authority relied on by counsel is *Booth, Street Railways*, § 429, which simply refers to a decision on this subject by the supreme court of Pennsylvania. The case referred to is *Gyger v. Philadelphia City Pass. R. Co.* 136 Pa. 96, *sub nom. Montgomery v. Philadelphia City Pass. R. Co.* 9 L.

R. A. 369, 20 Atl. 399. It was simply held in that case that, on account of the meaning in which the terms "railroad" and "railway" were used in the Constitution of Pennsylvania, the word "railroad" applied to steam railroads and "railway" to street railways, and that therefore the provision in the Constitution against consolidation of "railroads" with parallel or competing lines did not apply to street-railway companies, and the latter, though parallel, would not be enjoined from consolidating. It is quite patent, then, that this authority has no bearing upon the question before us; for the word employed in the Constitution of this state is neither "railroad" nor "railway," but "any corporation." It is true, it may be a much more difficult matter to show that by a consolidation of street railways in a populous city any effect is had upon competition and monopoly contemplated by the Constitution. On page 108, 136 Pa., page 371, 9 L. R. A., and page 400, 20 Atl., in the Pennsylvania case cited, Green, J., delivering the opinion, said: "It is quite clear that the sense of 'competing,' which is the essential sense of the prohibition, is not applicable to the travel upon the streets of cities and towns over passenger railways." He further said: "The travel over parallel streets is not necessarily a competing travel. Each street has travel of its own, which is conducted upon its own railway." But the argument of the court in that case only tends to show the greater difficulty in showing a defeating or lessening of competition, to the injury of the public, by combining two parallel street-car lines, than would be the case between two steam railroads engaged in competition for traffic between distant points. The question is, at last, one of fact, and, in its adjudication in any particular case, the courts should be governed by the fundamental principle as to whether there was such a creation of a monopoly or defeating of competition as would result in injury to the public.

5. It is further insisted that the Trust Company of Georgia has, under its charter, no power to purchase stock in other corporations. It is claimed that it was chartered as a banking company, and that the investing in stock in railroad companies has nothing whatever to do with the business for which it was created. It is true that this trust company was incorporated, by an act approved September 21, 1891, as the Commercial Travellers' Savings Bank. See 2 Acts 1890-91, pp. 310-313. That act was amended so as to change the name and capital stock. See Acts 1893, p. 142. In the original act are incorporated, and made a part of its charter, the provisions in §§ 6, 7, 8, and 11 of an act to incorporate the Oglethorpe Savings & Trust Company, approved December 18, 1886. By reference to the provisions in that act, it will be seen that there was an unmistakable delegation of power by the legislature to this Commercial Travelers' Savings Bank (now known as the Trust Company of Georgia) to purchase stock. It further appears from the record that, while it was chartered as a banking company, 48 L. R. A.

other powers were given it, almost *ad infinitum*, and that the main business it has been following is that of a trust company, rather than a regular banking company. It is insisted by counsel that there was at common law no power in any corporation to purchase stock in another; but it is equally true that at common law corporations had no power to make contracts, or enter into transactions that would defeat competition or promote monopoly. But it has never been questioned that, in the absence of any constitutional provision on the subject, the legislature can confer such power upon corporations. The truth is that a corporation, which is a creature of the state, can exercise no power except what is delegated to it, expressly or impliedly, by its creator, the legislature. This power of purchasing stock the Trust Company of Georgia has, under its charter, and the only limitation upon it is that it cannot exercise it for the purpose of creating a monopoly or defeating competition, to the injury of the public.

6. The only question remaining in this case for consideration is whether or not, under the evidence before the judge below on the trial of this application for temporary injunction, such wrong, injury, or damage to the public interests was either contemplated or threatened as would justify a court of equity in granting the prayers of the petition. The interpretation given the word "competition" in the case of *State v. Central of Georgia R. Co.* (decided at this term) 35 S. E. 37, renders it unnecessary to enter into a further discussion of that subject. It is well enough, however, to bear in mind in this connection the vast difference between the business of street-railway companies, constructed generally simply for the purpose of passenger travel from one portion of a city to another, and steam-railroad companies, whose business is the transportation of freight and passengers for long distances, and involving business in extensive territory. The Atlanta Railway & Power Company (formerly known as the Consolidated Street-Railway Company) owned and operated about 65 miles of street-car lines. This company was formed in 1891 by a consolidation of half a dozen street-car companies, each of which operated independently a line of small mileage,—some run by dummy, and some by horse or mule power, and none of them having systems of transfers, or extending through lines across the city. The evidence shows that in many instances these lines were parallel to each other, running upon streets only a block apart for considerable distances, and at many places crossing or intersecting each other. These systems were in 1891 brought together and consolidated, not only under authority given by the city council of Atlanta, but under general and special legislative enactments of the general assembly. See Civil Code, § 2184. For the special act on this subject, see Acts 1890-91, vol. 1, p. 279, where the Metropolitan Street-Railroad Company was authorized to extend and operate its road in any part of Dekalb and Cobb counties, increase its stock to \$1.

000,000, and to sell its railroad property and franchises to any other company; also to purchase property and franchises of any other company, or to unite with the same, and in such event to change its name to the Consolidated Street-Railroad Company of Atlanta. See also special acts in same volume, on pages 283, 340. After this consolidation the lines were electrically equipped. It does not appear that there has been any opposition to this consolidation during the eight or nine years of its operation, and the record indicates that it was of great benefit to the public, by the connection of disconnected lines, and affording to the public generally much greater facilities for transportation. The other defendant, the Atlanta Railway Company, comprised a system of about 15 miles of street-car lines. It was composed of two companies, known as the Atlanta Street-Railroad Company and the Atlanta Traction Company. These two companies after existing for several years, became unsuccessful in business, passed into the hands of a receiver, and were finally consolidated by purchase and combination as the Atlanta Railway Company. This last-named company has never paid any dividends to its stockholders, according to the evidence, and had acquired from the city franchises to enter territory into which no street-car lines had been built, but, for want of means, was unable to avail itself of this privilege. It is contended in behalf of counsel for the Trust Company of Georgia that that company realized that the Atlanta Railway Company was not in a position to complete the lines under the franchises it had acquired, thus making of it a really important system, and if the lines of that company should then be connected with those of the Atlanta Railway & Power Company, and transfers issued to and from all the lines of the entire system, there would be an increase in the volume of business, because of increase in facilities to the public, and that the public would even be more benefited by this arrangement than it had been by the consolidation in 1891. It was made patent that with the disconnected lines a passenger, by paying the usual fare of 5 cents, could only go in one direction, and only to a point on the line which he first takes; and, with the separate lines connected, one could start upon any line of the system, and for the same fare, by procuring a transfer to any other line in the system, he could reach at the same expense any point upon any of the lines that are controlled by the entire system. It further appears from the evidence that a street-car company could not be operated, except at a loss, unless there was considerable patronage from those resident along the route of line it operated; that short-trip passengers left a profit with the company which would pay the expenses of transporting the one taking the long trip. We think the evidence in this record fully sustains the conclusion, to say the least of it, that the consolidation of these two lines would probably lead to granting the public generally along their routes greater and less expensive facilities and conveniences of

transportation. This is certainly a most important consideration, when a court of chancery is appealed to, to restrain by injunction the accomplishment of such an end, for the only business of street-car companies is the transportation of passengers who patronize their lines. This record indicates there was on the trial below testimony from over 100 witnesses to the effect that a combination of these two systems as contemplated would inure to the general interests of the people interested in the operation of these roads as means of transportation. After a careful review of the entire testimony in the case, which consumed about one and one half days of our time in its investigation, we have reached the conclusion that there is really no serious conflict among the witnesses touching the general effect upon the public interest of the transactions sought to be enjoined. The main point of conflict seems to us to be limited to certain intersections and terminal points of these two railway companies. There was quite a quantity of evidence introduced in behalf of the state showing competition at some intersections of these roads within the city, and also at some of their terminal points. There was, on the other hand, much evidence in behalf of the railway companies showing that whatever competition existed at these points was insignificant in its nature, and amounted to nothing compared to the extent of the business transacted by the companies. There was testimony in behalf of the state to the effect that, while these two lines were running absolutely independent one of the other, schedules at some points were so arranged as to be more convenient to the public; and, on the other hand, there was testimony in behalf of the railway companies to show that at other points schedules and accommodations to the public were increased since the two roads were acting more in harmony one with the other. In this connection we will allude to the Decatur lines of the two roads as being the lines which, counsel seem to insist upon, were most strongly in competition with one another. This line of the power company runs from near the center of the city of Decatur, on the north side of the stream railroad. The other line also runs from near the center of the city, on the south side of the steam railroad. They both terminate in the town of Decatur, at points about 500 or more feet apart. Under the evidence there was no competition whatever, it seems, between them after leaving Decatur along their routes to the city, their distance being about a mile or more apart; and the evidence shows that the amount of business at Decatur, where there was some competition for passengers *en route* to Atlanta, did not amount to more than 8 per cent of the entire business of the line. We will not undertake to give in this connection a synopsis of the conflicting evidence touching the competing points on these lines particularly at Grant Park, Oakland, Ft. McPherson, and some points of intersection on the streets. Our conclusion is that the evidence, fairly considered, is that the competition at these points

is unimportant and insignificant when compared to what appears to be the general interests of the public, and to the amount of business done by these companies along their lines where no manner of competition exists at all. Street-car companies, like all other transportation companies, should be operated in such a way as to afford the greatest convenience, comfort, and facilities for traveling to the greatest number of people who live near enough their lines to want, and to be able readily, to use them for transportation. It is utterly impracticable for the same facilities to be granted every one, so that the people at every point would fare exactly alike; and, when the question arises whether a few shall suffer some inconsiderable inconvenience by the inauguration of a system which is of advantage to the general public, we know of no safer principle to apply than the old adage of "the greatest good to the greatest number." In any event, as we think we have shown both by reason and authority, whenever the state proceeds in such a matter in its sovereign capacity, in law the foundation of its action must be based upon the public good, and when it fails to show any danger to the public interests a right of action of this sort fails.

The judge below, in his decision, states that the determination of the matter before him "rests upon the finding as to the truth of the following questions of fact, viz.: Does the consolidation of these two street railroads in question defeat competition at any point on any of their lines? Does it tend to defeat competition? Does it lessen competition? If either proposition, under the evidence offered, is determined in favor of the petitioner, then such consolidation will be violative of the organic law of the state, and will not be permitted." It is true, this court has repeatedly decided, and it is unquestionably a sound rule in such matters, that when a decision of the court below granting an interlocutory injunction is based upon a conflict of evidence, if there be sufficient testimony to sustain the judgment of the court below, under the law, its discretion in granting or refusing an injunction will not be controlled. The question involved in this case, as well as in nearly all cases which are litigated, depends upon the facts developed by the evidence. But evidently, from the decision itself, we think the judge below, in reaching a conclusion on the case, has applied to it a wrong principle of law. His conclusion is that if the consolidation of the two street railroads defeats competition at any point on any of their lines, or tends to defeat such competition, or lessen it, the courts will interfere to restrain and set aside such a combination. This thought in his opinion, coupled with the character of the evidence in this record, which we have only in general terms undertaken to outline above, we think necessarily leads to the conclusion of misconception on the part of the judge below as to the true meaning and spir-

it of the Constitution and laws of the state on this subject, as construed by this court in the case of *State v. Central of Georgia R. Co.* We therefore conclude that the judgment of the court below granting the injunction prayed for should be reversed.

We have said nothing in the foregoing opinion touching the allegations in the pleadings and the evidence in regard to the Atlanta Railway Company removing its tracks from Richardson street. The judge below, in his judgment, enjoins the street-railroad companies from taking up any of the tracks of their respective lines. In the bill of exceptions the plaintiffs in error expressly "except to so much of the order as prohibits them from taking up any part of the tracks of their respective lines, except the track of the Atlanta Railway Company on Richardson street, particularly referred to in the petition." The effect of not excepting to that portion of the order leaves that part of the court's order unaffected by this judgment. In giving the reasons for his judgment, the judge below says: "Where these lines are in cities, and where they hold their franchises from city government, it is possible for them to be controlled; but large parts of the lines of each of these companies are located outside of cities, and are not even located on public roads." We think, however, in the consideration of this case, although some of the lines run in the country and in an adjoining county, yet all of them being connected with the lines permeating the city in various directions, constituting a comparatively small portion of a grand system of street railways, the effect of consolidation upon the public generally should be considered, including, not only the interests of the people in the country,—and, so far as the record discloses, they do not seem to be complaining,—but also the people interested in all portions of the lines. In the latter part of his decision the judge states: "Believing, further, that the interests of the two defendant street-railroad companies, as well as those of the public, may be subserved by the interchange of business between said roads, and by transfer of passengers from the lines of one of the roads to those of the other, said companies are permitted to make any physical connections with the rails of each other, and they are further permitted to enter into any traffic arrangement which may be necessary to enable each of said companies to grant transfers or interchangeable tickets over the lines of the other." The evidence is uncontradicted that the purpose of the transactions among the defendant companies was substantially to effect this result; that the trust company purchased the stock in both companies, and the bonds in one of them none of which it now holds, but, it seems, had sold or hypothecated them for the purpose of raising money, partly with the view of carrying out this scheme, and also with the view of aiding the Atlanta Railway Company in completing its contemplated lines through territory and to points in the city

where, it seems, there are but little or no street-car accommodations. While the judge seems to recognize in this connection the public interests, yet the effect of his injunction, it seems to us, would be to restrain the parties in such a way that they could not

avail themselves of the means of accomplishing the end which he himself thinks desirable.

Judgment reversed.

All the Justices concur.

INDIANA SUPREME COURT.

TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY, *Appt.*,

v.

Alfred FOWLER, Admr. of Robert P. Fowler, Deceased.

(.....Ind.....)

1. The conductor of a freight train, who takes the engine and goes forward a mile or two from a station by order of the road superintendent, to see whether certain culverts are safe, or whether they have been injured by a recent heavy storm, is within the scope of his employment while riding on the engine between two of such culverts over a trestle, which breaks down, causing his death.
2. The breaking of a railroad trestle by a flood and the drift carried thereby renders the railroad company liable to an employee injured thereby, on the ground of negligence, if the character of the flood and drift is such as might reasonably be anticipated.
3. The question whether or not a flood which broke a railroad trestle was such as could have been reasonably anticipated is for the jury.
4. The negligence of the conductor of a freight train in going forward with the engine to examine culverts after a storm, under the order of the roadmaster, is a question for the jury.

(February 23, 1900.)

APPPEAL by defendant from a judgment of the Circuit Court for Montgomery County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Messrs. John G. Williams and Thomas & Whittington for appellant.

Messrs. Crane & Anderson for appellee.

Hadley, Ch. J., delivered the opinion of the court:

Suit by appellee to recover damages for wrongfully causing the death of Robert P. Fowler. After formal averments, it is alleged in the complaint that "for twenty-five years prior to the 1st day of March, 1896, said road was carried over a stream in said

Montgomery county, known as 'Walnut fork,' on a Howe truss bridge of one span of about 150 feet between the abutments on the banks of said stream; that the bottom of said bridge was about 25 feet above the bed of said stream, which at that point consisted of smooth rock in place; that said stream flowed between well-defined banks about 150 feet apart, and said road and said bridge crossed said stream at an angle of about 30 degrees; that said stream, at the place crossed by said bridge, has a great fall, and for some distance above said bridge the current is very rapid, and the stream approaches said bridge upon a curve or bend, being about 300 feet up stream from the bridge; that said stream has always been accustomed to sudden and great floods, rising with great rapidity, and carrying great quantities of water and driftwood down said stream and under said bridge, frequently rising to a height of 12 or 15 feet above the ordinary flow of the water; that frequently, during the time prior to the taking down of said bridge, as hereinafter alleged, said stream rose suddenly to a height of 12 or 15 feet above the ordinary stage, carrying with it large quantities of driftwood, consisting in part of logs, stumps, and tops of large trees, all of which safely passed through and under said bridge without injury thereto or to said railroad, of all of which facts then, and at all times thereafter, the defendant had full notice and knowledge; that on the said 1st day of March, 1896, the defendant removed said bridge, and in the place thereof carelessly, negligently, and unskillfully constructed and placed on the smooth surface of the bottom rock of said stream another bridge, consisting of a series of bents constructed of pine timber about 16 inches square, resting on mudsills placed upon the smooth surface of said rock bottom, without stays or anchors or other fastenings to hold them in place, at about an angle of 30 degrees with the thread of the stream, and at right angles with the line of said road; that twelve of said bents were placed parallel to each other, at the angle and in the manner aforesaid, on said rock bottom, 12 feet apart, and in such position with reference to said stream that an unobstructed opening of 1 to 2 feet was left for the passage of water and driftwood between said bents; that said bents acted as an obstruction to the flow of said stream, and caught the driftwood in time of high water; that about 6 o'clock on the afternoon of July 28, 1896, while said trestlework was standing as aforesaid, a heavy and severe rain fell in

NOTE.—For a flood considered as an act of God, see also *Blythe v. Denver & R. G. R. Co.* (Colo.) 11 L. R. A. 615, and note; also *Smith v. Western Railway of Alabama* (Ala.) 11 L. R. A. 619; *Long v. Pennsylvania R. Co.* (Pa.) 14 L. R. A. 741; *Lang v. Pennsylvania R. Co.* (Pa.) 14 L. R. A. 360; *Libby v. Maine C. R. Co.* (Me.) 1 L. R. A. 812; and *Wald v. Pittsburgh, C. C. & P. L. R. Co.* (Ill.) 35 L. R. A. 356.
(L. R. A.)

said county, along the line of said stream, above said trestlework, and said stream rose suddenly to a height of about 10 feet above the ordinary stage of said stream, carrying upon and against said trestlework large quantities of drift, stumps, and large trees, which lodged against said trestlework, and about 12 o'clock P. M. of said day the force of the current of said stream, and the back-water caused by said trestlework and drift, forced said bents out of position, and carried them several feet down stream, and out of line with said road, and so destroyed said trestle that it was impossible for a locomotive engine or train to cross the same with safety; that on said July 28, 1896, plaintiff's decedent was in the employ of the defendant in the capacity of a conductor of a freight train, and upon said day had in charge a freight train running from Terre Haute to Logansport; that plaintiff's decedent arrived with his train at 11:30 P. M. on said day at Crawfordsville Junction, a point on said road about 1 mile south of said trestlework, and was there informed by John S. Brothers, who was then road superintendent of said road, of the severe rainstorm above mentioned, and of apprehended danger to said road at a culvert about halfway between said junction and said trestlework, and at another place a mile or so north of and beyond said trestlework; that said Brothers was the roadmaster of defendant, having in charge the care, maintenance, and inspection of the line of said road, and knew and had knowledge of the condition of the roadbed, bridges, and trestles, and resided in Crawfordsville, in said county, within 1 mile of said trestlework, and upon the night of said storm was looking after the line of said road to ascertain the extent of the injuries that might have resulted from said storm; that said Brothers was at said junction, and informed decedent of the apprehended injuries to said road at the two points above mentioned, and no others, and, after said Brothers and said decedent had consulted with reference to said matters, said locomotive was detached from said train, and run forward, with said Brothers and plaintiff's decedent and the engineer and fireman and a brakeman thereon, to said culvert, where it was stopped, and the road inspected and found to be uninjured; that thereupon the plaintiff's decedent, and said engineer, brakeman, and fireman boarded said engine, and, without any notice or knowledge of the faulty construction and condition of said trestlework, and believing the same to be safe, and upon the order of said Brothers, started forward to inspect said place of apprehended danger north of and beyond said trestlework; that, as said locomotive approached said trestlework, the engineer discovered that said trestle and track were out of line, and before said locomotive could be stopped, or the persons thereon could get off from said locomotive, it ran upon said trestlework, which gave way, and precipitated said locomotive to the ground

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below and into said stream, whereby the decedent was caught between the engine and tender of said locomotive, and crushed, and carried into the water below, and drowned and killed,"—all without fault of the decedent. Demurrer to the complaint overruled. Answer in general denial. Verdict and judgment for plaintiff. Motion for new trial overruled. Error assigned by appellant on both adverse rulings.

The point made against the complaint is that the decedent, at the time he lost his life, was, without the direction or acquiescence of his employer, acting without the scope of his employment; that, being the conductor of a freight train, it was no part of his duty to inspect the track; and that when he detached the locomotive, and went forward on it to inspect reported impairments, he was performing work which he was not employed to perform, and in respect of which appellant owed him no duty to furnish him a safe trestle over which to pass; and he was therefore guilty of contributory negligence. We concede the rule to be as contended,—that the master's duty to the servant only extends to the particular work, or class of work, which the servant is employed to perform, and that when the servant, without the command or acquiescence of the master, voluntarily undertakes hazardous work outside of his employment, he puts himself beyond the protection of the master's implied obligation, and if he is injured he is without remedy. *Brown v. Byroads*, 47 Ind. 435; *Pittsburgh, C. & St. L. R. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *Jorgenson v. Johnson Chair Co.* 169 Ill. 429, 48 N. E. 822; *Mellor v. Merchants' Mfg. Co.* 150 Mass. 362, 5 L. R. A. 792, 23 N. E. 100; *Knob v. Pioneer Coal Co.* 90 Tenn. 546, 18 S. W. 255; *Freeberg v. St. Paul Plow-Works*, 48 Minn. 99, 109, 50 N. W. 1028. But the rule stated does not have strict application in all cases. In the presence of an emergency, when an unusual situation presents itself, and the employee, having in view the general scope of his duty, voluntarily steps outside the strict bounds of his employment, he is justified if, under the circumstances of the case, common prudence fairly and reasonably called for the act. The principle is clearly stated by an eminent author in these words: "While, as a general rule, the servant has no claim for damages for injury received while voluntarily assuming to do something which the master did not employ him to do, yet, in case of emergency, he may of his own volition step outside of the line of his usual duties, and if this departure is only such as the necessities of the case fairly and reasonably call for, keeping in view the character of the work he is required to do, it will not of itself defeat a recovery of damages in case he is injured. Whether he is guilty of negligence is a question for the jury, and his conduct must be tried in the light of all the surroundings. Hence it was held that an engineer who left his engine in

charge of the fireman, in violation of the rules of the company, and stepped on the main track, and signaled the fireman to move his train on the side track, and while thus engaged was run over and killed by a hand car in charge of section men, was not so without the scope of his employment, or negligent, but that his representatives could recover from the master damages for his death." 2 Bailey, Personal Injuries relating to Master and Servant, § 3524. In the case referred to by the author it is said: "While it was not the duty of an engineer to leave his engine for the purpose of getting signals, still it cannot be ruled, as a matter of law, that the plaintiff must fail in this suit because Barry stepped out on the main track to get the signals, even though it was no part of his general duties thus to do." *Barry v. Hannibal & St. J. R. Co.* 98 Mo. 62, 11 S. W. 308. In *Seley v. Southern P. R. Co.* 6 Utah, 319, 23 Pac. 751, it was held that the duties of a freight conductor are "somewhat general," and that when the conductor, upon failure of the brakeman to successfully make a coupling, stepped in, and, in attempting to make it, lost his life, he was not so far from the scope of his employment as to preclude a recovery. In *Somerset & C. R. Co. v. Galbraith*, 109 Pa. 32, 1 Atl. 371, it was said: "Galbraith was the conductor of the train. He was bound to exercise, in the interest of his employer, all due care and caution. If he knew of any obstruction on the track, or had reason to expect any, it was his clear duty to guard against it. 'The conductor . . . is held responsible for the safe transport of his train, and that requires of him, in cases of this kind, to use judgment.' . . . He was held, of course, to the reasonable observance of all these rules, but he had a general duty and discretion to exercise in an emergency." To the same effect see Bailey, Personal Injuries relating to Master and Servant, § 3400. See also *Thomp. Neg.* 1017; *Sears v. Central R. & Bkg. Co.* 53 Ga. 630.

As conductor of the train it was Fowler's duty to take it safely to its destination on schedule time, or in accordance with such special orders as he might receive from his superiors. In the orderly, timely, and safe movement of the train, he was the responsible agent, and, in respect of controlling and safeguarding the train in its progress, the scope of his employment required of him such care and caution as the nature and magnitude of his trust fairly demanded. The complaint shows that he arrived at the junction about midnight. He was there informed that there had been a heavy rainfall in the vicinity; that two culverts, one $\frac{1}{2}$ mile and the other about 2 miles north of the junction, had probably been rendered unsafe to the passage of his train. His informant was appellant's roadmaster in charge of all that particular part of the road, and who lived in the neighborhood, and but a mile distant from the fatal trestle, and whose

duty it was to keep well informed of the condition of the road, and who, in describing to Fowler apprehended injuries to the track, had made no mention of the trestle. As an employee alert to his employer's interest and to the discharge of his duty as the responsible manager of the train, what was the deceased to do? To have run the train forward heedless of the warnings would have been positive negligence. To have run the whole train forward to the first point of apprehended injury, with the probable result of being forced to return for materials and men to make repairs, would seem unwise and a needless waste of time. To have remained impassive at the junction with his train, until the roadmaster could have found his way to the questionable places and returned with information that it was safe to proceed, would seem wholly inconsistent with his general duty to move his train safely and on time. In any view of the case, it is very clear that his prompt detaching of the engine, and taking on board one of his brakemen and the roadmaster, probably as helpers if need be, and proceeding to the reported danger points for personal inspection, to see, with his own eyes, the character and extent of the new peril to be encountered by his train, was not such a departure from the work he was employed to perform as will warrant the court in ruling, as a matter of law, that he was thereby guilty of negligence. Beyond all question, the averments of the complaint are sufficient to withstand a demurrer.

As a reason for a new trial, it is insisted that the verdict is not sustained by sufficient evidence. It is claimed that there is no evidence to show either negligence on the part of appellant or freedom from contributory negligence on the part of the deceased. The negligence charged against appellant is in constructing and maintaining the trestle, in failing and neglecting to maintain a proper and suitable bridge to carry the railroad over the stream, and in failing to properly guard and inspect the bridge. The evidence tends to prove that the stream of Walnut Fork runs through a timbered district; that its current is rapid, and subject to sudden rises, and when at flood carries a large amount of driftwood. On three previous occasions, namely, 1875, 1883, and September, 1895, the stream was as high, and in 1883 2 feet higher, than it was on the night of July 28, 1896, when Robert P. Fowler lost his life. For more than twenty-five years prior to 1896 appellant had maintained across the stream a Howe truss bridge, having a span of more than 100 feet of clear space between the abutments, and during the previous floods of 1875, 1883, and 1895 the stream was well known to have carried down, with its other drift, large trees and logs, and passed them, without injury, under the railroad bridge. In January, 1896, the appellant removed its Howe truss bridge, and replaced it with a trestle bridge. In the new bridge there were

ten bents, placed at right angles with the line of the railroad, and $12\frac{1}{2}$ feet apart from center to center, with 11 feet of clear space between them, the trestle posts standing upon mudsills resting on the leveled rock stratum at the bottom of the creek. The rock stratum dipped to the southwest, or down stream, and the level for the mudsills was, as a rule, but not without exception, produced by hewing down the rock at the upper end. There were no anchors placed in the mudsills. The railroad crossed the stream at an angle less than a right angle, and there was evidence tending to prove that the trestle bents were placed at such an angle to the channel and current of the stream that a straight line up and down the center of the channel would show not exceeding 3 feet of clear space between the bents for the passage of driftwood. On the morning after the accident four or five posts of the trestle were found broken and lodged in a drift down stream, and a large tree that had never been there before was found resting on the bank a few hundred yards below the bridge. The trestle was new, well constructed for a bridge of its kind, except as may be inferred from the failure to anchor the mudsills, in good repair, and sufficient to carry four times the weight of the locomotive that fell through it, or four times the weight of the decedent's train. As the party on the engine approached the trestle, the engineer, a moment before the accident, but not in time to stop the engine, discovered that the track on the bridge was several feet out of line down stream. It is argued that the flood of July 28th was most unusual and extraordinary, and carried an unusual amount and quality of drift, and that the law does not require the appellant to provide against such events, and that, the bridge being sufficient and safe against usual floods and drifts, negligence cannot be imputed to it in the erection of the trestle. If the flood of July 28th had been unprecedented, there would be substance in this contention. If such flood had never occurred within the memory of those residing in the neighborhood, prior to the erection of the trestle, then the appellant had the right to assume that it would not occur at all, and would have been excused in not providing against it. But the evidence tends to show that in 1875, 1883, and in September, 1895, the stream had been as high, and the drift as great, and in 1883 higher and greater, than at the time of the accident. Of these events appellant was bound to take notice. It had been in possession of that part of the stream for twenty-seven years, and must be held to know, concerning its nature and characteristics as to floods and drift, what it might have known upon reasonable inquiry. The master carpenter in charge of that division of appellant's road, and who had been in its employ for twenty-seven years, testified that he had known the stream for twenty-seven years, remembered

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the floods of 1875 and 1895, and had frequently seen brush, rails, and logs being carried by its current, and that he knew as much about the stream as the neighbors when the trestle was put in. Because the flood was unusual and extraordinary will not excuse the appellant, if the character and history of the stream showed that such a flood might at some time be reasonably expected. In constructing the trestle, it was required to provide against such dangers as could have been reasonably foreseen, and to adopt such precautions as men of ordinary sagacity and caution would anticipate and look forward to. *Seagel v. Chicago, M. & St. P. R. Co.* 83 Iowa, 380, 388, 49 N. W. 990; *Bogart v. Delaware, L. & W. R. Co.* 145 N. Y. 283, 40 N. E. 17; *Doyle v. Chicago, St. P. & A. C. R. Co.* 77 Iowa, 607, 4 L. R. A. 420, 42 N. W. 555; *Carney v. Caraqueet R. Co.* 29 N. B. 425. In the last case cited it is said at page 431: "I have no doubt . . . that, if the bridge had given way whilst a train with passengers had been crossing over it, the railway company would have been liable in law for all damage which resulted, and that liability would have arisen because the bridge had been insecurely and insufficiently built. There was no 'act of God,' or *vis major* about it. The bridge yielded and gave way when there came more ice, a higher tide, and a greater storm than usual, but not greater nor higher than a person living in that section of the country might reasonably expect would come." If, therefore, the flood and character of the drift that broke the bridge on the night of July 28th might have reasonably been foreseen, the railroad company was required to provide against it; and, however substantially constructed and strong the trestle, we cannot say, as a matter of law, that the appellant was free from negligence in placing the bents athwart the current of the stream, which was known to be liable to sudden and great floods, and to carry a large amount of heavy and dangerous drift to beat against it. The question of appellant's negligence was properly left to the jury, as was also the question of the decedent's contributory negligence, and the verdict is sufficiently sustained by the evidence.

The action of the court in refusing to give to the jury appellant's request No. 7 is complained of. It presents the appellant's theory that the detaching of the engine by the decedent, without the order or acquiescence of appellant, and voluntarily proceeding on the engine to inspect the track, was such a departure from the duties of his employment as constituted negligence *per se*. The same question arose on the demurrer to the complaint, and, for reasons there given, we hold that the instruction was properly refused. We find no error in the record.

Judgment affirmed.

Rehearing denied.

IOWA SUPREME COURT.

William HIBBS, *Appt.*,
v.

Board of Directors, et al., of District TOWNSHIP OF ADAMS *et al.*

(..... Iowa)

1. The right of the voters of a district township to rescind a vote for a tax to build a schoolhouse in a subdistrict, at a regular meeting subsequent to that at which the tax is voted, exists by necessary implication from the power to vote the tax, when they rescind the vote before the tax has been collected, levied, or certified to the board of supervisors for that purpose.
2. A vested right to have a tax for building a schoolhouse levied and collected is not acquired, so as to prevent rescission of the vote for the tax, by commencing an action to compel the certification of the tax for levy and collection.

(*Given, J., dissents.*)

(January 23, 1900.)

APPEAL by plaintiff from a judgment of the District Court for Mahaska County in favor of defendants in a proceeding brought to compel the certification of a tax for the erection of a schoolhouse. *Affirmed.* The facts are stated in the opinion.

Mr. L. C. Blanchard, for appellant:

After the tax is voted, the duty of the board of directors is clearly specified by the statute: They shall make all contracts, purchases, payments, and sales necessary to carry out any vote of the district.

Code 1873, § 1723; *Austin v. Colony Dist.* *Twp.* 51 Iowa, 102, 49 N. W. 1051.

And § 1777 of Code 1873 (*McClain's Anno. Code*, § 2895) requires the board at their regular annual meeting in March of each year to "cause the secretary to certify the same, together with the amount voted for schoolhouse purposes, within five days thereafter, to the board of supervisors."

This statute is mandatory; the board has no discretion in the matter.

When a positive official duty is enjoined by law upon any officer, and as to the mode or manner of performance he has no discretion, the only adequate remedy, ordinarily, is that of mandamus.

Benjamin v. Malaka Dist. Twp. 50 Iowa, 648.

Plaintiff's rights had become vested long before the action to rescind was taken. Such a tax cannot be rescinded after rights become vested.

Ibid.; *Cooley*, *Const. Lim.* 6th ed. 443; 2 *Beach*, *Modern Law of Contracts*, § 1637, note; *Henderson & N. R. Co. v. Dickerson*,

NOTE.—The above case is believed to make the first precedent on the question of the right to rescind a vote for a tax.

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17 B. Mon. 173, 66 Am. Dec. 148; *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 17 L. ed. 805; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558; 6 Am. & Eng. Enc. Law, 2d ed. p. 956, and notes; *Jordan v. Wimer*, 45 Iowa, 65.

We commenced this action to secure the rights which the law gave us. We have expended time and money in good faith in the endeavor to compel the board to do what the law said they should do. Our rights under such conditions are vested rights.

Wilson v. Tucker, 105 Iowa, 55, 74 N. W. 908; *McDonald v. Jackson*, 55 Iowa, 37, 7 N. W. 408; *Brodt v. Rohkar*, 48 Iowa, 36.

Messrs. Bolton, McCoy, & Bolton, and *J. C. Williams*, for appellees:

There was no necessity for two schoolhouses in this district. The schoolhouse is shown to be in good repair and large enough to accommodate all the pupils. Under these facts the tax is illegal, and should not be levied, and the board was justified in refusing to instruct the clerk to certify the tax.

Cusey v. Nutt Independent Dist. 64 Iowa, 659, 21 N. W. 122; *Seaman v. Baughman*, 82 Iowa, 216, 11 L. R. A. 354, 47 N. W. 1091.

The power that creates law can certainly destroy. If the plaintiffs in this case had no vested rights by reason of the vote in favor of the tax, then they have no legal right to complain of the rescinding of the tax. A repeal of the law authorizing the vote takes away the power to levy the tax, even though a favorable vote has been already taken, but the rate not fixed.

Covington & L. R. Co. v. Kenton County Ct. 12 B. Mon. 150; 2 *Desty*, *Taxn.* p. 1122.

Under an act authorizing counties and townships to aid in the construction of railroads, a railroad company has not, and cannot acquire, any legal right to or interest in a tax voted, until such tax has been levied and collected and a valid subscription made on behalf of the township.

Jager v. Doherty, 61 Ind. 528; 2 *Desty*, *Taxn.* p. 1204; *Crawford County Comrs. v. Louisville, N. A. & St. L. Air Line R. Co.* 39 Ind. 192; *Bittinger v. Bell*, 65 Ind. 453; *Sankey v. Terre Haute & S. W. R. Co.* 42 Ind. 402.

The mere vote of the electors to subscribe to the stock of a railroad company is not an executed contract, under the protection of the Federal Constitution.

Land Grant R. & Trust Co. v. Davis County Comrs. 6 Kan. 256.

The act of voting a tax is not of itself a levy.

School Dist. No. 6 v. School Dist. No. 9, 13 Neb. 173, 12 N. W. 921; *Iowa Railroad Land Co. v. Woodbury County*, 39 Iowa, 172.

A tax, to be valid, must be levied. A vote of the people alone does not make it valid.

Iowa Railroad Land Co. v. Woodbury County, 39 Iowa, 172.

Deemer, J., delivered the opinion of the court:

The district township of Adams is divided into eight subdistricts. In each of these there is a schoolhouse. The village of Lacey, a station on the Illinois Central Railroad, is situated near the west line of the township, about 1½ miles from the schoolhouse in that subdistrict, and has sixteen or seventeen pupils of school age. At the regular annual meeting of the electors of the district township held March 8, 1897, it was voted "that there be levied a tax by Adams township to build a schoolhouse at Lacey, not to cost more than seven hundred (\$700) dollars." Twenty-one votes were cast in favor of the proposition and twelve against. This proceeding seems to have been entirely regular, but the board and secretary failed to certify the tax to the board of supervisors for levy and collection, as required by law. On the 29th day of March, 1897, plaintiff commenced this action to compel the certification of the tax so voted. After the action was commenced, and on the 1st day of March, 1898, a petition was presented to the district township board, signed by thirteen electors and property owners of the township, asking the board to submit to the voters of the district township at the regular meeting to be held March 14, 1898, a proposition to rescind the tax voted at the previous annual meeting for the purpose of building the schoolhouse at or near Lacey. The board ordered the submission of the proposition at said meeting, and instructed the secretary to insert the same in the annual call for the election, which was accordingly done. At said annual meeting in the year 1898, and before the trial of the case in the court below, said proposition was voted on by ballot, fifty-six votes being cast, fifty-three of which were for rescinding and three against. While other matters are presented in answer, the only question for us to consider is the effect of this vote rescinding the former vote authorizing the tax. That it was the duty of the board to certify the tax voted at the 1897 meeting there can be no question. But it did not do so, and, before any tax was in fact certified or levied, the electors, at a regular meeting, and by a large majority, voted to rescind the order voting the tax. What effect is to be given to the order or vote of rescission? Appellant contends that, having once voted the tax, the electors have no power of rescission. It is fundamental that electors of a district township can only exercise such powers as are conferred by statute, either expressly or by reasonable implication. *Washington Dist. Twp. v. Thomas*, 59 Iowa, 50, 12 N. W. 767. By section 2749 of the Code of 1897 they are given power "to vote a schoolhouse tax, not exceeding 10 mills on the dollar in any one year, for the purchase of grounds, construction of schoolhouses, the payment of debts contracted for the erection of schoolhouses," etc. Having the power to vote the tax, they, by necessary implication, have the right to rescind that vote, unless by so doing they interfere with vested rights. Power to do necessarily implies the

power not to do; so that, having voted at one regular annual meeting to vote a schoolhouse tax, they may, at a subsequent meeting, vote not to levy a tax, unless, as we have said, some vested right has intervened. Whenever the electors meet in annual session, and fail to vote a schoolhouse tax, they virtually determine that no schoolhouse tax shall be levied; and the mere fact that they have previously voted to levy such a tax is not in itself controlling on the question of power.

But it is said that, as soon as the tax was voted by the electors, plaintiff and others, interested in securing the schoolhouse, became possessed of a vested right, which could not be interfered with by subsequent vote. Let us see what that right is. As has been stated, the board and its officers failed to certify the tax to the board of supervisors for levy and collection. Plaintiff's right was to bring action to compel them to do so. *Oden Dahl v. Russell*, 86 Iowa, 673, 53 N. W. 336. No tax had, in fact, been levied, and none had been collected. The electors had simply determined that a tax should be levied, but, before anything had been done thereunder, they decided to rescind their action. True, plaintiff had commenced his action to compel the board of directors to certify the tax, but this did not give him a vested right. *Huff v. Cook*, 44 Iowa, 639. A case must be decided on the facts as they appear at the time of trial. In *Benjamin v. Malaka Dist. Twp.* 50 Iowa, 648, relied on by appellant, the tax had been levied and collected, and, as said in the opinion, "by the payment of the taxes levied and collected for the purpose of erecting the house, the plaintiff's right thereto became vested, and no subsequent action of the electors without his consent could have the effect of depriving him of such right." The distinction between that case and this is so apparent that we need not say more.

The trial court was right in dismissing plaintiff's petition, and the judgment is affirmed.

Granger, Ch. J., not sitting.

Given, J., dissenting:

I do not concur in the conclusion that the voters had power to vote, in 1898, to rescind the tax regularly voted in 1897. Their powers being expressed in the statute, all powers not expressly or by reasonable implication conferred are excluded. The power to rescind is not expressly given, and, as I view it, may not be reasonably implied. The power to vote on a question of a tax implies the power to vote against it, but not to vote to rescind it after it has been regularly authorized. As well may it be implied that power to vote for or against a person for an office confers power to rescind his election regularly made by a subsequent vote of the electors. The law provides how the will of the voters shall be ascertained, and, when their will is expressed, as provided by law, nothing remains but to carry it into effect.

It is said that the power to rescind exists

"unless by so doing they interfere with vested rights." While I do not agree that the power to rescind exists, yet, conceding that it does until some adverse right is vested, how is it in this case? By the vote of 1897 the tax was regularly authorized, and it was then the duty of the defendants to cause that tax to be certified for levy and collection, and to apply it to the authorized use; but this they wrongfully and obstinately refused to do. It is beyond question that, as matters stood on March 29, 1897, the day plaintiff filed his petition, he was entitled to an order commanding the certification of said tax. It was because he, in common with others alike interested, had become vested with the right to have the tax certified, collected, and applied as authorized by the vote of 1897. This right was completely

vested long before the attempted rescission, and, according to the opinion, barred a rescission. A is regularly elected to an office, and thereby has become vested with the right to qualify and hold the office. Will it be pretended that no right has become vested until he qualifies, and therefore the voters may rescind the election before he qualifies? I am of the opinion that no power is given to rescind the vote by which this tax was authorized; that none such should be implied; and that, if it may, the right of plaintiff to have the tax certified, collected, and applied had become a vested right. I do not think it was intended to introduce such an element of uncertainty into the administration of the affairs of school districts as may follow under sanction of this opinion.

KENTUCKY COURT OF APPEALS.

FORT JEFFERSON IMPROVEMENT COMPANY *et al.*, *Appts.*,

v.

J. B. DUPOYSTER *et al.*

(..... Ky.)

1. A deed of a tract of land by one in possession of only a part of it, at a time when third persons were in possession of the greater portion claiming under a superior title, is not absolutely void under the champerty statute, but only voidable at the instance of the parties in adverse possession.
2. A deed to one who purchases when a portion of the tract is in adverse possession of third persons cannot be attacked by his vendee after the former has purchased in the outstanding title, to avoid taking the title tendered under the contract.
3. A deed to one during his natural life, who is to deed or will the lands to the bodily heirs of another, the former having the discretion of allotting the lands as to may see proper, confers a life estate on the first taker, with vested remainder to the heirs of the other person mentioned, which will open to let in afterborn children; and the interests of children dying before the life tenant will pass to their heirs.
4. Upon rescission of a deed of real estate because the grantors had, to their knowledge, no title which they could convey, of which fact the vendee was ignorant, a lien for purchase money wrongfully received by the vendors may be decreed upon any portion of the land of which the vendors were the owners.

(June 15, 1899.)

A PPEAL by defendants from a judgment of the Circuit Court for Ballard County in favor of cross complainants in a proceeding to enforce specific performance of a contract to purchase real estate which was rescinded without awarding a lien on the property for the money already paid. *Reversed.*

NOTE.—On the question of the effect of adverse possession upon the validity of a deed, see also *Reyes v. Middleton* (Fla.) 29 L. R. A. 66.

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The facts are stated in the opinion.

Messrs. J. M. Nichols & Son, for appellants:

All sales or conveyances, including those made under execution, of any land, or of the pretended right or title to the same, of which any other person, at the time of such sale, contract, or conveyance, has adverse possession, shall be null and void.

Ky. Rev. Stat. chap. 12, § 2.

Void acts are not good to some purpose.

Wait, Fraud. Conv. § 412; Cardwell v. Sprigg, 7 Dana, 36; *Chiles v. Conley*, 9 Dana, 385; *Griffith v. Dicken*, 4 Dana, 503; *Baley v. Deakins*, 5 B. Mon. 181; *Crowley v. Vaughan*, 11 Bush, 518; *Gately v. Wilder*, 12 Ky. L. Rep. 621, 14 S. W. 680.

The deed is not only void as to the occupant of the land, but it is void as between the parties to the deed.

Graves v. Leathers, 17 B. Mon. 667.

The deed being void, no estoppel can be founded upon it.

Cardwell v. Sprigg, 1 B. Mon. 372; *Kercheval v. Triplett*, 1 A. K. Marsh. 493.

A champertous deed is void, and confers no right of entry.

Bentley v. Watkins, 7 S. W. 629; *Bowling v. Roark*, 15 Ky. L. Rep. 499, 24 S. W. 4; *Wait, Fraud. Conv. § 413*; 28 Am. & Eng. Enc. Law, p. 475.

If a man has accepted and holds a void deed which gives him no right to enter, and the land being occupied, he cannot enter; and he then buys the same land from the party in possession, who has the title and possession; and after this second purchase he enters and takes possession,—his entry and holding will be in right of and under this second purchase.

Taylor v. Watkins, 4 B. Mon. 566.

The claim that all the purchases of this land made after the deed of March 16, 1859, were made to quiet that title, has no foundation in law or fact.

Bowling v. Roark, 15 Ky. L. Rep. 499, 24 S. W. 4.

When Dupoyster bought from the parties who had the title, and took possession, his allegiance was to that title, and he was never under an estoppel as to the deed of March 16, 1859, nor on those who hold under him.

Lyne v. Bank of Kentucky, 5 J. J. Marsh. 579.

Innocent purchasers are protected in a deed which was not acknowledged or proved and lodged for record as prescribed by law.

Dozier v. Barnett, 13 Bush, 457; *Patrick v. Marshall*, 2 Bibb, 45, 4 Am. Dec. 670; *Duvall v. Guthrie*, 3 Bibb, 532; *Hughes v. Easten*, 4 J. J. Marsh. 573, 20 Am. Dec. 230; *Dickerson v. Talbot*, 14 B. Mon. 62; *Lyne v. Bank of Kentucky*, 5 J. J. Marsh. 558; *Winlock v. Hardy*, 4 Litt. 273; *Womack v. Hughes*, Litt. Sel. Cas. 295.

A deed, though acknowledged and left in the clerk's office for registration, is not constructive notice until the tax is paid thereon (Rev. Stat. chap. 24, § 32) and as to them the vendee has but an equitable title.

Phillips v. Clark, 4 Met. (Ky.) 348, 83 Am. Dec. 471.

If the certificate is insufficient, the fact that the deed was deposited for record in due time and recorded avails nothing.

Miller v. Henshaw, 4 Dana, 327.

The clerk fails to make the certificate as required by the statutes, in this: he fails to "certify the time when the instrument was lodged in his office for record." This is a fatal defect.

Womack v. Hughes, Litt. Sel. Cas. 294; *Lyne v. Bank of Kentucky*, 5 J. J. Marsh. 558; *McConnell v. Brown*, Litt. Sel. Cas. 464; *Walker v. Walker*, 42 Ill. 311, 89 Am. Dec. 445; *Rivard v. Walker*, 39 Ill. 413; *Robinson v. Gould*, 26 Iowa, 89.

The recording of a deed is not constructive notice of its contents, where it is not entitled to be recorded.

Prentice v. Duluth Storage & Forwarding Co. 19 U. S. App. 100, 58 Fed. Rep. 438, 7 C. C. A. 293; *Lowry v. Harris*, 12 Minn. 255, Gil. 166; *Morton v. Smith*, 2 Dill. 316, Fed. Cas. No. 9,867; *O'Brien v. Gaslin*, 20 Neb. 347, 30 N. W. 274; *Greenwood v. Jenswold*, 69 Iowa, 53, 28 N. W. 433; *Ely v. Wilcox*, 20 Wis. 523, 91 Am. Dec. 436; *Fisher v. Vaughn*, 75 Wis. 609, 44 N. W. 831.

No deed can take effect, as having been delivered, until such act of delivery has been assented to by the grantee, and he has done something equivalent to an actual acceptance.

2 Washb. Real Prop. p. 581; *Com. v. Jackson*, 10 Bush, 429; *Walker v. Walker*, 42 Ill. 311, 89 Am. Dec. 445; *Rivard v. Walker*, 39 Ill. 413; *Robinson v. Gould*, 26 Iowa, 89; *Ford v. Gregory*, 10 B. Mon. 180.

The words "bodily heirs of J. C. Dupoyster," used in the deed, do not mean the children of J. C. Dupoyster.

True v. Nicholls, 2 Duv. 547; *Johnson v. Johnson*, 2 Met. (Ky.) 331.

The grantor used the words "bodily heirs" in their legal and technical sense, meaning 48 L. R. A.

the lineal descendants of J. C. Dupoyster to the remotest degree.

This is simply a deed to B. S. Dupoyster for his life, and then to the heirs of J. C. Dupoyster, whoever they may happen to be.

Appellees must lose this action, though it may be true that if their father was dead, and it was thus ascertained that they were the heirs of J. C. Dupoyster, they might recover.

Williamson v. Williamson, 18 B. Mon. 368.

There have been born to J. C. Dupoyster four children, two of whom are dead, and they died in infancy and without issue. J. C. Dupoyster is their next of kin and heir at law. Therefore he owned an undivided one-half interest in the land, which by his deed passed to appellant, and in which appellees have no interest.

Walters v. Crutcher, 15 B. Mon. 10.

Dupoyster represented the title to the land clear and perfect. It was not, and he is guilty of a fraud which cannot be cured.

Breckinridge v. Moore, 3 B. Mon. 635; *Bibb v. Prather*, Sneed (Ky.) 136, 2 Am. Dec. 711; *Upshaw v. Debou*, 7 Bush, 442.

Mr. Thomas P. Bashaw, also for appellants:

If the habendum discovers a plain intention to invest Ben S. Dupoyster with a life estate only, the granting clause, standing alone, gives him the fee.

There is then a clear repugnancy between the granting clause and the habendum,—the former giving him the fee, the latter a life estate only, with absolutely nothing else anywhere in the deed throwing the least light on the intention of the grantor.

The grantee will take the fee.

Ratliffe v. Marrs, 87 Ky. 26; 3 Washb. Real Prop. 439; 13 Am. & Eng. Enc. Law. p. 798, and note; *Cornwell v. Orton*, 126 Mo. 355, 27 S. W. 536.

If Mrs. Edwards and Joe B. Dupoyster actively participated in the fraud, they are, by way of estoppel, divested of their interest in the lands as against appellees.

Heck v. Fisher, 78 Ky. 643; *Holloway v. Louisville R. Co.* 92 Ky. 244, 17 S. W. 572; *Bull v. Sevier*, 88 Ky. 515, 11 S. W. 506.

Mr. D. G. Park, for appellees:

By the terms of the deed, Ben S. Dupoyster took a life estate, with contingent remainder to the bodily heirs of J. C. Dupoyster, as a class, with power of allotment among them by the life tenant by deed or will.

Williamson v. Williamson, 18 B. Mon. 365; *Thompson v. Vance*, 1 Met. (Ky.) 670; *Howell v. Ackerman*, 89 Ky. 22, 11 S. W. 819; *Lewis v. Citizens' Nat. Bank*, 95 Ky. 79, 23 S. W. 667; *Turman v. White*, 14 B. Mon. 570.

The language of the deed: "Then to said heirs of said J. C. Dupoyster, and second party has the discretion of allotting said lands between said heirs as he may see proper,"—precludes the vesting of the land until the death of Ben S. Dupoyster.

Turman v. White, 14 B. Mon. 570; *Howell v. Ackerman*, 89 Ky. 22, 11 S. W. 819; *Williamson v. Williamson*, 18 B. Mon. 373; *Lewis v. Citizens' Nat. Bank*, 95 Ky. 83, 23 S. W. 667.

The power created in the life tenant was not general, but special, and could not be exercised in favor of any other than the class named.

The appellants are in no attitude to rely on either the statutes of champerty or limitation. Having purchased from and come into possession through the life tenant, Ben S. Dupoyster, they can no more deny the validity of his title, or allege his possession to be adverse to appellees as remaindermen, than Ben S. Dupoyster himself could have denied such title or alleged that his possession was adverse as against them.

The possession should be held according to the title by which it was acquired.

Kirk v. Nichols, 2 J. J. Marsh. 470.

No cause of action accrued to the appellees until the death of the life tenant, and of course their cause of action for the land is not barred by any statute of limitation.

Butler v. McMillan, 88 Ky. 420, 11 S. W. 362; *Board v. Board*, L. R. 9 Q. B. 48.

The champerty statute is not available to the appellants. Neither the life tenant nor his alienee can dispute the title of the reversioner.

Kirk v. Nichols, 2 J. J. Marsh. 470; 2 Herman. Estoppel & Res. Adjudicata, § 892, p. 1014; *Board v. Board*, L. R. 9 Q. B. 48; Bigelow, Estoppel, 5th ed. 555; Newell, Ejectment, p. 602, §15.

Though the deed would be void as to the person holding adversely at the time it was made, and those claiming under him between the parties and as to the rest of the world it would be effectual and valid.

Martindale, Conv. 2d ed. § 24; *Luen v. Wilson*, 95 Ky. 503, 3 S. W. 911.

Mr. W. G. Bullitt also for appellees.

Haselrigg, Ch. J., delivered the opinion of the court:

It is the contention of appellees that, claiming under paper title from one Langdon and others, Thomas Dupoyster and his son Joe C. settled in 1848 upon the tract of land in controversy, containing some 3,600 acres, in Ballard and Carlisle counties; that they occupied a small portion of the land that was cleared, made some little improvements, cut timber, and cleared a few more acres of land, and asserted their ownership to the entire tract. Appellees further contend that on March 16, 1859, Thomas Dupoyster, who had three children living at that time (Joe C., Ben S., and Thomas Dupoyster), by deed duly signed, acknowledged, and recorded in the proper office, conveyed this land to his son Ben S. for life, and then to the children of Joe C. Dupoyster, under conditions to be considered presently. In September, 1890, Joe C. Dupoyster, his wife, and the brother Ben S. Dupoyster, claiming to own this land, 48 L. R. A.

conveyed the same to appellant, the Ft. Jefferson Improvement Company, for the consideration of \$50,000, part to be paid in stock, \$10,000 to be paid in cash when deed was made, and \$25,000 six months thereafter. The company had paid something over \$8,000 on the trade, when Joe C. Dupoyster, in his own right and as the administrator of his brother Ben S., who had died in March, 1891, filed in the Ballard circuit court, December, 1891, the present action to recover of the appellant company the balance of the purchase money. To this action, Harkless, Trimble, and others, claiming liens on the land, were made parties; but there is no appeal from any judgment on their behalf, and it is not necessary to discuss their interests. To this action the Ft. Jefferson Improvement Company set up several defenses, but we will discuss the only material one, in which they charged fraud upon the part of their vendors in making the sale. It is charged that liens of Harkless and others were on the lands when sold, and that since the purchase the company had discovered that Joe C. had theretofore sold a large portion of the land to one McCombs, all of which Joe C. Dupoyster had fraudulently concealed from the company, representing that the latter was getting a clear title. The company therefore asked for a rescission of the contract of sale, and for a lien on the land to secure to it the money already paid. An amended answer of the company charged that in November, 1883, Ben S. Dupoyster had conveyed the entire tract to Joe B., son of Joe C. Dupoyster, and assigned this as additional ground for rescission. It appears that this deed of 1883 conveys about 1,000 acres of the 3,600 acres in controversy, and that, though it was of record, it was not indexed.

In 1893 Joe B. Dupoyster, infant, and Dalva D. Edwards, the only living children of Joe C. Dupoyster, came into this suit by cross action, and set up the deed of March 16, 1859, from old man Thomas Dupoyster to his son Ben S., alleging that by the terms of the deed a life estate in the land in controversy was given to Ben S. Dupoyster, and at his death the remainder vested in the then living children of Joe C. Dupoyster; that they were the only living children of Joe C. Dupoyster at the time of the death of Ben Dupoyster; and they prayed for judgment awarding them the complete title and possession of the whole tract of land in controversy. The company made defense to this cross action, denying that Thomas Dupoyster executed the deed of 1859 to Ben Dupoyster, and alleging that the latter never accepted it; denied that the deed was ever acknowledged or recorded until 1893, while this suit was pending. Indeed, they attacked the deed and certificate as a forgery, and assailed it as not genuine in many other respects. After a great volume of proof was taken on the issues joined, the court made an order rescinding the contract of sale, and awarding judgment to the company against

Joe C. Dupoyster in his own right, and against him as administrator of Ben S. Dupoyster, for the sum of about \$10,000, purchase money the company had paid, but declined to adjudge the company a lien on the land in controversy to secure payment of judgment. The court further adjudged the whole tract of land to Joe B. Dupoyster and Dalva D. Edwards, as prayed for in their cross action, and from this judgment the Ft. Jefferson Improvement Company has appealed.

The first and most important question that presents itself to us for decision is as to the genuineness of the deed of March 16, 1859. The old gentleman Thomas Dupoyster, at the time of the alleged execution of this deed had three sons; and we cannot discern what reasonable motive he could have had in deeding all this land to one child for life, with remainder to the unborn children of one of his other sons, making no provision for two of his children. This alleged original deed is before us for examination. The writing in the body of the deed is singularly similar to the certificate written on the back of the deed. Joe C. Dupoyster admits that he wrote the body of the deed, but it is claimed that the clerk, J. Corbett, wrote the certificate. Comparing the body of the deed of March 16, 1859, with the Lauderdale deeds, we are not entirely satisfied that the same person wrote them. At least, it hardly seems possible that they could have been written by the same man at the time they are dated, and they are dated only a little over a year apart. Joe C. Dupoyster says that he wrote them all. If this is true, the evidence of Chowning and Asthorpe would lead us to believe that the deed dated 1859 was written many years after the deeds to Lauderdale. These witnesses say this 1859 deed is written in a more mature hand. Indeed, the testimony of Asthorpe, Ort, L. W. Corbett, Keith, Chowning, and an examination of the several original admittedly genuine handwritings of Corbett, and the fact that the alleged deed was recorded, if at all, out of its regular place, conduce strongly to support the contention that the deed of 1859 is not genuine. Yet to dispel this conclusion there is the testimony of Hogancamp, Powell, Overly, Stovall, Shelton, Thomas, Sprouse, and others, tending strongly to establish its genuineness. Judge White testifies that he saw of record a deed from Thomas Dupoyster to his son Ben S., but does not remember the contents. Mr. Bugg does not remember that the deed filed here is the original deed, but a long time prior to this suit Joe C. Dupoyster stated to him that Thomas Dupoyster had deeded the land to his son Ben, and offered it to Bugg for examination; but the latter failed to examine same, and cannot testify that the deed filed here is the original deed. The deed of Ben S. to his nephew Joe B., of 1883, refers to the fact that Thomas Dupoyster had deeded these lands to his son Ben.

The county records, having been destroyed by fire, cannot give us any light on the subject. Taking the evidence as a whole, and lending some weight to the finding of the chancellor below, we conclude that the deed filed here is the original and genuine deed of Thomas Dupoyster to his son Ben.

It is insisted by counsel for appellant that, even if this deed of 1859 is genuine, it must be declared void under the champerty statute. This question is thoroughly and ably discussed by counsel, and we have given it much consideration. It may well be conceded, as contended by counsel, that there was a superior title to that of the Langdons and others, and that at the time Thomas Dupoyster settled upon a portion of the land in controversy there were several parties in actual possession of the greater portion of this land, claiming it under the superior title. We think the evidence clearly establishes the fact that these parties were holding a great portion of this land under the superior title adversely to Thomas Dupoyster at the time he made the deed of March 16, 1859, to his son Ben. Taking this view of the case, counsel contends that the deed is therefore absolutely void, as being within the champerty statute, and respectable authority is cited sustaining counsel's position; but, construing the statute as a whole, and in view of the decision of this court in the case of *Lucy v. Wilson*, 85 Ky. 503, 3 S. W. 911, we are of opinion that the deed is not void, but only voidable at the instance of the parties in adverse possession. The evidence clearly shows that Ben S. Dupoyster and his brother Joe, claiming under this deed of 1859, purchased all these adverse claims for Ben, and took the actual possession of the whole tract, and were so holding it under this deed at the time it was sold to the appellants. If A should sell to B lands at the time in the adverse possession of others, and B claiming under his deed, should purchase in the adverse titles, and would thereafter sell it to C, we do not understand upon what grounds C could complain of his title, so as to have the deed from A to B declared void. A different rule would apply if the parties in adverse possession were complaining. And so, in this case, as Ben Dupoyster had acquired the fee to this land under the deed of 1859, we do not think that appellants can be heard to complain, the outstanding titles having been theretofore bought in by Ben.

Having held this deed of 1859 to be genuine, and not void as within the champerty statutes, we now find it necessary to construe this writing, in order to determine who are the owners of the land in controversy. The deed reads as follows:

"This indenture, made and entered into by and between Thos. Dupoyster, party of the first part, and Ben S. Dupoyster, party of the second part, all of Ballard county, Kentucky, this, the 16th day of March, 1859, to wit, said party of the first part, for the fol-

lowing consideration, to wit, that said second party has certain lands in Mississippi county, Mo., which the second party is to convey to the first party, or such parties as the first party may direct to be conveyed to, and also one dollar in hand paid by second party to first party, the receipt whereof is hereby acknowledged, said first party does bargain, sell, and convey unto second party the following described lands, to wit: All of section three, township five, range four west, not in Mississippi river; also, all of section ten in same township and range, not in said river; also, all of section two and section one in same township and range; also, all of sections eleven and twelve in same township and range, not covered by the Wm. Clark and Walter Scott surveys; also, all of section seven and the south half of section six in township five, range three west; also, the south half of section thirty-four and the southwest quarter of section thirty-five, township six, range four west. All of said lands are on the waters of Mayfield creek, on the Mississippi river, in Ballard county, of Kentucky. It is expressly agreed and understood that said second party is to deed or will said lands to the bodily heirs of J. C. Dupoyster,—in other words, the title and possession of said lands is only invested in said second party during his natural lifetime, then to said heirs of J. C. Dupoyster; and second party has the discretion of allotting said lands between said heirs as he may see proper; said second party to have and to hold said lands during his natural lifetime, and said heirs, and their heirs and assigns, together with all the appurtenances thereunto belonging, forever, with covenant of general warranty."

The lower court construed this deed to mean that Ben S. Dupoyster took a life estate, with a contingent remainder to the bodily heirs of J. C. Dupoyster, with power of appointment in the life tenant. We think it quite plain that the grantor intended that Ben Dupoyster should take only a life estate in the land conveyed. We are also of opinion that the word "heirs" and "bodily heirs," as used in this deed, mean, "children," and the lower court properly so held; but we are of opinion that the court erred in deciding that the intention of the grantor was to invest the children of J. C. Dupoyster with a mere contingent remainder. The intention, we think, was to vest a life estate in Ben, with remainder to the children of Joe C.; his firstborn taking the entire remainder, which, however, opened up to let in the afterborn children. No power of appointment proper is created by this deed in the life tenant. At any rate, the power was an expressly limited one, and was directed to be exercised for the benefit of the bodily heirs of Joe C.; and, to make the meaning plainer, the grantor adds: "In other words, the title and possession of said lands is only vested in said second party during his natural lifetime, 48 L. R. A.

then to the heirs of J. C. Dupoyster." Then follows a provision merely giving to Ben the "discretion" of allotting, of dividing out or partitioning, "as he may see proper," these lands among the children of Joe C. The language used does not suggest an unequal allotment or partition, nor create the power of cutting off or lessening the right or interest of any one of these heirs or children. We must suppose the allotment or division was intended to be an equal one, but that the discretion was vested in Ben to designate the location of each child's interest or share. And this designation or allotment he might make by will or deed. It follows that the children of J. C., as they were born, took vested remainders. It appears from the record that during the married life of J. C. Dupoyster there have been born to him four children, two of whom are dead. Hence, under our construction of this deed, the interest of the dead children passed by the law of descent to their lawful heir or heirs. If it should appear that the child of Joe B. Dupoyster has received by the deed of 1883 more than his proportion of the land in controversy, as fixed under our construction of the deed of 1859, then that deed should be held void to that extent.

At the time of the conveyance of the land in controversy by J. C. Dupoyster and Ben S. Dupoyster to the appellant company, it is quite certain that the Dupoysters knew of the existence of this deed of 1859, and knew that they could not convey to the company the fee-simple title,—all of which, from the evidence, was unknown to the company. This fact, in connection with other evidence here tending to show fraud and misrepresentation upon the part of the Dupoysters, justified the lower court in ordering a rescission of the contract. On whatever of the land J. C. may be the owner of by inheritance from his dead children there will be a lien in favor of appellant for the purchase money wrongfully received by him.

A brief has been filed on behalf of the Langdon heirs, but there are no pleadings filed or issues made in this action from which we can intelligently discuss their interests, if any.

The judgment is reversed, and cause remanded for proceedings consistent herewith.

Motions for various modifications of the decree having been filed, **Haselrigg**, Ch. J., on March 17, 1900, handed down the following response:

We think the writ of possession rightfully issued, and the motion to quash the same was properly overruled. The motion for receiver here and the petition for rehearing and modification are overruled. The question of what estate was inherited by J. C. Dupoyster, and all questions pertaining thereto, and of rent and other matters not specially passed on, are not decided.

MASSACHUSETTS SUPREME JUDICIAL COURT.

William A. MCKEE

v.

Marcus L. TOURTELLOTTE.

(167 Mass. 69.)

1. The mere fact that in an employee's judgment an act required by the employer is unsafe does not, as matter of law, render him guilty of negligence in performing it, if the employer assures him that there is no danger.
2. A party fearing that an instruction will be taken by the jury in a broader sense than he deems consistent with the law must call the court's attention to the language, to render it subject to review.
3. That an employee is told by a third person that the work is not safe will not prevent his recovery for an injury, if he believes his employer's assurance that it is safe.

(October 23, 1896.)

EXCEPTIONS by defendant to rulings of the Superior Court for Hampden County made during the trial of an action brought

NOTE.—Effect of an assurance of safety given by the master or a coservant.

- I. General rule.
- II. Illustrative cases.
- III. Rationale of rule.
- IV. When an assurance of safety is not conclusive in the servant's favor.
- V. Whose assurances bind the master.

I. General rule.

A subject which is closely connected with that of the effect of a positive order to do a dangerous act, as to which see note to *Dallemand v. Saalfeldt* (III.) *post*,—is the effect produced upon the servant's right of recovery by evidence that he received from his master or some superior coservant an express assurance that the work undertaken by him involved no danger, or that proper precautions would be taken to protect him while he was doing the work.

In many of the cases a specific order and an assurance of safety are both factors to be reckoned with; but as this circumstance is not invariable, and each factor obviously has its own characteristic significance, it has been deemed better to treat the latter separately, even though, by so doing, we shall find ourselves brought once more into contact with conceptions similar to those already dealt with in connection with the former.

The doctrine of the cases on the assurance of safety may be enumerated in its most general form as follows:

If the servant is shown to have entered upon the performance of certain work, relying upon an assurance of his master or his master's representative that such work would not unduly imperil his safety, the mere fact that, before he received the assurance, his apprehensions as to the possibility of injury had been excited by circumstances which had come to his knowledge will not, as matter of law, render him chargeable either with an assumption of the risk involved in the work or with contributory negligence. It should be remarked that, although the effect of such evidence in respect 48 L. R. A.

to recover damages for alleged negligence resulting in injury to plaintiff, which resulted in a verdict in plaintiff's favor. *Overruled.* The facts are stated in the opinion. *Mr. C. L. Long* for defendant. *Mr. W. H. McClintock* for plaintiff.

Holmes, J., delivered the opinion of the court:

This is an action for injuries suffered in consequence of the caving in of a ditch bank while the plaintiff was at work connecting water pipes in the ditch. The defendant does not deny that he knew of the danger, but, on the contrary, says that it was obvious, and that he and others warned the plaintiff of it, and that he told him not to work there. The plaintiff's evidence is that he was working there by the implied command of the defendant, and that the defendant declared the ditch to be all right. Seemingly, the plaintiff knew that the bank overhung a couple of feet.

The defendant asked for a ruling that it was no part of the plaintiff's duty to follow instructions of the defendant to work in a

to both defenses named is recognized by the courts (*Nelson v. St. Paul Plow Works* (1894) 57 Minn. 43, 38 N. W. 868), the large majority of the cases in which an assurance of safety is an element deal with the servant's rights from the standpoint of contributory negligence.

The assurances of safety with which we are now concerned are the more or less explicit statements which are made by masters or superior servants to allay the apprehension of their subordinates; but it should be remembered that, as a master is under the duty of keeping the place of work reasonably safe or giving notice of its insecurity, the invitation which is inferentially extended to servants to make use of any part of the premises which is required for the due performance of their duties may be regarded as being accompanied by an implied assurance that they will not be exposed to any danger from which ordinary care can protect them. See *Salem Stone & Lime Co. v. Griffin* (1894) 139 Ind. 141, 38 N. E. 411.

II. Illustrative cases.

The most frequent examples of the application of the above doctrine are the decisions in which the contributory negligence of the servant is held to be for the jury, on the ground that he relied upon an expression of opinion as to the condition of the appliances, taking that term in its broadest sense.

An employer who ties two ladders together to make one sufficiently long to reach to the roof of his barn, and directs his employee to ascend, assuring him that it is safe, and that he is an old sailor and skillful tier of knots, is liable where the employee relies on his assurances without examining the fastening, and is injured by its giving way because it is improperly tied. *Denning v. Gould* (1893) 157 Mass. 563, 32 N. E. 862.

An employee who does not know a safe rate of speed for a grindstone turned by machinery has the right to rely on a statement by the superintendent of the employer that the speed at which it is revolving is safe. *Heifenstein v. Medart* (1896) 136 Mo. 595, 38 S. W. 294.

dangerous place, and if the plaintiff knew, or had reasonable cause to know, that it was dangerous to work in the ditch, he could not recover, although the defendant may have said to him that the ditch was all right. This was not given in the words of the request, but, as we interpret the instructions, was meant to be given in substance, pretty nearly, so far as correct. The court said: "If you should find that he was not bound to anticipate the danger of the earth caving in, that he was warranted in assuming that that part was left safe for him, and if you should find, upon the evidence, that the master, standing by, observed him doing the work, and made a declaration that it was safe, still that would not protect him against the obvious perils and dangers that existed, and which you have a right to take into consideration." But, later in the charge, the court added: "The mere fact that a man knows the unsafe condition of a thing does not necessarily, as matter of law, constitute him negligent in case he does that thing." This contradicted the ruling asked, and rightly, although possibly the illustrations were not the most apposite that could have been chosen. When we say that a man appreciates a danger, we mean that he forms

a judgment as to the future, and that his judgment is right. But if against this judgment is set the judgment of a superior,—one, too, who from the nature of the callings of the two men, and of the superior's duty, seems likely to make the more accurate forecast,—and if to this is added a command to go on with his work and to run the risk, it becomes a complex question of the particular circumstances whether the inferior is not justified, as a prudent man, in surrendering his own opinion and obeying the command. The nature and the degree of the danger, the extent of the plaintiff's appreciation of it, and the exigency of the work, all enter into consideration, and no universal rule can be laid down. See *Hennessey v. Boston*, 161 Mass. 502, 37 N. E. 668; *Coan v. Marlborough*, 164 Mass. 206, 41 N. E. 238; *Burgess v. Davis Sulphur Ore Co.* 165 Mass. 71, 42 N. E. 501.

The instructions of the court on this point were excepted to, but no attention was called to any matter of objection other than their inconsistency with the request which has been stated. In the course of this part of his charge, the judge mentioned the plaintiff's evidence that the other men were at work in the same place, and said to the jury: "If any

Affirming on Rehearing 136 Mo. 619, 36 S. W. 863, 37 S. W. 829.

A carpenter employed by an electric company has a right to rely on a statement by the foreman that uninsulated wires near which he is required to work are not dangerous, where there is nothing to indicate that any electrical current is passing through them. *Chicago Edison Co. v. Hudson* (1896) 66 Ill. App. 639.

In *Haas v. Balch* (1893) 12 U. S. App. 534, 6 C. C. A. 201, 56 Fed. Rep. 984, the plaintiff, when called to engage in shoveling gravel into cars under an overhanging bank, noticed its appearance, and inquired of the foreman as to its safety. The foreman, who had previously been upon the bank, endeavoring to throw it down, went up again, when thus appealed to, for the purpose of examining it, and he then repeated the assurance of safety, accompanied with the order which he had given when he first instructed the plaintiff to assist in the loading of the cars. The court said: "It certainly cannot be said, as a matter of law, that the plaintiff was not justified in giving some weight to and placing some reliance upon assurances thus given and repeated. There were other facts to be weighed in connection with the assurances given by the foreman, upon the question of contributory negligence on the part of the plaintiff,—such as the composition of the bank, the character of the overhanging crust, the fact that it had remained in its then condition since the previous day, and that it had resisted the efforts of the foreman to throw it down. Under these circumstances, we think that the questions of the assumption of the risk and of contributory negligence on the part of the plaintiff were for the jury, and not for the court, and that it was error to withdraw them from the jury."

See also *Bradbury v. Goodwin* (1886) 108 Ind. 286, 9 N. E. 302 (master assured servant that the appliances for lowering a heavy safe were adequate for the purpose); *Lake Superior Iron Co. v. Erickson* (1878) 39 Mich. 492, 33 Am. Rep. 423 (miner injured); *Daley v. Schaaf* (1882) 28 Hun, 814 (servant assured that there was no danger of the fall of bricks of which

he was apprehensive); *Chadwick v. Brewster* (1891) 39 N. Y. S. R. 718, 15 N. Y. Supp. 596 (servant a house-painter injured by the fall of a scaffold, the planks of which were not tied by him in consequence of his reliance on the assurance of the master that they would hold without being tied); *Warner v. Chicago, R. I. & P. R. Co.* (1895) 62 Mo. App. 192 (servant was assured that ladder with worn rounds was safe); *Jones v. St. Louis, N. & P. Packet Co.* (1891) 43 Mo. App. 398 (plaintiff called the attention of the second mate to a defect in a plank, and was assured that it could be safely used); *American Wire Nail Co. v. Connelly* (1893) 8 Ind. App. 398, 35 N. E. 721 (foreman assured workman that a new and more dangerous kind of work was safe); *Monahan v. Kansas City Clay & C. Co.* (1894) 58 Mo. App. 68 (miner injured by falling of unlined shaft had been assured it was safe); *Davies v. Griffith* (1892) 27 Ohio L. J. 180 (carpenter employed by a builder objected that a scaffold was made of insufficient material, and mounted it after the builder had assured him that it was all right).

Other groups of cases governed by the same principle are those in which there has been an explicit assertion by the master, or some agent for whose statements he is responsible, that certain dangerous conditions of which the servant has acquired knowledge have been remedied.

Atchison, T. & S. F. R. Co. v. McKee (1887) 37 Kan. 502, 15 Pac. 484 (superintendent told plaintiff that machine complained of had been repaired); *Nelson v. St. Paul Plow Works* (1894) 57 Minn. 48, 58 N. W. 868; *Lawrence v. Hagemeyer & Co.* (1892) 93 Ky. 591, 20 S. W. 704 (servant had refused to use a saw unless it was repaired, and only resumed work when informed by the machinist that it was "all right"); *Goggin v. D. M. Osborne & Co.* (1896) 115 Cal. 437, 47 Pac. 248 (same facts); *Sophenstein v. Bertels* (1896) 178 Pa. 401, 35 Atl. 1000 (employee, after discovering that a machine was out of order and informing the superintendent thereof, continued to operate it after the superintendent had done some work upon it and pronounced it all right).

inference is to be drawn from that fact, you are entitled to draw it as to what the judgment of the other men was as to the safety or the unsafety of it, the claim being that he [the plaintiff] was not in the exercise of due care because he knew of the unsafe condition." It is not quite clear whether the judge meant that the actual conduct of interested persons on the spot might be considered by the jury to be some evidence as to what conduct was prudent, or only that they might regard its possible influence on the plaintiff when they were deciding whether he knew of the unsafe condition, as would seem from the connection in which the remark was made. The judge had stated the defendant's testimony that he and some of the men had told the plaintiff that the ditch was unsafe, and that the plaintiff denied that anyone had told him so, but said that the master stood by until ready to go, and left the men at work there, and that the other men were at work in the same place. On the latter interpretation, especially, there is no question of introducing evidence upon collateral issues as to the experience of other men at other

times, as in *Schoonmaker v. Wilbraham*, 110 Mass. 134, but a reference to the plaintiff's contradictory version of the actual circumstances in which he found himself, and under which he had to make up his mind, all of which were before the jury for such conclusion as they might draw. If the defendant feared that the instruction would be taken in a broader sense than he deemed consistent with the law, he should have called attention to the language.

The defendant also asked a ruling that if the plaintiff was told by any party that the bank would cave he could not recover. Very plainly this was wrong. The plaintiff may have been told so by a workman, but may have believed a statement by the defendant that the ditch was safe.

Exceptions to the exclusion of evidence of the depth at which the pipe then lay, and that there had been no change in the level of the street, are not argued. It does not appear that the defendant expected to contradict or to qualify the plaintiff's evidence already in.

Exceptions overruled.

Or that certain precautions to secure his safety will be taken.

A servant whose business it is to examine revolvers after they have been tested has a right to rely to some extent on the tester's assurance that he will leave no unexploded cartridges in the revolvers. *Anderson v. Duckworth* (1894) 162 Mass. 251, 38 N. E. 510. Compare *Bradley v. New York C. R. Co.* (1874) 3 Thomp. & C. 288 (laborer entitled to rely on assurance of trackmaster that warning of the approach of trains would be given). As to the master's duty to warn the servant; see *note* to *James v. Rapides Lumber Co. (La.)* 44 L. R. A. 33.

Or that a certain future event which is expected to happen will not happen before a certain time.

That the boss or foreman of a railroad told a trackman that no train or engine would come over a certain bridge until a certain hour may properly be taken into consideration by the jury in determining whether he was negligent in not seeing the engine which injured him while he was crossing the bridge before that hour in the dark, although the engine was coming in the direction opposite to that in which he himself was walking. [*Brewer and Brown, J.J. dissented on the ground that the plaintiff was negligent as a matter of law.*] *Northern P. R. Co. v. Amato* (1892) 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740, *Affirming* 1 U. S. App. 113, 49 Fed. Rep. 881, 1 C. C. A. 468; *Floetli v. Third Ave. R. Co.* (1896) 10 App. Div. 308, 41 N. Y. Supp. 792 (workman went under track in reliance on statement of foreman that no car would pass until a time much later than the time of the accident).

Or that an occurrence which will endanger his safety can only happen as a consequence of some particular thing being done. *Blanton v. Dold* (1891) 109 Mo. 75, 18 S. W. 1149 (plaintiff not negligent, as matter of law, in putting his hand inside a machine which, he was assured by the foreman, would not start without the pulling of a rope).

If the servant is otherwise entitled to rely upon the master's assurance that there is no danger, the mere fact that he is told by a fellow servant that there is danger is not enough to render him chargeable, as matter of law, with contributory negligence. 48 L. R. A.

III. Rationale of rule.

In Missouri it has been declared that an assurance from one representing the master, that the machinery or apparatus being used is all right, and an order from him to his servant to use it, notwithstanding a complaint of the servant as to its sufficiency, amount to a guarantee of safety. *Rowland v. Missouri P. R. Co.* (1886) 20 Mo. App. 463; *McGowan v. St. Louis & I. M. R. Co.* (1878) 61 Mo. 532.

But this conception, which would obviously place the master in the position of having taken upon himself the whole risk of what might happen, irrespective of the prudence or imprudence of the servant in exposing himself to the danger, seems scarcely consistent with the doctrine prevailing in the same state as to the inability of the servant to recover where his confidence in the master's statements was unwarrantable.

A more satisfactory theory, recognized in Missouri itself as well as in other states, is that, as the knowledge and means of knowledge possessed by the servant are, under normal circumstances, inferior to those possessed by the master, the former is, as a general rule, justified in relying upon any express statement made by the former in respect to the extent of the danger of the employment. This doctrine is stated in the main case as follows: "When we say that a man appreciates a danger, we mean that he forms a judgment as to the future, and that his judgment is right. But if against this judgment is set the judgment of a superior, one, too, who, from the nature of the callings of the two men and of the superior's duty, seems likely to make the more accurate forecast, and if to this is added a command to go on with his work and to run the risk, it becomes a complex question of the particular circumstances whether the inferior is not justified as a prudent man in surrendering his own opinion and obeying the command. The nature and the degree of the danger, the extent of the plaintiff's appreciation of it, and the exigency of the work, all enter into consideration, and no universal rule can be laid down."

To the same effect is the language used in *Helfenstein v. Medart* (1896) 136 Mo. 595, 38 S. W. 294; *Warner v. Chicago, R. I. & P. R. Co.* (1895) 62 Mo. App. 191. The fact that there was nothing to put the servant on inquiry as

to the existence of danger was emphasized in *Chicago Edison Co. v. Hudson* (1896) 66 Ill. App. 639 (uninsulated wires near place where a carpenter was put to work). In *Chadwick v. Brewster* (1891) 39 N. Y. S. R. 718, 15 N. Y. Supp. 398, the court speaks of the "interposition of the master's superior knowledge" leading the servant to take the risk.

In view of this disparity of information, an assurance of safety, like a specific order, (see *Haas v. Balch*, *supra*, II.) may be regarded as having the effect of lulling the servant into a feeling of security and giving him good reason to believe that there is no need for the vigilance which he would otherwise have exercised. *Hoffman v. Dickinson* (1888) 81 W. Va. 142, 6 N. E. 53 (*arguendo*).

In *Graham v. Newburg Orrel Coal & C. Co.* (1893) 38 W. Va. 273, 18 S. E. 584, where the plaintiff was injured by an explosion of gas in a mine, the evidence was that the boss asked and urged him to work on the night in question, saying he would have a nice night's work, and that the boss made this statement when he had not been in the mine for hours, and therefore could not know anything about the gas. The court said: "Now, whether we consider this statement an order or a request, Graham was lulled into a feeling of security by it, and unless we could find, as we cannot, that the danger was known to Graham, and was patent and manifest, so as to deter any reasonably prudent man, it frees Graham from contributory negligence. . . . I regard it tantamount to an order to work. Had he refused, would he have been retained? But if not a command, it was an assurance by a superior having every means and with capacity to know, and bound to know, given to one not having equal means or capacity, not knowing the danger or having no definite knowledge of any ground of danger, inspiring confidence and a feeling of security."

The general principle here involved is that a person who, by the breach of some duty, has caused another person to relax his vigilance under circumstances of peril, is not at liberty to impute the consequences of his act to the latter person's want of vigilance. *Pennsylvania R. Co. v. Ogler* (1860) 85 Pa. 60, 78 Am. Dec. 322.

In one case it was argued that the rule as to the effect of an assurance of safety should be different where the appliance was of an extremely simple character, such as a ladder, but this contention did not prevail. *Warner v. Chicago, R. I. & P. R. Co.* (1895) 62 Mo. App. 192 (servant used a ladder with worn rounds).

The servant's position is, of course, proportionally strengthened where he is not only assured that the conditions complained of do not imperil his safety, but also that they will be altered for the better.

Where a miner complains that he is exposed to danger from the possible fall of a large stone in the roof of a tunnel, and is not only assured by the underground manager of the mine that there is no risk, but receives a promise from the same official that the stone will be very shortly removed, it is for the jury to say whether an injury which he suffers through going back to work before the manager's promise is fulfilled shall be considered due to his own rashness, or to his having implicitly relied on the assurances so given him. *Paterson v. Wallace* (1854) 1 Macq. H. L. Cas. 748. See also *Chicago Drop Forge & Foundry Co. v. Van Dam* (1894) 140 Ill. 337, 86 N. E. 1024. Affirming (1893) 50 Ill. App. 470 (inexperienced servant went on using a defective machine after the foreman had assured him that it was all right and that he would shortly be supplied with a contrivance which would

diminish the peril); *Warner v. Chicago, R. I. & P. R. Co.* (1895) 62 Mo. App. 191 (ladder with worn rounds).

IV. When an assurance of safety is not conclusive in the servant's favor.

That the servant is not, under all circumstances, protected by the fact that he received an assurance of safety before he went to work, is not disputed. But the cases dealing with the import of evidence that the danger was understood by him disclose the same divergence of views as that which we have had occasion to notice in discussing the effect of a specific order.

On the one hand, contributory negligence is said to be predicable, as a matter of law, of the undertaking or continuance of work involving exposure to an abnormal danger, whenever the condition to which the assurance related was apparent to a person in the exercise of ordinary care. *Lawrence v. Hagemeyer & Co.* (1892) 93 Ky. 591, 20 S. W. 704; *Graham v. Newburg Orrel Coal & C. Co.* (1893) 38 W. Va. 273, 18 S. E. 584.

Where the servant knew that the place of work was unsafe, it is erroneous to give an unqualified instruction to the effect that he is entitled to recover if he had been assured by the master's representative that it was safe. *Breckinridge & P. Syndicate v. Murphy* (1897) 18 Ky. L. Rep. 915, 38 S. W. 700 (not to be reported).

That the assurance of the person in charge of the work that he would see that the plaintiff was guarded against danger was not sufficient to justify the latter's continued exposure to the known risk of the environment,—at all events where the circumstances were such that it was impossible for that person to give the plaintiff such warning as would enable him to escape the peril,—see *Reese v. Clark* (1892) 146 Pa. 465, 23 Atl. 246 (injury caused by the fall of some heavy iron plates, propped up by bricks which the plaintiff was removing).

Or where the inadequacy of the appliances is palpable, see *Bradbury v. Goodwin* (1886) 108 Ind. 286, 9 N. E. 302.

Or where the servant has equal means of knowledge, see *Perschke v. Hencken* (1897) 44 N. Y. Supp. 265.

Where the evidence shows that the man employed to do the work on the shaft employed the deceased, who was a man of experience as a miner, and it was for that reason he employed him, and that the matter of gas was talked over between them, that they both knew that the shaft was making a little gas, and that they both thought there would not be any danger by using care, an instruction to the effect that if the jury believe that deceased went upon the platform by request of and under employment of defendant, and that before he went thereon defendant or his agents informed him that it was safe from explosive gases, and that he had reason to believe it was safe as defendant had informed him, then he did not go thereon voluntarily,—is not borne out by the testimony. *Coal Run Coal Co. v. Jones* (1889) 127 Ill. 379, 8 N. E. 865, 20 N. E. 89.

In other cases the doctrine laid down is that, although a defect is apparent, yet if the servant proceeds to work on an assurance given by the master that it is safe to do so, the master is liable for a resulting injury, unless the extra hazard is so palpable that no man of ordinary intelligence and prudence would incur it. *Aldridge v. Midland Blast Furnace Co.* (1883) 78 Mo. 559; *Monahan v. Kansas City Clay & C. R. Co.* (1894) 58 Mo. App. 68; *Jones*

v. St. Louis, N. & P. Packet Co. (1891) 43 Mo. App. 398.

It will be noticed that the decisions embodying this latter doctrine were all rendered in Missouri, where the courts have gone much further than in most of the other states in refusing to draw peremptory inferences of law from proof of the servant's knowledge. But the authorities for a similar doctrine in cases which involve the additional element of a specific order are not thus localized. As to such cases it is explicitly held that the mere fact that a servant knows the unsafe condition of a thing does not necessarily, as a matter of law, render him guilty of contributory negligence in continuing to work in its vicinity, where the master assures him that it is safe and commands him to go on with the work. *McKee v. Tourtelotte*; *Keegan v. Kavanaugh* (1876) 62 Mo. 230 (question for jury whether a hod carrier, engaged in helping to build a wall at the foot of an embankment of earth 20 or 30 feet deep and not shored or propped up, was negligent in obeying orders to go down, although reluctant to do so, when he was told that there was no danger); *Jackson v. Georgia R. Co.* (1886) 77 Ga. 82 (section-hand ordered with a curse, after inquiry as to danger, to obey or leave, and told there was no danger); *Chicago Anderson Pressed Brick Co. v. Sobkowiak* (1892) 45 Ill. App. 317, Affirmed in (1894) 148 Ill. 573, 36 N. E. 572 (servant after protest had gone to dig under a bank of earth in response to an express order and an assurance of safety).

The effect of the servant's knowledge where his assumption of the risks is relied upon is open to no doubt. If that knowledge is imperfect, and excusably so, the action is, upon general principles, not barred. *Nelson v. St. Paul Plow Works* (1894) 57 Minn. 43, 58 N. W. 868 (superintendent told servant that a machine the defects of which he had previously discovered had been repaired, case for jury). Compare *Colorado Fuel & I. Co. v. Cummings* (1896) 8 Colo. App. 541, 46 Pac. 875 (where the absence of any such statement was emphasized).

But an assurance that appliances are in good condition manifestly cannot prevent the operation of a defense which is complete, once it is shown that the risk was known. *Colorado Fuel & I. Co. v. Cummings* (1896) 8 Colo. App. 541, 46 Pac. 875; *Howery v. Lake Shore & M. S. R. Co.* (1895) 13 Misc. 641, 34 N. Y. Supp. 1089.

A servant "assumes the risk when he voluntarily enters into danger apparent to him, notwithstanding an agent of his employer tells him there is no danger." *Toomey v. Eureka Iron & S. Works* (1891) 89 Mich. 249, 50 N. W. 850.

An employee operating a planing machine with which he is familiar assumes the risk of the belt by which it is run breaking apart, when he observes that the fastenings have partially given way, and continues to operate it, although he calls the foreman's attention to it, and is told that the belt is all right and to go on. *Anderson v. H. C. Akeley Lumber Co.* (1891) 47 Minn. 128, 49 N. W. 664.

A statement by a foreman to a boy fifteen years old employed on a pasting machine, that it was foolish to use a split stock to put the paper between the belt of felting and a heated cylinder, and that he could use his hands without danger, was not an assurance that his hand would not be drawn into the machine if it came in contact with the surface of the belting and cylinder so as to render the employer liable for an injury. *Lowcock v. Franklin Paper Co.* (1897) 169 Mass. 313, 47 N. E. 1000 (verdict for plaintiff set aside).

Commenting upon the circumstances in *Wiegrefe v. Daw* (1891) 40 Ill. App. 56, the court said: "This case is not analogous to that upon 48 L. R. A.

which so many authorities have been cited, of defective machinery, and notwithstanding such condition the employee is urged by the employer that he can safely proceed with it, but it is a case as to the mode of proceeding with machinery that was not defective, where, as to the mode or way of safely operating it, there was an honest difference of opinion between the employer and employee. It cannot be, after such difference of opinion has manifested itself, that the employer thereafter becomes an insurer of the employee against an accident, even if it should occur through a mistaken judgment of the employer, where the employee voluntarily continues at such work. In such case it would seem that the hazard, if any, thereafter would be incident to the employee's service, which he voluntarily assumes."

In *Haas v. Balch* (1893) 12 U. S. App. 534, 56 Fed. Rep. 984, 6 C. C. A. 201, the cases which declare the general rule to be that where the servant is of mature age, and of ordinary intelligence, he assumes the risk of a known situation, even though assured by an agent or representative of the master that there is no danger, have been thus commented upon: "In all, or nearly all, these cases the employee had equal knowledge of the risk to be apprehended with the master or his representative, and hence was not relieved from the duty of exercising his own judgment upon the question whether he would or would not subject himself to the known dangers of the situation. There are other cases which hold the rule to be that, when a servant is directed by the master or his representative to place himself in a situation of danger, the law will not charge him with the risks of the situation, or hold him guilty of contributory negligence, unless the danger is so glaring that no prudent man would subject himself thereto even in obedience to the commands of a master. The difference observable in these cases, in the weight given to an assurance of safety on the part of the master or his representative, is mainly due to the different state of facts proved in the several cases upon the point of equal knowledge or means of knowledge, between the master and servant, of the risk to be incurred in the given instance. The fact that the assurance of safety has been given is one to be weighed in each case. The weight to be given thereto is dependent upon the circumstances of the particular case. If in a given instance, the servant, being of mature age and of ordinary intelligence, has equal knowledge with the master of the dangers to be apprehended, and he voluntarily subjects himself thereto, knowing of their existence, the mere fact that he had received an assurance that there was no risk to be dreaded or avoided might be of little avail in relieving him from a charge of contributory negligence. On the other hand, if the master or his representative has superior knowledge or means of knowledge of a given situation and of its safety, or the contrary, and he assures the servant that he can safely undertake a given work, such an assurance may justify the servant in undertaking the work in reliance upon the superior knowledge of the master, and without being liable to the charge of negligence in so doing, unless the danger, in the language of the Supreme Court in *District of Columbia v. McElligott* (1886) 117 U. S. 633, 29 L. ed. 949, 6 Sup. Ct. Rep. 884, is 'so imminent or manifest as to prevent a reasonably prudent man from risking it.'"

V. Whose assurances bind the master.

The cases dealing with the question, By whose assurances is the master bound?—are not less wanting in explicitness than those

which involve the representative character of the agents who give orders.

There is authority for the view that only a vice principal can bind the master. "If the conductor who quieted the plaintiff's apprehensions of danger, and reassured him of his safety and the sufficiency of the rope, was a vice principal, acting for and in lieu of the master in the control of the hands and the superintendence of the work and machinery, we think the defendant would have been liable notwithstanding the plaintiff may have believed the rope to be unsafe. . . . If the conductor did not occupy the position of master to the plaintiff at the time of his injury, then what he said and did with reference to the rope could no more bind the master than the words or conduct of any one of the eleven laborers who were working at the log in conjunction with the plaintiff." *McGowan v. St. Louis & I. M. R. Co.* (1876) 61 Mo. 528.

In some cases the assurances were, as a matter of fact, given by a vice principal, but no restrictive emphasis is laid upon this circumstance. *Goggin v. D. M. Osborne & Co.* (1896) 115 Cal. 437, 47 Pac. 248 (local manager); *Monahan v. Kansas City Clay & C. Co.* (1894) 58 Mo. App. 68 (foreman of mine); *Atchison, T. & S. F. R. Co. v. McKee* (1887) 37 Kan. 592, 15 Pac. 484 (superintendent); *Jones v. St. Louis, N. & P. Packet Co.* (1891) 43 Mo. App. 398 (second mate of ship).

On the other hand, there are cases in which the servant for whose statements the master was compelled to answer was not a vice principal under the decisions of the state where the action was brought.

A workman is entitled to rely on the representation of a fellow servant whose province it is to inform the workmen whether they may safely work or not in a given place. *Paterson v. Wallace* (1854) 1 Macq. H. L. Cas. 748 (underground manager of mine).

A trackmaster, as incident to his right to employ laborers for a railroad company, is authorized to give them an assurance that he will warn them of the approach of trains. *Bradley v. New York C. R. Co.* (1874) 3 Thomp. & C. 288; *Pool v. Chicago, M. & St. P. R. Co.* (1882) 56 Wis. 227 (servant in charge of hand car assured a detective in the company's employ that he might safely sit with his feet hanging down). But in this last case the injured servant was in a different department.

C. B. L.

President, etc., of HARVARD COLLEGE
v.
ASSESSORS OF CAMBRIDGE.

(..... Mass.)

1. **Dormitories and dining halls** furnished by a college for the use of students are devoted to college purposes, and therefore exempt from taxation under Pub. Stat. chap. 11, § 5, cl. 3, as amended by Stat. 1880, chap. 465.

NOTE.—As to exemption of property of institutions of learning from taxation, see *Catlin v. Trinity College* (N. Y.) 3 L. R. A. 206; *Detroit Home & Day School v. Detroit* (Mich.) 6 L. R. A. 97; *Auditor General v. University of Michigan* (Mich.) 10 L. R. A. 376, and note; *Philadelphia v. Overseers of Public Schools* (Pa.) 29 L. R. A. 600; *Brown University v. Granger* (R. I.) 36 L. R. A. 847; *Kentucky Fe-*
48 L. R. A.

2. **A dwelling house occupied by the president of a college and his family**, built with funds given expressly for the purpose of erecting a dwelling house for the president and his successors in office, and situated on the college grounds, and kept in order and repair at college expense; while the whole lower floor, except possibly the kitchen, is used for class-day, commencement, and other receptions, and for many hospitalities incident to the president's functions, and the hall and drawing-room are also used for the convenience of the college and the president, for meetings of the faculty and committees, for conferences with university officers and students, for calls on university business, and for the annual meetings of the corporation at which degrees are voted,—is exempt from taxation as property occupied by the institution or an officer thereof for the purposes for which it was incorporated.

3. **Houses occupied by college professors**, with the permission of the college and without their having any estate therein or paying any rent therefor, but for the use of which an allowance is made as part of the compensation for their services, while the principal or dominant consideration in regard to the occupation has reference to the performance of their duties in the offices which they hold as professors and otherwise, rather than to the private benefit which they would receive in the way of homes for themselves and their families,—are exempt from taxation under Stat. chap. 11, § 5, cl. 3, as amended by Stat. 1889, chap. 465.

(January 4, 1900.)

REPORT by the Superior Court for Middlesex County for the opinion of the Supreme Judicial Court after judgment in favor of petitioner, of an action to recover back taxes alleged to have been wrongfully assessed against property of petitioner and to quash the assessment. *Affirmed.*

The facts are stated in the opinion.

Messrs. Samuel Hoar and William Sullivan, for petitioner:

The English colleges were primarily boarding houses.

1 V. A. Huber, *English Universities*, p. 178; *Yale University v. New Haven*, 71 Conn. 316, 43 L. R. A. 490, 42 Atl. 87; G. C. Broderick, *History of Oxford University*, chap. 2, pp. 18-20, 61, 62; Atkinson & Clark, *History of Cambridge University*, p. 243.

In the buildings of which an English college usually consisted are the president's chamber, the fellows' rooms, scholars' rooms, warden's lodgings, the treasury, the library, the chapel, the hall or commons, buttery, kitchen, brewery, storehouse, offices, and stables.

C. G. Robertson, *University of Oxford*, All Souls, chap. 1; Stokes, *University of Cambridge*, Corpus Christi, chap. 2; Gray,

male Orphan School v. Louisville (Ky.) 40 L. R. A. 119; *Yale University v. New Haven* (Conn.) 43 L. R. A. 490; *White v. Smith* (Pa.) 43 L. R. A. 498; and *Phillips Academy v. Andover* (Mass.) *post*, 550.

As to exemption of property used by such institutions for revenue, see also note to *Book Agents of M. E. Church South v. Hinton* (Tenn.) 19 L. R. A. 289.

Queen's College, chaps. 2, 7; Broderick, History of the University of Oxford, chap. 2.

In like manner Harvard College, from its foundation, was a community of teachers and students living in the college, housed and fed by the college.

1 Quincy, History of Harvard University, 452; A. McF. Davis, Early College Buildings, p. 3.

The second college building was the president's house.

1 Quincy, History of Harvard University, appx. No. VII. p. 473.

From the beginning the corporation and the overseers of Harvard College have considered the college to be essentially a community of teachers and students, housed and fed in the college, living in college buildings.

They considered it absolutely necessary for the accomplishment of the purposes for which the college was incorporated, that it should have buildings suitable for housing and feeding its president and teachers and students.

It would be a very strange and illogical policy for the colony, the province, or the commonwealth to put a tax upon buildings which they considered so essential to the college that they strained their own resources to help build and maintain them.

The exemption granted by the colony in the charter has ever since been respected by the province and the commonwealth.

Hardy v. Waltham, 7 Pick. 108; *Harvard College v. Boston*, 104 Mass. 470.

The word "occupied," in the statute, is not used in the general sense in which a corporation or individual may be said to occupy their real estate when it is not occupied by anyone else, but in the sense in which an incorporated college, academy, hospital, or like institution occupies its college, academy, or hospital, and the land and buildings connected therewith.

Lynn Workingmen's Aid Asso. v. Lynn, 136 Mass. 285.

The occupancy by "officers," required by the Revised Statutes of 1835 and the subsequent enactments, is the same kind of occupancy,—actual occupancy by the party designated, without qualification as to the degree or completeness of the occupant's control, unqualified as to the right or title under which the occupancy is maintained, and qualified in the statute of 1835 and its subsequent revisions only in the purpose for which it is maintained.

The premises are not in the exclusive control of the president; they are occupied in part by the college and its officers. The president occupies so much of them as he occupies, not as a lessee, but as licensee. There is no relation of landlord and tenant, but mere permission to occupy, on one side, and on the other, no obligation either to occupy or to pay rent.

Pierce v. Cambridge, 2 Cush. 613.

The students are not lessees. Their relation is more that of lodgers.

White v. Maynard, 111 Mass. 250, 15 Am. Rep. 28.

It is the dealings of the college with its 48 L. R. A.

property, the use it makes of it, that is to decide the question of its exemption.

Mount Hermon Boys' School v. Gill, 145 Mass. 148, 13 N. E. 354; *Chapel of Good Shepherd v. Boston*, 120 Mass. 212; *Massachusetts General Hospital v. Somerville*, 101 Mass. 319; *Wesleyan Academy v. Wilbraham*, 99 Mass. 599; *Salem Lyceum v. Salem*, 154 Mass. 15, 27 N. E. 672; *New England Hospital for Women & Children v. Boston*, 113 Mass. 518; *Trinity Church v. Boston*, 118 Mass. 164.

Dormitories and dining-halls are exempt.

Yale University v. New Haven, 71 Conn. 316, 43 L. R. A. 490, 42 Atl. 87.

Mr. Gilbert A. A. Pevey, for defendants:

Exemptions, being an exception to the general rule, are regarded as in derogation of equal rights, and the tendency of the courts is to construe them strictly.

Boston Soc. of Redemptorist Fathers v. Boston, 129 Mass. 178; *Mount Hermon Boys' School v. Gill*, 145 Mass. 144, 13 N. E. 354; *Cincinnati College v. State*, 19 Ohio. 115; *Third Cong. Soc. v. Springfield*, 147 Mass. 396, 18 N. E. 68.

Prior to the Revised Statutes of 1836, certain exemptions had been provided by law for Harvard College, with certain exceptions in favor of local taxation in Cambridge.

Harvard College v. Boston, 104 Mass. 499; *Harvard College v. Kettell*, 16 Mass. 204; Stat. 1821, chap. 107, § 6; Stat. 1830, chap. 151, § 6.

The intent of the legislature by the provisions of the Revised Statutes, and the subsequent later provisions as now found in chapter 465 of the Acts of 1889, was to restrict the terms of the then (1835) existing law.

Williams College v. Williamstown Assessors, 167 Mass. 507, 46 N. E. 394.

If the exemption is not applicable to the houses, neither does it apply to the several pieces of land appurtenant to the houses.

Trinity Church v. Boston, 118 Mass. 167.

To relieve from taxation, the property must be shown to have been necessarily occupied by the institution or its officers for the purpose for which the institution was incorporated.

Massachusetts General Hospital v. Somerville, 101 Mass. 321; *Proprietors of South Cong. Meetinghouse v. Lowell*, 1 Met. 541; *Amherst College v. Amherst Assessors*, 173 Mass. 233, 53 N. E. 815.

Rooms occupied by tenants for hire of a corporation established for charitable uses are not exempt.

Chapel of Good Shepherd v. Boston, 120 Mass. 212.

The principal use was not that for college purposes.

Salem Lyceum v. Salem, 154 Mass. 16, 27 N. E. 672.

The question of rent or lease, or the manner of payment of the rent, is important only as bearing upon the nature of the occupation, and whether the occupation is in fact for the purposes for which the plaintiff was incorporated.

Pierce v. Cambridge, 2 Cush. 611; *Mass-*

achusetts General Hospital v. Somerville, 101 Mass. 326; *Mount Hermon Boys' School v. Gill*, 145 Mass. 145, 13 N. E. 354; *Williams College v. Williamstown Assessors*, 167 Mass. 509, 46 N. E. 394; *Wesleyan Academy v. Wilbraham*, 99 Mass. 603.

Exemption from taxation of church property depends upon the use for which the building in question is intended, and is limited by such use.

Old South Soc. v. Boston, 127 Mass. 379.

This exemption is extended only to the part of the property which was used as a place of worship and for the purposes connected with it, such as the vestry, the furnace, and the like.

Proprietors of South Cong. Meeting-house v. Lovell, 1 Met. 538; *Old South Soc. v. Boston*, 127 Mass. 379; *Trinity Church v. Boston*, 118 Mass. 164.

Morton, J., delivered the opinion of the court:

This is an action to recover back taxes that were assessed by the defendants on certain parcels of real estate belonging to the plaintiff corporation, situated in Cambridge, which the plaintiff contends were exempt from taxation under Pub. Stat. chap. 11, § 5, cl. 3, as amended by Stat. 1889, chap. 465. The case was heard by a justice of the superior court without a jury, on what are called agreed facts, but which we interpret as authorizing the court to draw such inferences from them as he thought they justified; and he found that the property was exempt, and found for the plaintiff for the entire amount, and reported the case to this court in such a manner as to present the question of the assessability of each of the parcels.

We think that the ruling of the superior court was right, and that all of the property was exempt from taxation. Many of the principles and considerations and authorities applicable to this case have been stated and referred to somewhat at length in *Phillips Academy v. Andover*, post, 550, 55 N. E. 841, and we do not deem it necessary to repeat them here.

The history of Harvard College, and of like institutions, shows, we think, that from the beginning dormitories and dining halls have been furnished by the college for the use of the students, and have been regarded as devoted to college purposes. In addition to this, the effect of the decisions in *Wesleyan Academy v. Wilbraham*, 99 Mass. 599, and *Mount Hermon Boys' School v. Gill*, 145 Mass. 139, 13 N. E. 354, is plainly to exempt property applied to such uses. See also *Yale University v. New Haven*, 71 Conn. 316, 43 L. R. A. 490, 42 Atl. 87, and *State v. Ross*, 24 N. J. L. 497. We do not think that it makes any difference in principle that the college, instead of itself furnishing board, provides a place, without rent or compensation in any form, or a lease or any agreement for a fixed term, for the use of students who club together for the purpose of obtaining for themselves, with the assistance of the college, food at cost. Property so used is occupied for the purposes for 48 L. R. A.

which the college was incorporated. Many particulars are stated in the agreed facts in regard to No. 17 Kirkland street, which is the parcel that we are now considering, that we do not think it necessary to refer to, as it seems to us plain that the property is exempt from taxation.

The history of the college, and of the legislation relating to it, also shows, we think, that the president's house, during the earlier years of the college at any rate, was regarded as almost, if not quite, as necessary for the purposes of the institution as dormitories and dining halls. Public money was appropriated by the general court to build it, as it had been to build the college buildings; and the occupancy of it evidently was considered as altogether official. The present house was built with funds given expressly for the purpose of erecting a dwelling house for the president and his successors in office, and since it was built has been occupied by them and their families. The president pays no rent or compensation for the use and occupation of the house, and has no lease, but occupies it, if he chooses, so long as he performs the duties of president. It, with several of the other houses that were taxed, namely, Nos. 11, 25, and 37 Quincy street,—this being 17 Quincy street, are now, and were at the time of the assessment, within the college grounds, and the premises are kept in order and repair, including grading, graveling walks, fertilizing, and repairing and cleaning furnace, removal of ashes, etc., under the direction of the college superintendent of buildings and the superintendent of grounds, and at the college expense. The whole lower floor, "except, possibly, the kitchen, is used for class-day, commencement, and other receptions, and for many hospitalities incident to the president's functions." The hall and drawing-room are also used for the convenience of the college and the president, for meetings of the faculty and committees, for conferences with university officers and students, for calls on university business, and for the annual meetings of the corporation at which degrees are voted. The rest of the house consists of the usual living and housekeeping rooms and chambers, and is used by the president and his family as a dwelling house. It seems to us that, on these facts, the dominant or principal purpose of the occupancy by the president cannot fairly be regarded as other than that for which the college was incorporated, and that the justice who heard the case in the superior court was justified in so finding. His occupation is official, as the head of the university, just as, for instance, the president occupies the White House; and it cannot be said, in any just sense, we think, that it is a private occupation, for his own benefit.

The remaining six houses are occupied by professors, three of whom are deans, each charged with a portion of the administrative duties formerly devolving exclusively on the president. Three of the houses, as already observed, are within the college

grounds. All of them are kept in order and repair at the expense of the college, in the same manner and to the same extent as the house occupied by the president. The halls and drawing-rooms in all of them, except No. 37 Quincy street, occupied by Prof. Langdell, are used partly for the convenience of the college, and partly for that of the professor,—for different college uses and purposes incident to his duties as professor, chairman of committees, dean, and the like. In the case of No. 11 Quincy street, the drawing-room and hall are used by the professor for regular college exercises during the college year. In the case of No. 16 Quincy street, the professor is chairman of the "Fresman Advisors Committee of the Faculty of Arts and Sciences," consisting of about twenty persons, and he has a great number of interviews in his drawing-room with students and parents. In the case of No. 25 Quincy street, the college, in 1892, made additions and improvements at its own expense, so as to make it more convenient for the transaction of college business, and the entertaining of guests on college account. The additions, as well as the drawing-room and hall, are used for different college purposes incident to the several duties of the occupying professor. The parts of the houses to which no reference has been made are used by the professors and their families, and consist of the usual living and housekeeping rooms and chambers. In the fall of the year, when the salaries of the professors are voted, they are fixed at certain sums, "and the use of the house \$750," or whatever the sum may be. Otherwise, the professor pays no rent, and has no other agreement for his use and occupation of the house, but uses it as such professor.

We think that it was competent for the justice who heard the case to find, on these facts, that the principal or dominant consideration in regard to the occupation of the houses by the several professors had reference to the performance of their duties in the offices which they held as professors and otherwise, rather than to the private benefit which they would receive in the way of homes for themselves and their families, and that he was justified in finding that the occupancy was for the purpose for which the college was incorporated. This case is distinguishable, we think, from *Williams College v. Williamstown Assessors*, 167 Mass. 505, 46 N. E. 394. In the first place, there was no question in that case as to the taxation of a building used for a dormitory and dining hall for the students. In the next place, the occupation by the professors in this case clearly lacks the exclusive character which it was held to have in that case. In the third place, no such use for college purposes is shown to have been made of the houses occupied by the professors in that case as appears in this case. In the fourth place, the sums fixed as compensation for the use of the houses in that case were paid and received as rent, and the court so treated it in the opinion. In this case the sums fixed for the use of the houses were al-

lowed as part of the compensation for services as professor, thus tending to show, as said in *Massachusetts General Hospital v. Somerville*, 101 Mass. 326, that "the occupation was one merely by reason of service," and that the value put upon the use of the house was merely "a convenient mode of adjusting the compensation, . . . and not as the income or fruit of an estate granted." Lastly, this case seems to be one where the buildings are occupied "with the permission of the college, and without" the professors "having any estate therein or paying any rent therefor;" in which case it was said in *Pierce v. Cambridge*, 2 Cush. 611, the buildings would be exempt from taxation. The defendant relies on *Third Cong. Soc. v. Springfield*, 147 Mass. 396, 18 N. E. 68, which was a case where a parsonage was declared to be unexempt. The court held that religious societies did not come within the clause that we have been considering, but within the seventh clause, and that the exemption was limited to houses of religious worship only. That case is not applicable to this. We think that the judgment of the Superior Court should be affirmed.

So ordered.

Trustees of PHILLIPS ACADEMY

v.

Inhabitants of the Town of ANDOVER et al.

(..... Mass.)

1. The occupancy of real estate by an educational institution or its officers for the purposes for which it was incorporated, in order to exempt the property from taxation under Pub. Stat. chap. 11, § 5, cl. 3, as amended by Stat. 1889, chap. 465, must have, or be supposed to have, a direct connection with such purposes.
2. Premises occupied by the professors of an academy and their families may be exempt from taxation, under Pub. Stat. chap. 11, § 5, cl. 3, as amended by Stat. 1889, chap. 465, exempting real estate of such institutions when occupied by them or their officers for the purposes for which they are incorporated.
3. Abutting property may be constitutionally assessed for benefits from the watering of streets.
4. A vote appropriating money for street sprinkling, expressly stating that it is appropriated under Stat. 1893, chap. 186, means that the provisions of that act are to be applied in regard to the expenditure, and, in the absence of anything limiting the amount of the assessment the fair inference is that the whole cost is to be assessed on the abutting property.

(January 4, 1900.)

CASE submitted upon agreed statement of facts for the opinion of the Supreme Judicial Court as to the right to recover back taxes assessed upon property belonging to

NOTE.—As to exemption of property of educational institutions from taxation, see preceding case and footnote thereto.

plaintiffs and paid under protest. *New trial ordered.*

The facts are stated in the opinion.

Mr. Thomas H. Russell, for plaintiffs:

Plaintiffs are entitled to have abated the part of said tax assessed upon nine houses which at the time of said assessment were occupied by the professors; also they are entitled to have abated \$192.27, assessed upon them and included in said tax, for a part of the expense of sprinkling the streets of Andover.

Mr. William Odlin, for defendants:

Each professor is the sole occupant of his premises, has complete and undisturbed possession thereof, and uses the property strictly for his private purposes.

This occupation of widely separated individual houses by separate individuals as their place of residence, and residence only, is not such a use by the corporation as to be within the purpose for which the corporation was formed.

Williams College v. Williamstown Assessors, 167 Mass. 505, 46 N. E. 394.

The legislature had the authority to pass chapter 186 of the Acts of 1895, and the selectmen had the right to water the streets as they did, and assess the costs on the estates benefited.

Boston Seamen's Friend Soc. v. Boston, 116 Mass. 181.

The assessment for street watering is a tax for a local improvement, and is not a tax imposed for the general purpose of government, from which exemption under the statutes can be properly claimed.

Morton, J., delivered the opinion of the court:

This case was heard on agreed facts, and the principal question is whether the property for which the plaintiffs were assessed was exempt from taxation by virtue of Pub. Stat. chap. 11, § 5, cl. 3, as amended by Stat. 1889, chap. 465, which provides that "the personal property of literary, benevolent, charitable and scientific institutions and temperance societies incorporated within this commonwealth, and the real estate belonging to such institutions occupied by them or their officers for the purposes for which they are incorporated," shall be exempt from taxation. There can be no doubt that Phillips Academy is an institution within the meaning of the exempting clause, and that, with perhaps a possible doubt in the case of Prof. Park, the persons occupying the various houses were officers of the institution. *Williams College v. Williamstown Assessors*, 167 Mass. 505, 46 N. E. 394. The more difficult question is whether the property was occupied by them for the purposes for which the institution was incorporated. It is not easy, and perhaps not possible, to define what will constitute such an occupancy under all circumstances, and we shall not attempt it; but there are some general rules and considerations which we deem it proper to state, notwithstanding the disposition which is made of this case.

The occupancy referred to usually will result from the official connection of the officer with the institution, and commonly will continue only so long as such connection lasts. The legislature could have provided, as it did formerly in the case of Harvard College (in tax act of 1818, and prior and subsequent tax acts), that such occupancy of itself should exempt the estate from taxation, or even that all of the real estate belonging to any of the favored institutions should be exempt. Previous to the adoption of the Revised Statutes this seems to have been the case, with a qualification after a time in regard to Harvard College and Phillips Academy. The exemptions were incorporated each year in the annual tax acts, and the institutions exempted were described by name, except that, beginning with 1801, there was in each act a general provision exempting academies established by the law of this commonwealth. Phillips Academy came under this general provision, but by a proviso in the act of 1821 (chap. 107, § 6) and in succeeding acts it was provided (and this is the qualification referred to above) that nothing contained in the act should "prevent the town of Andover from taxing such real estate belonging to the corporation of Phillips Academy situate in said town as shall not be under the immediate occupation and improvement of said corporation, or of any person or persons connected with said corporation exempted from taxation by this act." The persons who were exempted from taxation that were connected or likely to be connected with Phillips Academy were ministers of the gospel, preceptors of academies, and Latin grammar school masters. These and other personal exemptions relating to "the president, professors, tutors, librarians, and students of Harvard, Williams, and Amherst Colleges and of all other theological, medical, and literary institutions," were repealed by Stat. 1828, chap. 143. The effect of this repeal, so far as Phillips Academy was concerned, seems to have been to cause the omission in subsequent tax acts from the proviso of the concluding clause, which had provided by implication that real estate belonging to the corporation and occupied by any person connected with it should be exempt from taxation. By the Revised Statutes a general rule was established, which described in a single phrase the institutions to be exempted, and limited the exemption to the real estate belonging to them, and "actually occupied by them or by the officers of said institutions for the purposes for which they were incorporated." Rev. Stat. chap. 7, § 5, cl. 2. This statute, with certain additions and amendments not now material, has been continued by successive reenactments to the present time. It is manifest that under the Revised Statutes and succeeding statutes the mere fact that real estate belonging to an exempted institution was occupied by it or by one of its officers could not be regarded as sufficient, without anything more, to exempt the property from taxation, and it has not been so regarded. *Pierce v. Cambridge*, 2 Cush. 611; *Williams College v. Williamstown Assessors*, 167

Mass. 505, 46 N. E. 394; *Amherst College v. Amherst Assessors*, 173 Mass. 233, 53 N. E. 815. In any other view the words "for the purposes for which they are incorporated" would be unnecessary and meaningless. The omission from subsequent statutes of the word "actually," which was in the Revised Statutes, does not affect the construction. *Lynn Workmen's Aid Assn. v. Lynn*, 136 Mass. 283, 285. Whatever else, therefore, may be said of the occupancy, it must be for the purposes for which the institution was incorporated, and this renders it necessary to inquire into the nature and character of the occupancy. If they are such that, taking all of the circumstances and all the legitimate considerations into account, it can be fairly said that the purpose of the occupancy is that for which the institution was incorporated, then the property is exempt; otherwise, not.

The occupancy contemplated by the statute means, we think, something more than that which results from ownership and possession on the part of the institution, or the use of the property for investment purposes. It must have, or be supposed to have, direct reference to the purposes for which the institution was incorporated, and must tend, or be supposed to tend, directly to promote them. In a sense, any occupancy on the part of the institution or its officers may be said to have reference to those purposes, and to promote them. But the language of the statute implies, we think, a direct, or what is supposed to be a direct, connection between the occupation and the purposes for which the institution was incorporated, and not an indirect one. It is not enough, for instance, that an income is derived from the occupancy, which is applied to carrying on the institution. *Chapel of Good Shepherd v. Boston*, 120 Mass. 212. At the same time the occupancy may be of the sort contemplated by the statute, notwithstanding that, as incident to it, rent is received, or the pecuniary value to the officer occupying it is taken into account in some other manner. *Massachusetts General Hospital v. Somerville*, 101 Mass. 319. The distinction lies, it seems to us, between an occupancy which is for the private benefit and convenience of the officer, and which is so regarded by the parties,—as in the ordinary case of landlord and tenant,—and an occupancy where, although necessarily to some extent the relation of landlord and tenant enters into it, the dominant or principal matter of consideration is the effect of the occupancy in promoting the objects of the institution, and upon the efficiency and influence of the officer as such, and upon those whom the institution is designed to benefit. In the former case the property would not be exempt, and in the latter it would; and the fact that the institution incidentally derived some pecuniary advantage from the occupancy would not deprive the property of the exemption to which it otherwise would be entitled. In considering whether property is occupied so as to be exempt, regard may be had, among other things, to the situation of the institution. If, for instance, it is so

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situated that desirable residences are not or may not be easily obtainable, and those in charge of it are of opinion that such officers as the best interests of the institution and of those resorting to it require can be more readily obtained if the institution provides places for them to live in, and it does so, this may be taken into account in determining whether the occupancy is for the purposes for which the institution was incorporated. Or, again, if, with the best interests of the institution as an educational institution in view, and for the purpose of enhancing its advantages to students, and of promoting discipline and good conduct, and greater freedom of intercourse between students and professors and instructors, those in charge deem it advisable that the president and professors and others connected with the institution should occupy residences in the college yard or in proximity to the college buildings, this also may be taken into account. The dominant purpose of the occupancy under such or similar circumstances may be as truly that for which the institution was incorporated, as the occupancy of buildings for recitation purposes or for offices or for other like purposes would be. And the occupancy does not lose what may be termed its institutional character and purpose because, as incidental to it, the president and professors and other officers and their families are provided with homes, for the possession and enjoyment of which by them compensation is allowed or taken into account in some manner. In many, if not most, New England colleges and academies, the presence of the families of the president and professors and other officers has been and is regarded as advantageous to the students and as beneficial to the institution. The occupancy, therefore, by them, as homes, of property belonging to such institutions, would not necessarily be inconsistent with the spirit and intent of the exempting clause. In considering the purpose of the occupancy, due weight is also to be given to the intentions of those in charge of the institution. The institution can only act through agents. In *Massachusetts General Hospital v. Somerville*, 101 Mass. 319, 322, it is said: "What lands are reasonably required, and what uses of land will promote the purposes for which the institution was incorporated, must be determined by its officers. . . . In the absence of anything to show abuse, or otherwise to impeach their determination, it is sufficient that the lands are intended for, and in fact appropriated to, those purposes." And again, later: "The presumption is in favor of their judgment, and it requires something more than mere difference of opinion upon a matter of opinion especially confided to them to overcome that presumption." Their conclusions are not final. But, if consistent with other facts tending to show that the purpose of the occupancy is that for which the institution was incorporated, they well may be allowed to have a controlling effect. The question whether, in any given case, the property is or is not exempt, is to be determined by con-

sidering all of the facts and circumstances, and the intentions and purposes of those in charge of the institution respecting the use and occupation of the property will or may have a material bearing upon the proper determination of the question.

In applying the principles thus laid down, it is clear that not only may premises used by officers as homes for themselves and their families be so occupied by such officers as to be exempt, but also dormitories and dining halls and boarding houses, gymnasiums, and other buildings intended primarily for, and actually devoted to, the use and benefit of students and those attending the institution for the purpose for which it was incorporated. The statute is not to be construed narrowly, but in a fair and liberal sense, and so as to promote that spirit of learning, charity, and benevolence which it has always been one of the fundamental objects of the people of this state to encourage.

We think that there is nothing in *Pierce v. Cambridge*, 2 Cush. 611; *Williams College v. Williamstown Assessors*, 167 Mass. 505, 46 N. E. 304, and *Amherst College v. Amherst Assessors*, 173 Mass. 233, 53 N. E. 815, necessarily inconsistent with the views expressed above. In *Pierce v. Cambridge*, the question, as stated in *Williams College v. Williamstown Assessors*, 167 Mass. 505, 46 N. E. 304, "was whether the real estate was taxable to Pierce as tenant;" and the decision was put on the ground that the facts were such as to create in Prof. Pierce an estate as tenant, for which he was taxable. Perhaps the case might have stood equally well on the ground that the occupation appeared to be rather for the private benefit and convenience of Prof. Pierce than for the purpose for which the college was incorporated. So, in *Williams College v. Williamstown Assessors*, the occupation was held by a majority of the court to be for private purposes. The case stands on its own facts, and was not supposed by a majority of the court to overrule any prior cases, or to change the law as it had been previously practised and understood. *Amherst College v. Amherst Assessors* followed the *Williamstown Case*, and went on the ground that it could not be held, as matter of law,—which was the ruling of the superior court,—that the house was exempt, though it was intimated in the opinion that it could have been found "that the dominant purposes of the president's occupation were not private, but those for which the college was incorporated." On the other hand, we think that the conclusions which we have reached are abundantly supported by *Wesleyan Academy v. Wilbraham*, 99 Mass. 599; *Massachusetts General Hospital v. Somerville*, 101 Mass. 319, 322, and *Mount Hermon Boys' School v. Gill*, 145 Mass. 139, 13 N. E. 354, in this state; and *State v. Ross*, 24 N. J. L. 497, and *Yale University v. New Haven*, 71 Conn. 316, 43 L. R. A. 490, 42 Atl. 87. In addition to these cases, the case of *Salem Lyceum v. Salem*, 154 Mass. 15, 27 N. E. 672, should be referred to. The property in that case was held to be in exempt, but it was said that, "if the

principal occupation is by the plaintiff for those purposes [i. e., the purposes for which the plaintiff was incorporated], occasional and incidental use for other purposes might not render it liable to taxation;" thus recognizing that it is or may be the dominant purpose which gives character to the occupation. As illustrating still further the effect of intention, not only upon the character of the occupation, but as establishing the fact of occupancy for a purpose entitling the property to exemption, see *New England Hospital for Women & Children v. Boston*, 113 Mass. 518, and *Trinity Church v. Boston*, 118 Mass. 164. See also *Proprietors of Rural Cemetery v. Worcester County Comrs.* 152 Mass. 408, 10 L. R. A. 365, 25 N. E. 618. In this last case the petitioner, which was a cemetery corporation, was authorized to purchase additional lands, to be "applied exclusively" to the objects of the corporation. It purchased lands on which there was a dwelling house and barns, and it was assessed for these lands. At the time of the assessment complained of, no burial lots had been laid out on them. But it was held that it could not be said that the land was not devoted exclusively to the objects of the corporation, and that the exemption from taxation of the dwelling house and barns was justified by the fact that the buildings and their occupation, as described, were necessary for the business of the corporation and the management of the cemetery; and the property was accordingly declared to be exempt. This case would seem to show that, even if the occupation was required to be exclusively for the purposes for which the institution was incorporated (which we do not think it is), an occupation by an officer and his family might be regarded under some circumstances as exclusively for such purposes, notwithstanding the element of private benefit. Whether the occupancy of Prof. Taylor should be referred to his life estate or to his connection with the academy as professor, or whether the academy is taxable for its reversionary interest, we do not deem it necessary to consider now.

Down to this point, we are all substantially agreed. But some of my brethren think that the facts are not stated with sufficient fullness to enable us to pass satisfactorily upon the question thus far considered, and that the agreed facts should be discharged and the case sent back, so that the facts can be presented more fully. Others of my brethren and myself are inclined to construe the agreed facts somewhat liberally, and to think that we can decide the case now. But with this expression I yield to the views of those of my brethren who think otherwise, and am content that the agreed facts should be discharged and the case sent back for another trial.

There remains the question as to the street-watering assessments. It is hardly to be expected that any new facts which may be developed will affect that question. It will save time and further trouble, therefore, if we express our opinion on it now, and we see no objection to doing so. The assess-

ments were made under Stat. 1895, chap. 186, the constitutionality of which is attacked by the plaintiffs. A similar question under a similar statute was considered in *Sears v. Boston*, 173 Mass. 71, 43 L. R. A. 834, 53 N. E. 138, and the constitutionality of the statute was there upheld. We deem it enough on this point to refer to that case. It is settled that local or special assessments like these do not come within the exemptions from general taxation. *Boston Seamen's Friend Soc. v. Boston*, 116 Mass. 181. But it is contended that the provisions of the act were not complied with, because the vote appropriating the money for street watering did not provide that the assessors should assess the cost of watering on estates abutting on the streets that were watered. The vote

did, however, contain an express reference to Stat. 1895, chap. 186, and stated that the money was appropriated under that act. We think that the plain meaning of the vote was that the provisions of that act were to be applied in regard to the expenditure that was authorized, and that, in the absence of anything limiting the amount of the assessment, the fair inference was that the whole cost was to be assessed on the estates that abutted on the streets that were watered. All of the other provisions of the act were duly complied with, and we see no ground on which it can be held that the assessments were invalid. The result is that the agreed facts are to be discharged, and the case is to stand for another trial.

So ordered.

ILLINOIS SUPREME COURT.

CHICAGO, WILMINGTON, & VERMILION COAL COMPANY, *Appt.*,
v.

PEOPLE of the State of Illinois.

(181 Ill. 270.)

1. No restriction on the police power of the legislature to provide for the safety of miners by means of the inspection of mines, or otherwise, is made by Const. art. 4, § 29, which expressly requires the legislature to pass laws for the protection of operative miners by providing for ventilation and for the construction of escapement shafts, or such other appliances as may secure safety in all coal mines.
2. Imposing upon mine owners the burden of paying the cost of inspection of the mines, as provided by act July 1, 1895, as amended in July, 1897, is a valid exercise of the police power which does not depend upon any constitutional grant of power to legislate concerning mines.
3. The failure to limit the number of inspections of mines does not make act July 1, 1895, as amended July, 1897, providing for an inspection of mines at the cost of the mine owners, void on the ground that it is oppressive and may impose a burden by imposition of fees which would destroy the business of the mine owners, where the statute, after providing that the inspection shall be made at least four times a year and as often as the inspectors deem necessary, provides that they may be removed for neglect or malfeasance, and prohibits them from doing any act to the injury of the operators of mines.

(October 16, 1899.)

A PPEAL by defendant from a judgment of the Circuit Court for Sangamon County in favor of the People in a proceeding to

NOTE.—As to statutory provisions for protection of miners, see *Consolidated Coal & Min. Co. v. Floyd* (Ohio) 25 L. R. A. 848, and *note*; also *Re Morgan* (Colo.) 47 L. R. A. 52.

As to limitation of hours of labor in mines, see *Holden v. Hardy* (Utah) 37 L. R. A. 103; and *State v. Holden* (Utah) 37 L. R. A. 108. Affirmed by Supreme Court of the United States in 169 U. S. 366, 42 L. ed. 780. 48 L. R. A.

compel payment of fees for the inspection of defendant's mines. *Affirmed.*

Statement by Phillips, J.:

The plaintiff, the people of the state of Illinois, brought suit against the defendant coal company to recover on account of inspection fees of the state mine inspector for certain mines theretofore inspected. The suit is brought to recover for the fees provided for under an act entitled "An Act Providing for the Health and Safety of Persons Employed in Coal Mines," approved May 28, 1879, and amendments thereto. The case was tried under a stipulation as to the facts. It appears that the appellant owns six coal mines in this state, in each of which more than six men are employed. One of these mines is in the second mining district and five are in the first district. Between the 1st day of November, 1895, and the 1st day of July, 1897, in the first district, the mines were inspected twenty-two times, for which the aggregate sum of \$216 was charged, and between the 1st day of July, 1897, and the 27th day of April, 1898, seven inspections were made, for which \$70 was charged. The mine in the second district, between the 1st day of November, 1895, and the 27th day of April, 1898, was inspected four times, for which \$40 was charged. The aggregate of the charges for the inspections thus made was \$326. The defendant, by the stipulation, admitted the amount was due if the plaintiff was entitled to recover, and submitted two propositions of law to be held, to the effect there could be no recovery under either count of the declaration, which were refused, and exception taken. A motion in arrest of judgment was entered, which was denied, and a finding and judgment had in favor of the plaintiffs for \$326, to which the defendant excepted. The question is presented whether the act of July 1, 1895, and the amendment thereto in force July 1897, providing for the payment into the state treasury, by owners or operators of coal mines of this state, of the charges made

by state mine inspectors for inspecting the mines, are valid enactments.

Messrs. Charles W. Thomas and George S. House for appellant.

Messrs. C. A. Hill and B. D. Monroe, with **Mr. E. C. Akin,** Attorney General, for appellee:

The police power is inherent in all governments, and its exercise and application, except as limited by the Constitution of the state or of the United States, rests in the discretion of the legislature.

This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state.

Cooley, Const. Lim. p. 706; *Charleston v. Rogers*, 2 McCord, L. 495; *Morgan's L. & T. R. & S. Co. v. Louisiana Bd. of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; *Daniels v. Hilgard*, 77 Ill. 640; *People v. Harper*, 91 Ill. 357; *Parker & W. Public Health & Safety*, § 261; *Com. ex rel. Williams v. Bonnell*, 8 Phila. 534.

The word "appliances," as used in the Constitution, is not confined or limited to mere physical annexations, tools, machinery, or apparatus, but may, and does, include "anything through or by which something is effected or accomplished," or "that which is" adapted to the accomplishment of a purpose."

When a Constitution confers a power, or enjoins a duty, it also confers by implication any incidental power necessary to the exercise of the one or the performance of the other.

6 Am. & Eng. Enc. Law, 2d ed. p. 928.

Courts ought not to declare an act of the legislature invalid unless it is in plain and obvious conflict with the Constitution.

Cooley, Const. Lim. 6th ed. pp. 216-218; *Wilson v. Sanitary Dist.* 133 Ill. 443, 27 N. E. 203; 23 Am. & Eng. Enc. Law, p. 351.

Phillips, J., delivered the opinion of the court:

Section 29 of article 4 of the Constitution is as follows: "It shall be the duty of the general assembly to pass such laws as may be necessary for the protection of operative miners, by providing for ventilation when the same may be required, and the construction of escapement shafts, or such other appliances as may secure safety in all coal mines, and to provide for the enforcement of said laws by such penalties and punishments as may be deemed proper." This provision requires the legislature to pass such laws as may be necessary, etc., and leaves to that body the determination of the policy of the state as to what legislation is necessary to conform to its requirements. The legislature has seen proper, in the act entitled "An Act Providing for the Health and Safety of Persons Employed in Coal Mines," approved May 28, 1879, and in force July 1, 1879, and by the amendments thereto, to require certain duties to be done and performed by the owner, operator, or manager of a coal mine. Some of these duties are as follows: Section 1 provides that the owner shall make,

or cause to be made, an accurate map, to be furnished to the state inspector, of mines of the district. Section 2 provides the inspector may make a map at the expense of the owner, should he neglect or refuse so to do. Section 3 is as to the manner of construction of escapement shafts, etc. Section 4 is as to the ventilation of mines. Section 5 requires that bore holes shall be kept 20 feet in advance of each working place under certain circumstances. Section 6 is as to hoistways, and who may be employed, etc. Section 7 is as to operating the hoistways. Section 8 is as to fencing the shaft. Section 11 provides for the division of the state into districts, for the appointment of inspectors, and prescribes their duties and fixes their salaries. This latter section was amended in 1895. Prior to that time the inspector was paid wholly by the state, but after the amendment of 1895, and by the amendment of 1897, it was provided that fees might be charged, which were required to be paid by the mine owner. It is these two amendatory statutes which the appellant contends are unconstitutional, as placing a burden that is unreasonable and unjust on the mine owner.

The object and purpose of the statute are the protection of miners working in coal mines. While the act is an effort on the part of the general assembly to strictly comply with § 29 of article 4 of the Constitution, by providing for the ventilation of mines, the construction of escapement shafts, and such other appliances as shall secure safety in all coal mines, the general assembly has seen proper to include a provision for the preparation of maps and the filing of the same with the chief mine inspector of the district, and that on neglect or default of the owner to make such map the inspector may make the same at his expense, and this is one of the requirements of the statute which has been held constitutional by this court. In *Daniels v. Hilgard*, 77 Ill. 640, it was held (page 643): "Our legislature, in an act having for its avowed object the providing for the health and safety of persons employed in coal mines, has thought it proper to incorporate this provision for the making of a map. The lawmaking powers elsewhere, as it is seen in their laws for the same object, have adopted this same provision. This would seem to indicate as the legislative understanding that the provision is one in aid of the accomplishment of the purpose of such acts,—the protection of persons engaged in such mines,—a proper part of the system adopted to that end. The question is properly one of legislative determination. A court should not lightly interfere in such case. The legislature must have manifestly transcended its province for it to do so. We are of opinion that it is not for a court to say that the provision here which is called in question is anything more than a fair and reasonable police regulation with reference to the subject-matter of the act, which the legislature, in its discretion, has seen proper to adopt, and that it should not be set aside as unconstitutional."

To a much greater extent the provisions of § 11, which prescribe the duties of the inspector, and require his reports and statements to be posted in a conspicuous place, showing the condition of the mine, and what, in his judgment, is necessary for the protection of the lives and health of persons employed in such mine, etc., are an exercise of the police power of the state. The examination of the condition of the mine would also necessarily require the inspector to examine and report as to whether the manner of construction of escapement shafts, air shafts, and the ventilation of the mine is in conformity with the requirements of the statute. Inspections are necessary in determining health and quarantine laws, and also with reference to the examination of articles to be used as food, and it never has been held that a provision looking to the inspection of certain articles that may be offered for sale for the purposes of human food, or a law providing for inspection with reference to health, is an improper exercise of the police power. Nor could it be held that the provision of the statute with reference to the appointment of inspectors for coal mines, who are to discharge the duties imposed upon them by § 11, is not a proper exercise of the police power of the state. The very purpose and object of the statute are in regard to the health and safety of miners; and requiring that mine owners should permit an inspection of their mines for this purpose is but an exercise of such police power.

We do not understand the contention of the appellant to be, however, that these provisions of the statute are an improper exercise of the police power, but understand the contention is that the provisions of the statute which require a fee to be paid for such inspection by the mine owner are an improper exercise of the police power. It was held in *Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114, that an inspection fee imposed by the state of Louisiana on a vessel passing a quarantine station, for examination as to her sanitary condition and the ports from which she came, is a compensation for services rendered the vessel, and not a tax imposed, within the meaning of the provision of the Constitution concerning a tonnage tax imposed by the states, and that the act imposing such fee is a valid enactment. Inspection fees are not taxes, but are imposed under the principle that they are compensation for services rendered in and about making such inspection, which is presumably beneficial to the person upon whom the fees are imposed, under and by virtue of the general police powers of the state. *Charleston v. Rogers*, 2 McCord, L. 495; *Cooley*, Taxn. 413. It was held in *People v. Harper*, 91 Ill. 357, that the legislature had full power to pass a law committing the inspection of grain to a board created for that purpose; that the expenses occasioned by such inspection may be required to be borne

by those presumably benefited by it; that the fixing of fees for such services, and prescribing the manner of their collection and upon whom they shall be imposed, do not fall within the constitutional limitations concerning the imposition of a local burden by way of taxation. In that case the board of warehouse commissioners fixed the fees for the inspection of grain. The court held (page 369): "There is no provision of the Constitution which, either expressly or by necessary implication, inhibits the general assembly from committing the inspection of grain to a board created for that purpose, and we are not authorized to say that the board of commissioners of railroads and warehouses is not quite as legitimate as any other board that could have been selected or created for that purpose. It evidently was not designed that the inspection should be made a source of revenue, either to the state or to municipalities; for it is not enjoined as a means of raising revenue, but solely for the 'protection of producers, shippers, and receivers of grain and produce;' and there is natural justice in requiring that the expenses occasioned by the inspection should be borne by those presumably benefited by it. Certainly no clause of the Constitution is violated by this requirement."

The mining of coal is recognized as a dangerous and hazardous business, and is a productive industry of the greatest importance. For many years in this state many thousands of men have been engaged in that character of work, and a proper safeguard of their lives and health is a matter of so great interest and necessity that no subject can be mentioned where there is a more positive necessity for the exercise of the police power than in seeking to subvert their safety. With a recognition of the fact that under the police power the legislature has the right to provide for the inspection of mines, it may also provide for the payment of fees for such inspection, and may place the burden of the payment of such fees on the business that requires the employment of men in such dangerous and hazardous work, to an equal extent as it may place the burden on commerce in the shipment of grain, and appeals much more strongly for a proper enforcement of this character of law by proper inspection than the mere protection of trade. If an inspection is to be had, it is attended with expense. The expense thus incurred is imposed because of the peculiar dangers of the surrounding situation, and subserves, not only the interest of the miners, but alike protects the mine owner; and hence the burden of the payment of the fee can be properly imposed upon the mine owner without violating any provision of the Constitution.

Appellant contends that legislation, under the provisions of § 29 of article 4, can only be had with reference to ventilation and escapement shafts. Such contention cannot be sustained, because that section requires legislation for a particular purpose, having in

view the safety of miners, and submits to the legislature the policy to be pursued for the accomplishment of that end, and which cannot lightly be interfered with by a court. Appellant, from the position taken, seems to disregard the fact that the legislature may legislate, under the police power which it possesses, outside of the mere mandates of that provision of the Constitution. The contention is entirely too narrow.

Appellant further contends that, inasmuch as the specific time or occasion when inspections are to be made is not limited, power exists in the inspectors to inspect daily and unnecessarily, and impose a burden by the imposition of fees, which would in effect destroy the business of the mine owner. While the act requires that there must be at least four inspections a year, and imposes the duty on the inspectors to make the inspection as often as may be deemed necessary and proper, yet they are made subject to removal for neglect of duty or malfeasance in the discharge of duty, and it is expressly provided that they "shall not be guilty of any act tending to the injury of miners or operators of mines during their term of office." An attempt to impose unreasonable inspections, such as it is insisted by counsel for appellant they may do, would be an act tending to the injury of the operators of mines, for which the very provisions of the act provide a means of prevention, and the law is not so powerless that it could not prevent extortions of this character. From the stipulation of facts under which this case was tried, it appears that appellant's mines were inspected thirty-three times between November 1, 1895, and March 30, 1898,—a period of two years and five months,—during which time the appellant owned and operated six mines. Hence there was only an average of one inspection every five and one third months. It is true that mine No. 2, as appears from the facts, was inspected March 5, 1897, and was again inspected March 10, 1897. The facts and circumstances which induced the second inspection so soon after the other are not in any manner explained; but it may well be that because of the explosion of gas, or the obstruction to ventilation in the mine, or from some other cause resulting in inability to reach the escapement shaft, loss of life resulted, which necessarily induced prompt examination thereafter. We hold that it was within the power of the legislature to provide for the inspection of mines by inspectors so appointed, and to provide for fees to be paid by the mine owner to be used towards the payment of the expenses of such inspection. Such fee is in no sense a tax, but a mere compensation for services rendered, and the act is therefore not unconstitutional. It was not error to refuse to hold the propositions asked by the appellant, and the judgment of the Circuit Court of Sangamon County is affirmed.

48 L. R. A.

Joseph HUDNALL *et al.*, Appts.,
v.

O. M. B. HAM *et al.*

Mary E. TAYLOR, Appt.,
v.

Joseph HUDNALL *et al.*

(183 Ill. 486.)

1. A woman's mere ignorance of the rule of law that marriage will revoke her intended husband's will is not sufficient to overturn an antenuptial settlement by which she agrees to permit his property to go as provided in the will.
2. An antenuptial agreement in support of a will will not prevent the revocation of the will by the subsequent marriage where the statute says that "a marriage shall be deemed a revocation of a prior will."
3. A widow's release by an antenuptial contract, of all her claims on the estate of her husband, in consideration of a specified sum, does not preclude her from being deemed his widow, or entitle the descendants of his deceased mother to take his estate, under Rev. Stat. chap. 39, § 2, providing that, when there is no widow or children of the decedent, the estate shall go to his mother and her children and their descendants.
4. An antenuptial contract by which a wife agrees, in consideration of a certain sum of money, to release all her interest in her husband's estate in order that it may pass by certain provisions of his will, with a covenant not to interfere in any way with the disposition of the property made by the will, will preclude her from contesting the right of the beneficiaries under the will on the ground that the will was revoked by the marriage—especially when she has ratified the contract after her husband's death by accepting the consideration agreed upon.

(*Curtwright, Ch. J., and Phillips and Magruder, JJ., dissent.*)

(December 18, 1899.)

APPEALS by complainants and cross complainant from a decree of the Circuit Court for Jefferson County dismissing the bills in a proceeding to determine the right to property left by Jeremiah Taylor, deceased. *Affirmed.*

Statement by Carter, J.:

This is an appeal from a decree entered in the circuit court upon the final hearing of the issues made upon the bill filed by "the Hudnalls," as they are spoken of in the rec-

NOTE.—As to revocation of will by marriage, see cases in *note* to *Riggs v. Palmer* (N. Y.) 5 L. R. A. on page 346; and in *note* to *Davis v. Fogle* (Ind.) 7 L. R. A. 485; also *Roane v. Hollingshead* (Md.) 17 L. R. A. 592; *Re Hewlett* (Minn.) 34 L. R. A. 384; and *Ingersoll v. Hopkins* (Mass.) 40 L. R. A. 191

ord, and upon the cross bill of Mary E. T. Taylor, the widow of Jeremiah Taylor, deceased. The bill, in brief, alleged that Taylor was the son of Sallie Taylor and her then husband, Thomas Taylor, and that five years after his birth Sallie Taylor lawfully married one Hudnall, and that the complainants are the children and descendants of deceased children born of such marriage with Hudnall, and are the only heirs at law of said Jeremiah Taylor, who died without issue; that in 1890 Taylor made a will, giving, except a few small legacies, all of his property to C. D. and O. M. D. Ham, sons of his first wife, and afterward, in 1892, married Mary E. T. Farmer, and died in 1895; that, a few days before such marriage, Taylor and Mrs. Farmer entered into an antenuptial contract by which it was agreed between them that in lieu of dower, award, rights of inheritance, and distribution she should, if she survived him, be paid, within sixty days after his death, \$2,000; that after Taylor's death and the probate of his will she was paid by the executor, and accepted and receipted for, said \$2,000, the amount due her under the contract, and in full of all claims against the estate, either under the will, or the agreement, or otherwise; that by her agreement and the full execution of its terms she renounced and relinquished all of her rights and interests in and to said estate, as heir or otherwise; that by the marriage between her and Taylor the will which had been previously made was revoked, and Taylor's property descended as intestate estate to the complainants, who were his half-brothers and sisters and descendants of deceased half-brothers and sisters; his said mother, Sallie Taylor, having previously died. The bill prayed that the probate of the will be set aside, that the will be declared void, and that a distribution of the estate among the complainants be made, and for general relief. The Hams and the widow demurred to the bill. The demurrers were sustained, and the bill dismissed, but on a writ of error sued out by the complainants the decree was reversed by this court, and the cause remanded, with directions to overrule the demurrers, and for further proceedings in conformity with the opinion rendered by this court. *Hudnall v. Ham*, 172 Ill. 76, 49 N. E. 985. When the case was redocketed in the circuit court, "the Hams," as they are spoken of in the record, and other legatees, and the executor, answered the bill, setting up the antenuptial agreement, and alleged that it was made in good faith, and with full knowledge, and for the purpose of confirming and approving the will; that it referred to and approved the will, and that by reason thereof the will was not revoked by the subsequent marriage; and alleged that the Hudnalls were not within the contemplation of either of the parties to the agreement, and that it could not operate in their favor. The answer denied that Taylor was of legitimate birth, but alleged that he was the illegitimate son of Sallie Taylor, a *feme sole*, and denied that the Hudnalls were his heirs. The answer also alleged that in 1848

Taylor, then without means, married Frances Ham, a widow, and the mother of said C. D. and O. M. D. Ham, who were then of tender years; that said Frances had considerable property, and that said Taylor took possession of the same and of the property derived by said O. M. D. and C. D. Ham from their father, and that with this as a start he began to trade, and was successful in business, so that he finally accumulated the property which he had at the time of making said will; that there were no children of said marriage, but said Taylor adopted the stepsons as his own, and that it was always understood by said Frances and said Jeremiah that the said O. M. D. and C. D. Ham were to be treated and regarded, in all respects, as the sons of said Jeremiah; that they treated and regarded him as their father, and labored for and assisted him, and obeyed him as though they were his sons; that these facts were well known to Mrs. Farmer when she entered into the antenuptial agreement, which was made for the purpose of carrying out Taylor's design; and the answer alleged that the antenuptial agreement and will constituted an equitable assignment to the Hams, and that in equity and good conscience they were entitled to the property. Mary E. T. Taylor, the widow, in her answer alleged that when she signed the antenuptial agreement she was not informed as to the extent of the property of said Taylor, or as to his illegitimacy, which she had since learned; that she understood he wished his property to go to the children of his first wife, and was willing that such purpose should be accomplished, but alleged that she would not have been so willing if she had known how much property he had, or that he was illegitimate, though she admitted in her answer that when the antenuptial agreement was signed she had learned from him that he had no living relatives; alleged, also, that when she executed the agreement she was willing to release her future rights in the estate to the descendants of his first wife, and believed that the will would have that effect, and that she regarded the accomplishment of that purpose as an important part of the consideration to induce her to execute the antenuptial agreement; that at the time she signed the agreement, and also when she received the money, she was in ignorance of her rights, and of the extent and value of Taylor's property, which value was concealed from her, and that the \$2,000 was grossly inadequate, and was disproportionate to the value of the estate; alleged, also, that the will was revoked by the marriage, and that one of the principal objects of the antenuptial agreement, and of her receiving and receipting for the \$2,000, has failed, and cannot be accomplished, and that, as the consideration has failed, said agreement is not binding upon her; and offers to bring into court said \$2,000, and abide the order of the court. The widow filed her amended cross bill also, in which she set up substantially the same facts, and prayed that the will and probate be declared void, and set aside, and the ex-

centor removed, and that the antenuptial agreement be also set aside, and her receipt for said \$2,000 be declared to have no other effect than a receipt for so much money, and not a ratification of the agreement, and that an accounting be had.

Messrs. Blood & Blood, Sims & Covington, and James A. Watts, for appellants *Hudnall et al.*:

The widow is bound by the antenuptial agreement, and has no claim to the property.

Jacobs v. Jacobs, 42 Iowa, 606; *Taylor v. Taylor*, 144 Ill. 436, 33 N. E. 532; *Beebe v. Sweetcourt*, 3 Gilm. 162; *Hudnall v. Ham*, 172 Ill. 76, 49 N. E. 985; *Brenner v. Gauch*, 85 Ill. 368; *Weaver v. Weaver*, 109 Ill. 225; *McMahill v. McMahon*, 113 Ill. 461; 7 Am. & Eng. Enc. Law, p. 189; *Wms. Exrs.* 7th Eng. ed. 314; *Schouler, Exrs. & Admsrs.* § 193; *Giles v. Churchill*, 5 N. H. 341.

The widow, having elected to accept the money, is bound by her election.

Wilbanks v. Wilbanks, 18 Ill. 19; *Waters v. Howard*, 1 Md. Ch. 112; *Beall v. Schley*, 2 Gill, 181, 41 Am. Dec. 415; *Rodermund v. Clark*, 46 N. Y. 354; *Morris v. Rexford*, 18 N. Y. 552; *Lilly v. Adams*, 108 Mass. 50; *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346.

Ratification is the adoption of a previously formed contract, notwithstanding a vice which renders it relatively void.

Pearson v. Chapin, 44 Pa. 9.

One who has an option whether he will affirm a particular act or contract must elect to affirm or disaffirm it altogether.

Chicago, B. & Q. R. Co. v. Chamberlain, 84 Ill. 333; *Louks v. Keniston*, 50 Vt. 116; *Brouer v. Callender*, 105 Ill. 88; *Chicago Pk. & Provision Co. v. Tilton*, 87 Ill. 547; *Aile v. Yellowhead*, 80 Ill. 208; *Kimball v. Lincoln*, 7 Ill. App. 470; *Frick v. Trustees of Schools*, 99 Ill. 167; *Webster v. Nichols*, 104 Ill. 160.

Having treated the contract as subsisting, *Mrs. Taylor* cannot now avoid it.

Jennings v. Gage, 13 Ill. 610, 56 Am. Dec. 476; *Kellogg v. Turpie*, 93 Ill. 265, 34 Am. Rep. 163; *Kimball v. Lincoln*, 7 Ill. App. 479; *People v. Stephens*, 71 N. Y. 527.

If a voidable contract is voluntarily acted on, it cannot afterwards be avoided when discovered to be advantageous to be avoided.

Eduards v. Roberts, 7 Smedes & M. 544; *Collier v. Thompson*, 4 T. Mon. 81.

Where a party to a contract which might be set aside on the ground of fraud nevertheless elects to treat the transaction as binding, he thereby loses his right to rescind it; for fraud only gives the right to avoid or rescind a contract.

Tisdale v. Buckmore, 33 Me. 461; *Bishes v. Ham*, 47 Me. 543; *Evans v. Gale*, 17 N. H. 573, 43 Am. Dec. 614; *Nichols v. Michael*, 23 N. Y. 264, 80 Am. Dec. 259; *Cobb v. Hatfield*, 46 N. Y. 533; *Bishop v. Fletcher*, 48 Mich. 555, 12 N. W. 37; *Chaffee v. Rutland R. Co.* 55 Vt. 110; *Crusselle v. Reinhardt*, 68 Ga. 619.

The effect of the antenuptial agreement was a positive exclusion of the marital property.

rights of *Mrs. Taylor*; and upon the death of *Taylor* intestate, without issue, his next of kin are entitled to the estate.

Gamble v. Nenn, 5 Sneed, 466; *Loftus v. Penn*, 1 Swan, 445; *Crum v. Sawyer*, 132 Ill. 463, 24 N. E. 956.

The subsequent marriage revoked the will. *Starr & C. Stat. chap. 39, § 10*; *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 956; *Hudnall v. Ham*, 172 Ill. 76, 49 N. E. 985; *McAnnulty v. McAnnulty*, 120 Ill. 26, 60 Am. Rep. 552, 11 N. E. 359.

Ignorance of the law in this respect will not change the rule.

Crum v. Sawyer, 132 Ill. 443, 24 N. E. 956.

The Hams must claim as legatees and devisees, or not at all. The antenuptial contract and will do not transfer any rights to the Hams.

Sloniger v. Sloniger, 161 Ill. 278, 43 N. E. 1111; *Woodward v. Woodward*, 5 Sneed, 51.

Expression of intention to make a gift will not amount to a contract, or sustain a decree for specific performance.

Galloway v. Garland, 104 Ill. 277; *Clark v. Clark*, 122 Ill. 388, 13 N. E. 553; *Bailey v. Edmunds*, 64 Ill. 125.

The instrument was not intended to take effect until the death of *Taylor*, and is purely testamentary in character and effect, and is ambulatory and revocable.

Badgley v. Votrain, 68 Ill. 25, 18 Am. Rep. 541; *Crary v. Rawlins*, 8 Ga. 450; *Kinnebrew v. Kinnebrew*, 35 Ala. 628; *Roth v. Michalis*, 125 Ill. 325, 17 N. E. 809.

An existing property right to some distinct subject-matter is essential to the existence of every trust, and any instrument, however perfect otherwise, which fails to disclose this, cannot properly be established as a declaration of trust.

Roth v. Michalis, 125 Ill. 325, 17 N. E. 809.

Where anything remains to be done to devest the title of the person declaring the trust, the transaction will remain incomplete and executory.

Young v. Young, 80 N. Y. 422, 36 Am. Rep. 634; *Bridge v. Bridge*, 16 Beav. 315; *Beech v. Kcep*, 18 Beav. 285.

An imperfect conveyance or assignment without consideration, which does not pass the legal title, will not be aided or enforced in equity.

Roth v. Michalis, 125 Ill. 325, 17 N. E. 809.

A claim based upon a resulting trust is subject to the statute of limitations.

Quayle v. Guild, 91 Ill. 384; *Albretch v. Wolf*, 58 Ill. 190; *McLafin v. Jones*, 155 Ill. 539, 40 N. E. 330; *McNamara v. Garrity*, 106 Ill. 388; *Reynolds v. Sumner*, 126 Ill. 58, 1 L. R. A. 327, 18 N. E. 334; *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530.

Proof that a guardian had money of his ward, or of another person, at the time he purchased certain property, does not prove that the property was purchased with the ward's or other person's money.

McGinnis v. Jacobs, 147 Ill. 24, 35 N. E.

214; *Francis v. Roades*, 146 Ill. 635, 35 N. E. 232.

Mention made, in the antenuptial contract, of a will, does not constitute an assignment to the beneficiaries.

Crum v. Sawyer, 132 Ill. 452, 24 N. E. 956; 2 Story, Eq. Jur. 987.

Messrs. William H. Green and C. S. Conger, for appellant Mary E. Taylor:

The antenuptial contract is not binding upon the complainant in the cross bill, because at the time of its execution she was ignorant of the facts concerning Mr. Taylor's property, and of the fact of his illegitimacy, and also because its terms are so unjust and manifestly inequitable.

Schouler, Husb. & W. § 360; *Kline's Estate*, 64 Pa. 124; *Bierer's Appeal*, 92 Pa. 266; *Pierce v. Pierce*, 71 N. Y. 154, 27 Am. Rep. 22; *Taylor v. Taylor*, 144 Ill. 445, 33 N. E. 532; *Achilles v. Achilles*, 151 Ill. 136, 37 N. E. 693; *Cleere v. Cleere*, 82 Ala. 588, 60 Am. Rep. 750, 3 So. 107.

Mrs. Taylor did not ratify or confirm the antenuptial contract by receiving the \$2,000, and executing her receipt therefor.

To have that effect she must have elected to receive the money in lieu of asserting her rights as widow and heir, with full knowledge of the facts, and not in ignorance of any fact material to her interest, and not under a misapprehension of her legal rights.

Gilman, C. & S. R. Co. v. Kelly, 77 Ill. 426; *Wurster v. Reitzinger*, 5 Ill. App. 112; *Cauffman v. Cauffman*, 17 Serg. & R. 25; Redf. Wills, §§ 748-754; *Adair v. Brimmer*, 74 N. Y. 539; *Cumberland Coal & I. Co. v. Sherman*, 20 Md. 117, 30 Barb. 575; *Lam-mot v. Bouly*, 6 Harr. & J. 516; *Spurlock v. Brown*, 91 Tenn. 243, 18 S. W. 868; *Reaves v. Garrett*, 34 Ala. 558; *Watson v. Watson*, 128 Mass. 152; *United States v. Duncan*, 4 McLean, 90, Fed. Cas. No. 15,002; *Dabney v. Bailey*, 42 Ga. 521; 2 Jarman, Wills, §§ 40-42; *Bradford v. Kent*, 43 Pa. 484; *Anderson's Appeal*, 36 Pa. 476; *Carder v. Fayette County Courts*, 16 Ohio St. 356; *Nass v. Vanswearingen*, 7 Serg. & J. 192; *Wilson v. Keller*, 9 Ill. App. 347; *Mulholland v. Bartlett*, 74 Ill. 63; *Hayes v. Massachusetts Mut. L. Ins. Co.* 125 Ill. 639, 1 L. R. A. 303, 18 N. E. 322; *Bailey v. Day*, 26 Me. 88; *Kane v. Morehouse*, 46 Conn. 305; *Northrop v. Graves*, 19 Conn. 548, 1 Am. Dec. 264; *Pearson v. Chapin*, 44 Pa. 17; *Larrabee v. Van Alstine*, 1 Johns. 307, 3 Am. Dec. 333; *Bierer's Appeal*, 92 Pa. 266; 2 Story, Eq. Jur. § 1097; *Cordrey v. Hitchcock*, 103 Ill. 271; *Streathfield v. Streathfield*, Cas. t. Talb. 176; *White & T. Lead. Cas. in Eq.* 570.

The widow did not ratify the antenuptial agreement by receiving the \$2,000: (1) Because she had no knowledge of the amount, kind, or character of the property of Jeremiah Taylor, deceased, at the time she signed the agreement; (2) because she did not have such knowledge at the time she received the money, and was not advised as to her rights as widow.

Peaslee v. Peaslee, 147 Mass. 183, 17 N. E. 506; *Watson v. Watson*, 128 Mass. 152; *Pierce v. Pierce*, 71 N. Y. 154, 27 Am. Rep. 48 L. R. A.

22; *Cowee v. Cornell*, 75 N. Y. 99, 31 Am. Rep. 428; *Graham v. Graham*, 143 N. Y. 590, 38 N. E. 722; *Rau v. Von Zedlitz*, 132 Mass. 164; *Kline v. Kline*, 57 Pa. 120; *Barnard v. Gantz*, 140 N. Y. 258, 35 N. E. 430; *Re Smith*, 95 N. Y. 523.

The acceptance of the money by Mrs. Taylor cannot be regarded as an estoppel, or an acquiescence by her in the terms of the antenuptial contract, unless she was fully aware of all her legal rights at the time, and intended to waive them. She could not acquiesce in that of which she was ignorant.

Herman, Estoppel & Res Judicata, § 1062, p. 1193; *Krumdick v. White*, 107 Cal. 37, 39 Pac. 1066; *Northwestern Mut. L. Ins. Co. v. Woods*, 54 Kan. 663, 39 Pac. 189; *Blair v. Wait*, 69 N. Y. 113; *Barnard v. Gantz*, 140 N. Y. 251, 35 N. E. 430; *Garnsey v. Mundy*, 24 N. J. Eq. 243; *Pratt v. Philbrook*, 41 Me. 132.

The will was revoked by the subsequent marriage of Jeremiah Taylor, and his widow at his death became his sole heir.

Hudnall v. Ham, 172 Ill. 76, 49 N. E. 985; *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 956; *McAnnulty v. McAnnulty*, 120 Ill. 26, 60 Am. Rep. 552, 11 N. E. 397; *Sloniger v. Sloniger*, 161 Ill. 278, 43 N. E. 1111; *Duryea v. Duryea*, 85 Ill. 41; *Tyler v. Tyler*, 19 Ill. 151; Rev. Stat. chap. 39, § 2, ¶ 3.

The antenuptial agreement was not an assignment of the prospective rights of Mrs. Farmer in the property of Jeremiah Taylor, and the receipt of the money did not create an equitable assignment of her rights as widow and sole heir of her deceased husband.

Sloniger v. Sloniger, 161 Ill. 278, 43 N. E. 1111; *Barrett v. Geisinger*, 179 Ill. 240, 53 N. E. 576; *Lennig's Appeal*, 182 Pa. 496, 38 Atl. 466; *Whiton v. Whiton*, 179 Ill. 32, 53 N. E. 722.

Messrs. George W. Wall and C. H. Patton, for appellees:

Section 2, chap. 39, entitled *Descents*, provides that the estate, real and personal, of vest in the widow or surviving husband and an illegitimate person shall descend to and children, and if there are no children, then in the widow or surviving husband.

Here there was a widow; hence the complainants, who are the children and descendants of children of the mother, cannot inherit.

The statute is in derogation of the rule at common law, and must be strictly construed.

Belanger v. Hersey, 90 Ill. 70; *Stoltz v. Doering*, 112 Ill. 234; *Bales v. Elder*, 118 Ill. 436, 11 N. E. 421; *Jenkins v. Drane*, 121 Ill. 217, 12 N. E. 684; *Orthwein v. Thomas*, 127 Ill. 554, 4 L. R. A. 434, 21 N. E. 430; *Cruik v. Aden*, 127 Ill. 232, 3 L. R. A. 327, 20 N. E. 73; *Williams v. Vanderbilt*, 145 Ill. 235, 21 L. R. A. 489, 34 N. E. 476; *Douglass v. Lewis*, 131 U. S. 75, 33 L. ed. 53, 9 Sup. Ct. Rep. 797.

The statute declares that marriage will revoke a prior will.

Where a statutory provision is but declaratory of the common law, the statute is to be construed precisely as the rule was at com-

mon law, and subject to all the exceptions which prevailed at common law.

Endlich, Interpretation of Statutes, No. 127, pp. 172, 173; Black, Interpretation of Laws, Nos. 95, 96, p. 234; *Baker v. Baker*, 13 Cal. 87; *Miles v. Williams*, 1 P. Wms. 252; *Smith v. Laatsch*, 114 Ill. 279, 2 N. E. 50; Sedgw. Stat. & Const. L. 29.

Revocation was inferred because of marriage, and to protect those who came in by virtue of marriage. Hence, whenever it appeared that the testator had made provision for those who came within the scope of his new duty thus assumed by antenuptial agreement or otherwise, the reason of the rule having failed, the rule itself would fail.

4 Kent, Com. 523; *Warner v. Beach*, 4 Gray, 163; *Kenebel v. Scrafton*, 2 East, 530; *Brush v. Wilkins*, 4 Johns. Ch. 506; *Wheeler v. Wheeler*, 1 R. I. 373; *Gackenbach v. Brouse*, 4 Watts & S. 546.

The will and the antenuptial agreement are one instrument.

Bradish v. Gibbs, 3 Johns. Ch. 523; *Brydges v. Chandos*, 2 Ves. Jr. 417; *Marlborough v. Godolphin*, 2 Ves. Sr. 78; 1 Jarman. Wills, 228.

They constitute a contract which the parties had power to make, and which may be enforced at the instance of the beneficiaries intended therein, the legatees and devisees in the will.

Sedgw. Stat. & Const. L. 87, 88; *Tombs v. Rochester & S. R. Co.* 18 Barb. 583; *Morrison v. Underwood*, 5 Cush. 52; *Phyfe v. Eimer*, 45 N. Y. 102; *Rumsey v. North-Eastern R. Co.* 14 C. B. N. S. 649; *Shutte v. Thompson*, 15 Wall. 151, 21 L. ed. 123.

It is competent for one to make an agreement for a certain disposition of his property by will or otherwise, and this may be enforced in equity, if upon valuable consideration. Marriage is such a consideration.

2 Story, Eq. Jur. § 1040b, note 4; 1 Story, Eq. Jur. § 354; 2 Bl. Com. 297; 1 Am. & Eng. Enc. Law, 1st ed. p. 830; *Green v. Broyles*, 3 Humph. 167, 39 Am. Dec. 156; *Maddox v. Rowe*, 23 Ga. 431, 68 Am. Dec. 535; *Frisby v. Parkhurst*, 29 Md. 58, 96 Am. Dec. 503; *Gupton v. Gupton*, 47 Mo. 37; *Carmichael v. Carmichael*, 72 Mich. 76, 1 L. R. A. 596; *Bolman v. Overall*, 80 Ala. 451, 2 So. 624; *Taylor v. Mitchell*, 87 Pa. 518; *Sharkey v. McDermott*, 91 Mo. 647, 60 Am. Rep. 270, 4 S. W. 107; *Manning v. Pippen*, 86 Ala. 357, 5 So. 572; *Ridgeway v. Underwood*, 67 Ill. 419; *Shephard v. Clark*, 38 Ill. App. 66.

When such agreement is to dispose of property by will, it may be enforced against the heirs or devisees of the party making the agreement, and will operate upon the property descending to them.

Whiton v. Whiton, 179 Ill. 32, 53 N. E. 722; *Barrett v. Geisinger*, 179 Ill. 246, 53 N. E. 576; *Neves v. Scott*, 9 How. 196, 13 L. ed. 102, 13 How. 268, 14 L. ed. 140; *Walker v. Walker*, 9 Wall. 753, *sub nom. Walker v. Beal*, 19 L. ed. 814; *Adams v. Adams*, 21 Wall. 190, 22 L. ed. 504.

Even if by the letter of the statute, strictly construed, it should be held that marriage

revokes a prior will under all circumstances and without exceptions, yet the will may take effect as a part of the antenuptial settlement, and will estop the widow from interposing an objection to its full enforcement.

Lant's Appeal, 95 Pa. 279, 40 Am. Rep. 646.

Carter, J., delivered the opinion of the court:

Upon the final hearing, where the greater part of the testimony of the witnesses was heard in open court, the chancellor rendered the decree appealed from, finding the issues in favor of the Hams, and dismissing both the amended bill and the cross bill. From this decree the Hudnalls and the widow have taken separate appeals, but these appeals have been considered together, and will be disposed of here as one case. The cross bill was not before us when the case was here on error, 172 Ill. 76, 49 N. E. 985, and it was there said that the rights of the widow under her cross bill were not affected by that decision, except that, as the bill alleged, the antenuptial contract having been fully performed by her acceptance of and receipt for the money under it, the burden rested upon her to show, if she could, any sufficient grounds upon which it could be set aside. We have carefully considered all of the evidence, and cannot avoid the conclusion, reached also by the court below, that she has not sustained this burden, but has failed to establish the allegations of her cross bill that she was deceived by Jeremiah Taylor as to the extent and value of his property, and as to the facts upon which her right to inherit his property would depend, or that the same were concealed from her. We cannot find, from the evidence, that the contract was not fairly entered into, or not fairly carried out. It is clearly shown that she approved and joined in Taylor's desire that the bulk of his property should go to his said two stepsons, whom, as she knew, he had brought up from boyhood in his family, with the same affectionate care as if they had been his own children, and who had aided him in the acquisition of his property. While it is doubtless true that she accepted and receipted for the \$2,000 in ignorance of the law that her marriage with Taylor revoked the will which he had made in favor of the Hams, still, no deception was practised upon her, and the Hams seemed to know no more of that subject than she, and evidently Taylor died in the belief that his property would pass in accordance with his will and the antenuptial contract. Such was the intention of both parties to this contract, shown both by the contract itself and the circumstances under which it was entered into. Her mere ignorance of the law cannot be availed of by her to overturn the settlement.

Counsel for appellees make the contention, and cite authorities to support it, that the marriage was only a presumptive revocation of the will, and that that presumption was in this case rebutted by the antenuptial

agreement. But in effect the decision of this court when the case was here before on demurrer to the bill was that the will was revoked by the subsequent marriage, notwithstanding the antenuptial agreement. The question has been settled, at all events, by this court, in *McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. 397, where it was held that under the provision of the statute that "a marriage shall be deemed a revocation of a prior will" a marriage operates *per se* as such revocation. It follows, therefore, that Taylor's will was revoked by his subsequent marriage, and that the devisees and legatees therein named cannot take the property under that instrument as a will. Nor can they take it at all unless the antenuptial agreement and the instrument executed as a will, when taken and construed together, constitute an equitable assignment of the property to them which a court of equity will enforce to carry the contract into effect in accordance with the intention of the parties to it. It follows, also, that the widow is barred by the antenuptial contract and its full performance, unless the inheritance is cast upon her as the sole heir, for the reason that, as a matter of law, it can go nowhere else. Section 2 of chapter 39 of the Revised Statutes, in regard to descent, after providing that an illegitimate child shall inherit from its maternal ancestor, etc., provides: "Second, the estate, real and personal, of an illegitimate person, shall descend to and vest in the widow or surviving husband and children, as the estate of other persons in like cases; third, in case of the death of an illegitimate intestate leaving no child or descendant of a child, the whole estate, personal and real, shall descend to and absolutely vest in the widow or surviving husband; fourth, when there is no widow or surviving husband, and no child or descendants of a child, the estate of such person shall descend to and vest in the mother and her children, and their descendants,—one half to the mother, and the other half to be equally divided between her children and their descendants, the descendants of a child taking the share of their deceased parent or ancestor; fifth, in case there is no heir as above provided, the estate of such person shall descend to and vest in the next of kin to the mother of such intestate, according to the rule of the civil law; sixth, when there are no heirs or kindred, the estate of such person shall escheat to the state, and not otherwise." It is clear from the evidence that Taylor was the illegitimate son of Sallie Taylor, who, by her subsequent marriage, became the maternal ancestor of the appellants, the Hudnalls, and that, if Taylor had left no widow they would have been his heirs at law; his mother, Sallie Taylor, having previously died, and he never having had any child. The grounds, then, upon which the respective parties claim the property in controversy are reduced to these: The Hudnalls claim as Taylor's heirs at law under the statute; the Hams claim as equitable assignees under the antenuptial agreement, coupled with the instrument which, as 48 L. R. A.

a will, was revoked by Taylor's marriage; the widow claims that Taylor left no heir at law but herself, and that, being the sole heir, under the statute she is entitled to the property notwithstanding her agreement. The Hudnalls, by their bill, are the moving parties in the controversy, and their contention will be considered first.

At common law an illegitimate had no inheritable blood; could neither inherit nor transmit by inheritance, save to those of his own body. The right of an illegitimate to inherit property, and the right of others, though legitimate, to inherit from him through the maternal line, are conferred by the statute, and can have no existence in any case which does not come within the statute. The second paragraph—that "the estate, real and personal, of an illegitimate person, shall descend to and vest in the widow or surviving husband and children, as the estate of other persons in like cases"—has nothing to do with the case at bar, as mistakenly supposed by appellants, the Hudnalls. It confers no rights whatever upon collaterals. It simply gives to the surviving husband or wife and children of an illegitimate the same rights of inheritance from the deceased parent that they would have had if he or she had been legitimate. And by the third paragraph the widow, Mary E. T. Taylor, is made the sole heir of her deceased husband. Counsel for Hudnalls claim under the fourth paragraph of the statute. Had Mary E. T. Taylor died first, or had there been no widow, it is plain that they could inherit under this clause, as they were children and descendants of deceased children of Sallie Taylor, the mother of Jeremiah Taylor. But the difficulty with their position is that the statute would make them heirs only in case Taylor left no widow, and he did leave a widow. It is immaterial whether the widow has assigned, or has barred or estopped herself from taking or not, as their right to inherit does not, under the statute, depend on any act or contract of hers, but, so to speak, on her nonexistence at Taylor's death. They cannot take under the statute and against the statute at the same time. They are not his heirs at law at all, because he left surviving him a widow. If we were at liberty to interpolate words in the statute, and make it read, "When there is no widow who has not released, or who is not barred or estopped by contract, the estate shall descend," etc., the Hudnalls could be declared the heirs; but we have no authority to add to or qualify the statute, or to pervert its plain meaning. Mary E. T. Taylor is no less the widow of Jeremiah Taylor because she executed the antenuptial agreement. She was his lawful wife, and upon his death became his lawful widow, and her antenuptial contract cannot be used to confer heirship upon these appellants, where none is conferred by law. Heirship is not created by contract, but by law only. Persons who inherit are heirs at law, not heirs by contract.

It is insisted by counsel for the Hudnalls that their contention is supported by *Crum*

v. *Sawyer*, 132 Ill. 443, 24 N. E. 956; that is, that the antenuptial agreement had the same effect to make them the heirs as would the death of the widow before the death of her husband. But in this they are in error. What was there said was in reference to the effect of the antenuptial contract on the rights of the surviving husband and other heirs, where there were other heirs at law of the wife, he being only one of such heirs. It was not held or intimated that the effect of the contract was to make persons heirs at law who were not so by law, but only to enlarge the portions which the other heirs would take. And such, of course, would be the necessary effect, for the release of one heir to the estate would operate to increase the shares of the rest without at all changing the legal status of heirship.

Again, it is difficult to see upon what principle of equity a court of equity could proceed to grant the relief prayed for. To give the antenuptial agreement the effect contended for would violate equities of the strongest character, and would be to enforce only a part of the contract,—just enough of it to dispose of the widow out of the way of the other appellants,—and then, ignoring the rest of it, to violate the clearly expressed intention of the contracting parties by disposing of the property in utter disregard of the sole purpose for which the contract was made. It is to be noted that the Hudnalls rely upon this contract, for without it they concede that the widow would be the sole heir, and they would have no rights, as heirs or otherwise. The contract, however, shows on its face that it was not made for their benefit, but for the benefit of others; that is, to dispose of the property at Taylor's death to the persons as named in his will. The Hudnalls assume the same position toward the contract as toward the statute; that is, while claiming by virtue of it, they at the same time claim against its provisions. This they cannot be permitted to do. They cannot avail themselves of so much of the contract as is favorable to them, and disregard or override that which is against them. The contract should be enforced altogether, if at all, and not partially (2 Story, Eq. Jur. §§ 986, 1077, and notes), and so as to carry into effect the intention of the contracting parties, and not to thwart that intention.

It clearly appearing, then, that the Hudnalls are not entitled to the property, the question remains whether the widow, as sole heir of her deceased husband, is entitled to it, or whether there was an equitable assignment of it to the Hams. It is plain that it did not escheat, for the sixth paragraph of the statute provides that, "when there are no heirs or kindred, the estate of such person shall escheat to the state, and not otherwise." Clearly then unless the antenuptial contract, in connection with the instrument revoked as a will by operation of law, constitutes an equitable assignment to the Hams,—the persons named as beneficiaries in the so-called will,—the widow is entitled to the property as the sole heir, for, if the contract does not have this effect, it

cannot, under the facts in this case, have any effect whatever. As a mere release or relinquishment for the benefit of the heirs of the deceased, there being no heir but herself, the instrument could have no more effect than one made for her own benefit. But we are of the opinion that the contract has all the effect of an equitable assignment of all her interest in the property to the intended beneficiaries, as expressed in the instrument executed by Taylor for his last will. It is too well settled to require discussion that contingent interests and expectancies, and things having no present existence, but which rest only in possibility, may, by contract bona fide made, and for a sufficient consideration, be assigned so as to be binding in equity. Such a contract will be enforced in equity after the subject-matter of it has come into existence. *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 956; 2 Am. & Eng. Enc. Law, 2d ed. p. 1029, and notes. Thus, it was said by this court in *Crum v. Sawyer*: "This court has repeatedly held that estates in expectancy, though contingent, are proper subjects of contract, and therefore that assignments by expectant heirs of their future contingent estates, when made fairly and upon valuable considerations, though inoperative at law, will be enforced in equity as executory agreements to convey." 132 Ill. 461, 24 N. E. 960; *Ridgeway v. Underwood*, 67 Ill. 419. It is also well settled that it is competent for persons owning property or interests therein to make a contract to dispose of it, by will or otherwise, in a certain way, and that such a contract, based upon a sufficient consideration, will be enforced in equity. *Whiton v. Whiton*, 179 Ill. 32, 53 N. E. 722; *Barrett v. Geisinger*, 179 Ill. 240, 53 N. E. 756. It is also true that several instruments may be taken and construed together as constituting one entire contract. *Freer v. Lake*, 115 Ill. 662, 4 N. E. 512; *Wilson v. Roots*, 119 Ill. 379, 10 N. E. 204. Taylor had been appointed the legal guardian of his stepsons when they were infants, and had received certain moneys belonging to them, and there was no record or other evidence whether or not he had ever accounted for or paid the same; but the evidence is undisputed that he stood *in loco parentis* to them from his marriage to their mother, and, after they grew to manhood, still regarded them as his sons, and until his death cherished the lifelong purpose of making them the beneficiaries of all of his property. To accomplish this purpose, he made the will in question, and the contract with his second wife before his marriage. The record shows that she was fully informed of substantially all of these facts, and was willing to assist him in carrying out his long-cherished purpose. Under these circumstances the antenuptial agreement was made, which, in addition to the usual provisions of release and relinquishment in such instruments, contained this provision: "Said party of the second part hereby declares that she has been informed of the execution of a will by the party of the first part, by the terms of which his entire estate, whether in

possession or expectancy, has been devised and bequeathed to persons other than herself; and she further declares that such disposition of the property of the first party meets with her approval, and will not be interfered with by her in any way, either during the lifetime of the party of the first part or thereafter." It appears, also, that the will in question was the will referred to, and that after Taylor's death and the probate of the will she received from O. M. D. Hams, the executor, the \$2,000, and gave her receipt for the same, which receipt stated, among other things, that it was given for "the amount due me by the terms of the antenuptial agreement between the undersigned and said Jeremiah Taylor, deceased, and in full of all claims against said estate, either under said last will and testament, or said antenuptial agreement, or otherwise." The receipt also recited that she had received certain other articles of personal property which had been given to her by Taylor in his lifetime.

It seems too clear for argument, upon the facts and circumstances under which the will and antenuptial agreement were made, and from the reference to the will in the agreement, and her covenant not to interfere with its provisions, that the written instrument intended as a will became a part of the whole agreement between the parties, notwithstanding the operation of the statute revoking the instrument as a will. It was still an intelligible written declaration of Taylor's wishes and intentions that the property should go to the Hams at his death, and, though inoperative as a will, the written contract, signed by him and by the widow, who was his sole heir, made it operative as a part of their contract. Her contract of approval was a contract of confirmation, and her covenant not to interfere in any way with the disposition of the property thus made is binding upon her, especially in view of her ratification and full performance of the contract after Taylor's death. Construing the instrument intended as a will and the antenuptial agreement as one entire contract, its effect was a binding agreement between the only two parties having any interest in the property, either in possession or expectancy, that upon Taylor's death the whole title of the property should vest in the Hams, as provided in the instrument called a will.

While no case precisely in point has been cited by counsel on either side, we are referred to many cases which announced and applied equitable principles to carry out the intention of the parties, which are equally applicable here. Thus, in *Lant's Appeal*, 95 Pa. 279, 40 Am. Rep. 646, on the eve of marriage, the man and woman agreed verbally that she should dispose of her property, which was of large value, as she pleased, whereupon she made a will, giving a liberal portion to her intended husband and the rest to relatives and charities, and thereupon they were married. Two years thereafter she died. The husband contested the will, and claimed the entire estate, but it was held that, while the will was revoked, under the

statute, by the marriage, it would, in connection with the verbal agreement, be enforced in equity as an antenuptial contract, and that the husband was estopped from interfering with its full enforcement. See also *Bradish v. Gibbs*, 3 Johns. Ch. 532; [*Jones v. Morley*] 1 Ld. Raym. 290; [*Rutland v. Rutland*] 2 P. Wms. 209. Also *Neves v. Scott*, 9 How. 196, 13 L. ed. 102; *Id.*, 13 How. 268, 14 L. ed. 140,—where an antenuptial agreement was enforced which provided that the property of each of the contracting parties should be held in common after their marriage during their joint lives, and by the survivor during his or her life, and then should be equally divided among the heirs of the man on the one hand and of the woman on the other. There were no direct heirs, and evidently none were contemplated by the contracting parties, and it was held that their collateral heirs could enforce the contract; that they were not volunteers, but came fairly within the influence of the considerations upon which the agreement of the parties was founded, and were the special objects of their bounty. It was said by the court in that case that "courts will endeavor, as much as possible, to give effect to marriage agreements according to the understanding of the parties." There would seem to be no serious difficulty in the case at bar in carrying into effect the marriage settlement under consideration.

Nor do we regard the suggestion of counsel, even if it be correct, that Taylor was not deprived, by the antenuptial agreement, of the power to change his will, but that it remained ambulatory till his death, and might have been changed altogether, as fatal to the contentions of the Hams. As a matter of fact, he did not modify or change it. The antenuptial agreement would not have been invalid if it had in express terms reserved to Taylor the power to make a different disposition of his property freed from all claims of the widow.

It is further suggested that the contract was not sufficient to bar or release the widow's dower. She was the sole heir, and there was no separate dower interest, and no question of homestead is involved in the case.

It is next said that, as the Hams filed no cross bill, they can have no relief. It is sufficient to say that the decree appealed from granted them no affirmative relief, but simply found the issues in their favor, and dismissed the bill of the Hudnalls and the cross bill of the widow, which attacked their right to and possession of the property. The Hudnalls had no right to it whatever, and the widow had disposed of her right to it by contract, and had estopped herself from interfering in any way with the Hams in the assertion of their claims.

The decree is right from every standpoint and it will be affirmed.

Cartwright, Ch. J., and Phillips and Magruder, JJ., dissent.

Rehearing denied February 17, 1900.

Walter F. WYMAN, Appt.,
v.

FORT DEARBORN NATIONAL BANK
OF CHICAGO *et al.*

(181 Ill. 279.)

The holder of a check drawn by a bank which becomes insolvent before its presentation, whereupon the drawee bank, without knowledge of the check, applies the deposit upon its own claims against the insolvent bank, is entitled to be subrogated to any collateral which the drawee bank has after its own claims are satisfied.

(October 16, 1899.)

APPEAL by plaintiff from a judgment of the Appellate Court, First District, reversing a judgment of the Superior Court for Cook County in plaintiff's favor in an action brought to compel payment of a check drawn upon the defendant bank by the insolvent First National Bank of Helena, Montana. *Reversed.*

Statement by Phillips, J.:

On September 1, 1896, the First National Bank of Helena, Montana, drew its check upon the Fort Dearborn National Bank of Chicago for \$10,000, in favor of appellant. At the time this check was given, the Fort Dearborn National Bank had in its possession, on deposit to the credit of the First National Bank of Helena, \$20,523.67. The Fort Dearborn National Bank at the same time held a certificate of deposit of date May 15, 1895, from the First National Bank of Helena, in the sum of \$25,000, which latter was secured by collateral for the face amount of \$30,000 of notes taken by the First National Bank of Helena and indorsed to the Fort Dearborn National Bank. The Helena bank was indebted to the Fort Dearborn National Bank, on account, \$649.89. On the 4th day of September, 1896, the Helena bank was placed in the hands of a receiver, and on the same day the Fort Dearborn National Bank transferred the account on deposit with it to the amount of \$20,523.67 to itself, and credited its certificate of deposit with that amount, debiting the Helena bank with the same sum, and leaving a balance due the Fort Dearborn National Bank of \$2,321.39, with interest thereon. On the 5th day of September the check drawn in favor of appellant was presented for payment to the Fort Dearborn National Bank, which was refused. On the 21st day of January, 1897, the appellant filed in the superior court of Cook county his bill, making the Fort Dearborn National Bank and the receiver of the Helena bank defendants, and sought to marshal assets. To this bill of complaint a demurrer was interposed and overruled. Subsequently the defendants to the bill filed an answer, and the cause was submitted upon bill and answer, and a decree was entered in accordance with the prayer of the bill, to reverse which the de-

fendants sued out a writ of error to the appellate court for the first district, where the decree was reversed, and the cause remanded, with directions to dismiss the bill, whereupon the appellee in the appellate court prosecuted this appeal.

Messrs. Peckham, Brown, & Packard, for appellant:

By the execution and delivery of its check for \$10,000 on a deposit account of bankable funds in the Fort Dearborn Bank sufficient in amount to meet it, the First National Bank of Helena, on September 1, 1896, assigned and transferred *pro tanto* to Wyman that deposit account.

National Bank v. Indiana Bkg. Co. 114 Ill. 483, 2 N. E. 401; *Abt v. American Trust & Sav. Bank*, 159 Ill. 467, 42 N. E. 856; *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531, 30 L. R. A. 479, 49 N. E. 420.

Under these circumstances equity would compel the Fort Dearborn bank, having recourse on two funds, to exhaust the one on which it alone had a claim, in order that the other, in which alone Wyman had an interest, should go as far as possible to the satisfaction of his claim upon it.

Upon this theory the bill in this cause was framed, and upon this theory the decree was entered, and it presents a plainly proper case of the "marshaling of assets."

2 Beach, Modern Eq. Jur. § 784; 1 Story, Eq. Jur. §§ 635, 636; *Aldrich v. Cooper*, 8 Ves. Jr. 381, 2 White & T. Lead. Cas. in Eq. 82; 27 Am. L. Reg. N. S. p. 739; 14 Am. & Eng. Enc. Law, *Marshaling Assets*; *Milmine v. Bass*, 29 Fed. Rep. 632; *James v. Hubbard*, 1 Paige, 228; *Clowes v. Dickenson*, 5 Johns. Ch. 235, 9 Cow. 402; *Ingalls v. Morgan*, 10 N. Y. 178; *Campbell v. Carter*, 14 Ill. 286; *Young v. Morgan*, 89 Ill. 200.

It is sufficient if the funds were both in existence when the "claims or interests" accrued, and if, when the aid of equity is invoked, the doctrine of marshaling assets can then be applied without injury, delay, or embarrassment to the paramount creditor.

27 Am. L. Reg. N. S. p. 739; *James v. Hubbard*, 1 Paige, 228; *Clowes v. Dickenson*, 5 Johns. Ch. 235, 9 Cow. 402.

In equity, at least (no other change taking place in the state of accounts between the banks, no money or security passing between them, and no other check being given or presented before the presentation of ours or before the filing of our bill), the mere bookkeeping entries by which the Fort Dearborn Bank "appropriated" the "fund" on deposit made no difference in the actual existence of the two funds.

1 Beach, Modern Eq. Jur. § 7; *Young v. Morgan*, 89 Ill. 199.

Even if there were an "appropriation" actually made of the fund on deposit, before notice was given to the Fort Dearborn Bank of the assignment to Wyman of \$10,000 thereof, and in consequence that fund had ceased to exist, yet, nevertheless, to accomplish the purpose of protecting Wyman's undoubted rights so far as it could be done without injury to itself (no third parties' rights having intervened), it became the

NOTE.—As to subrogation to collateral, see also some cases in note to *Boone v. Clark* (Ill.).
L. R. A. on pages 288-290.

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duty of the Fort Dearborn Bank on receiving notice of such assignment to Wyman to revoke its "appropriation," and bring the deposit fund again into ostensible and technical, as well as actual, existence.

1 Beach, Modern Eq. Jur. § 8; Story, Eq. Jur. § 640; 1 Pom. Eq. Jur. §§ 364-368.

The receiver has no rights beyond those which the bank itself would have had.

Gibson v. Seagrim, 20 Beav. 614.

Messrs. Gilbert & Fell for appellees.

Phillips, J., delivered the opinion of the court:

It is insisted by the appellant that by the execution and delivery of its check for \$10,000 against the deposit account of the Fort Dearborn National Bank the First National Bank of Helena assigned and transferred to the appellant, from that deposit account, an amount sufficient to pay the check on September 1, 1896, the time at which it was drawn; and as sustaining this contention appellant cites *National Bank v. Indiana Bkg. Co.* 114 Ill. 483, 2 N. E. 401; *Abt v. American Trust & Sav. Bank*, 159 Ill. 467, 42 N. E. 856; and *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531, 39 L. R. A. 479, 49 N. E. 420. The principle is clearly established by the foregoing and other authorities in this state, that the check of a depositor upon his banker, delivered to another for value, transfers to that other the title to so much of the deposit as the check calls for, and the banker becomes the holder of the money for the use of the holder of the check, and is bound to account to him for the amount thereof, provided the party drawing the check has funds to that amount on deposit, subject to his check, at the time the same is presented. *Munn v. Burch*, 25 Ill. 35. The check operates as an absolute assignment of the fund on which it is drawn from the time it is delivered, as between the drawer and the payee, and the bank is bound as soon as the check is presented, and whatever sum stands upon the books to the credit of the depositor at the time of such presentation is absolutely assigned to the holder of the check. *Bickford v. First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436; *Brown v. Leckie*, 43 Ill. 497; *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398; *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212, 22 Am. Rep. 185; *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634, 12 L. R. A. 492, 27 N. E. 533; *Niblack v. Park Nat. Bank*, 169 Ill. 517, 39 L. R. A. 159, 48 N. E. 438. And the relation existing between the drawer, the check holder, and the banker becomes such, when there are sufficient funds on deposit to meet the check at the time of presentation, that, because such funds were appropriated at the time of the drawing of the check, the contract to be implied between the depositor, the banker, and the check holder is that the check holder, whoever he may be, may have his action, and recover against the bank the amount, *pro tanto*, of the check. *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531, 39 L. R. A. 479, 49 N. E. 420. In the latter case it was said (page 536, 171 Ill., page 48 L. R. A.

481, 39 L. R. A., and page 422, 49 N. E.): "If the funds are in the bank when the check is drawn, the drawing is an appropriation, as between the drawer and the payee, of the sum of money named in the check, which is to lie in the bank until called for by a presentation of the check. It is true that in such a case there is no privity between the bank and the check holder until presentment, and that priority in drawing a check does not give priority of right to the fund as against the banker, but that such priority of right is determined by the order of presentation." It was held in *Niblack v. Park Nat. Bank* (page 521, 169 Ill., page 161, 39 L. R. A., and page 439, 48 N. E.): "It is also the law, where a bank holds a demand note, or a note past due, it has the right to charge such obligation up against the maker's deposit account; and, if it does so before a check drawn by the depositor is presented for payment, it will be entitled to hold the deposit against any check afterwards presented." In this case, on the 4th of September—at least one day before the presentment of the check for payment—the Chicago bank transferred the account; and by proper entries on its books credited the Helena bank with all the money held by it to the credit of the latter bank, which credit was made on a certificate of deposit, which was, in effect, a demand note. *Hunt v. Divine*, 37 Ill. 137; *Tripp v. Curtin*, 36 Mich. 494, 24 Am. Rep. 610. Appropriating the deposit fund in good faith, in pursuance of strict legal rights, for the purpose of protecting its own interests, and without notice of the appropriation of the money by drawing the check in favor of appellant, was not a wrongful act, but one authorized by law, and absolutely transferred the legal and equitable right to the fund so deposited to the Fort Dearborn National Bank, the check not having been presented to it, nor it having any notice of the same, until the day after the transfer of the account. Under the recognized rule in this state there was between the Helena bank and the payee of the check an absolute assignment of \$10,000, then on deposit with the Fort Dearborn National Bank, and no right existed in the Helena bank to change that deposit in any way, or to so draw against it as to prevent the assignment *pro tanto* from being carried out. It is clear that the holder of the check had an interest in the fund so assigned, while it is equally clear that until the bank had notice it could pay subsequently drawn checks, or credit the amount of the deposit on any overdue paper of its own. The equitable interest of the check holder, however, remained the same.

It is a principle controlling the marshaling of securities that where one creditor can resort to two funds, and another to one of them only, the former must seek satisfaction out of that fund which the latter cannot touch. In 3 Pom. Eq. Jur. § 1414, it is said: "If, therefore, the prior creditor resorts to the doubly charged fund, the subsequent creditor will be substituted, as far as possible, to his rights. These rules must be tai-

and with the modifications and exceptions that in their application the paramount encumbrancer shall not be delayed or inconvenienced in the collection of his debt, . . . that the rights of third parties shall not be prejudiced, and that the parties themselves are creditors of the same debtor." Numerous authorities are there cited as sustaining these propositions. The principle of marshaling securities has been frequently applied to cases where there is an equitable interest or lien on collateral securities. In *Colebrooke on Collateral Securities* it is said (§ 98): "By this rule, a creditor having a lien upon two funds for payment of his debt, and a subsequent creditor a lien upon one only of such funds, the former is required to exhaust his remedy against the fund which is especially given for his security before resorting to that in which the subsequent creditor is interested. The rule, however, is never enforced in cases where it would cause an injury or damage to a creditor holding such liens upon separate funds, or would work injustice to other parties. The rule was applied where a merchant had forwarded his note to a broker for sale, and the proceeds, less commissions, remitted. The broker fraudulently pledged the note, with other collaterals, to a bank, to secure a loan to himself, of which the merchant received nothing. The merchant, learning of the misappropriation, gave notice to the bank, and claimed to be subrogated to any surplus arising from other securities held by it after payment of the loan. Subsequently, and before the maturity of the loan, the note fell due, and was paid without suit. Upon realizing the other securities, the bank held a surplus in its hands. The merchant was entitled to be paid from such surplus, his voluntary payment not affecting his right of recovery." This principle is sustained by *Farwell v. Importers' & T. Nat. Bank*, 90 N. Y. 483. In that case the merchant had an equitable interest in collaterals, which, with his note, were put up to secure the loan to the broker by reason of the broker's misappropriation of the note, and it is not, equitably, a stronger case for the marshaling of assets than where, as in this case, the bank had as security for its certificate of deposit and for its account due notes aggregating about \$30,000, and a deposit of over \$20,000. Here, \$10,000 of the amount deposited having been equitably assigned to the complainant, by reason of its appropriation by the bank before receiving notice of the drawing of the check the complainant was deprived of all interest in the deposit, and the Helena bank, or its receiver (who could have no greater interest than the bank itself), received the benefit of the application of the deposit by the Fort Dearborn National Bank on its certificate of deposit, and the complainant, as holder of the check, had such an interest in the sum deposited that he should be subrogated, as against the Helena bank or its receiver, to the notes held by the Fort Dearborn National Bank after the payment of the residue due the latter bank; and this principle of subrogation is

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applicable because, by reason of the appropriation of the fund by the bank with which the deposit was made to the payment of a debt for which it held two distinct characters of securities, one of those securities is, to an extent sufficient to pay the complainant, released from liability so far as the Fort Dearborn National Bank was concerned, and the latter bank had lawfully used \$10,000 of a deposit theretofore assigned to the complainant by the Helena bank. 2 Beach, *Modern Eq. Jur.* § 784; 1 Story, *Eq. Jur.* §§ 635, 636.

It is a maxim of equity that "equity regards and treats that as done which in good conscience ought to be done," and in writing of this maxim Mr. Pomeroy, in his work on *Equity Jurisprudence* (vol. 1, § 365), says: "The principle involves the notion of an equitable obligation existing from some cause; of a present relation of equitable right and duty subsisting between two parties,—a right held by one party, from whatever cause arising, that the other should do some act, and the corresponding duty—the ought—resting upon the latter to do such act. Equity does not regard and treat as done what might be done or what could be done, but only what ought to be done. Nor does the principle operate in favor of every person, no matter what may be his situation and relations, but only in favor of him who holds the equitable right to have the act performed, as against the one upon whom the duty of such performance has devolved." A court of equity, acting upon this fundamental principle, may go beneath the appearance of things, and deal with the real facts, where the interest is a purely equitable one, recognized by courts of equity alone. When, therefore, a prior encumbrancer of two funds, by his election of remedies, deprives a junior encumbrancer who has a lien upon one of the funds only, from reaching the particular fund on which he has a lien, the junior encumbrancer, to the extent of his lien, should be substituted to the lien of the paramount encumbrancer upon the other fund bound, as against the debtor and all claiming under him by lien or title subsequent in time. *Gibson v. Seagrims*, 20 Beav. 614; *James v. Hubbard*, 1 Paige, 228; *Clowes v. Dickenson*, 5 Johns. Ch. 235. Under a bill for marshaling securities relief may be had in that character of case. The Fort Dearborn National Bank had a right to apply the deposit in payment of the indebtedness *pro tanto* to the extent of the deposit, and deprive the check holder of any part of that deposit as a fund assigned to him; but he had such an equitable interest in that fund, by reason of its assignment by the check, that he is entitled to be subrogated to the extent of his check, with interest thereon from the time it was presented, to the fund to be derived from the collection or sale of the collateral securities held by the Fort Dearborn National Bank as security on its certificate of deposit and bank account, after the residue is paid to it. The superior court erred in decreeing that the Fort Dearborn National Bank

should deliver to the receiver of the First National Bank of Helena the collateral notes, but did not err in decreeing that from the proceeds of the same there should first be paid to the Fort Dearborn National Bank the amount, including interest, due it, and to pay to Wyman the amount due on said check and interest, and to retain the balance as part of the assets of the First National Bank of Helena. Nor was there error in the decree of the superior court in directing, if there was not enough to pay Wyman in full, the amount unpaid should be allowed as a claim against said First National Bank of Helena, to be paid in due course of administration of its assets, and that the receiver pay the costs. It was error in the appellate court for the first district to reverse the entire decree of the superior court, and remand the cause with directions to dismiss the bill. So far as the superior court decreed that the Fort Dearborn National Bank deliver to the receiver of the First National Bank of Helena the collateral notes, its decree is reversed, but in all other respects the decree of said court is affirmed.

For the error of the appellate court for the first district in reversing the entire case, and remanding with directions to dismiss the bill, its decree is reversed, and the cause is remanded.

INTER-OCEAN PUBLISHING COMPANY,
App't.,
v.

ASSOCIATED PRESS.

(184 Ill. 488.)

1. A corporation engaged in collecting and vending news, with charter power to own and operate telegraph lines and exercise the right of eminent domain, cannot discriminate between newspaper publishers in the sale of its news, since its business is affected with a public interest.
2. A by-law of a press association, which provides that its members shall not furnish its special news to, or receive news from, any person or corporation which shall have been declared antagonistic to such association, is void as creating a monopoly.

(February 19, 1900.)

APPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of defendant in an action brought to enjoin defendant from interfering with plaintiff's procurement of news for its paper. *Reversed.*

The facts are stated in the opinion.

Messrs. Knight & Brown, for appellant:

The appellee did not have the right to can-

NOTE—For unlawful discrimination between newspapers in furnishing news by telegraph, see also *Western U. Teleg. Co. v. Call Pub. Co.* (Neb.) 27 L. R. A. 622.

For telegraph companies as common carriers which cannot discriminate between patrons, see also *Kirby v. Western U. Teleg. Co.* (S. D.) 30 L. R. A. 612.
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cel the contract between the appellant and appellee, and thereby deprive appellant of the news service therein provided for, on the ground that appellant was receiving news from parties declared by the appellee antagonistic to it.

People ex rel. Paris & D. R. Co. v. Holdco, 82 Ill. 93; *Sanger v. Chicago*, 65 Ill. 506; *Risinger v. Cheney*, 7 Ill. 84; *Walker v. Tucker*, 70 Ill. 527.

If any part of the contract is illegal and void, then such illegal and void parts are separable from the provisions thereof which provide for furnishing to the appellant the news service therein specified.

Brown v. Rounsavell, 78 Ill. 591; *Wclty v. Jacobs*, 171 Ill. 632, 40 L. R. A. 98, 49 N. E. 723; *Baldwin v. Fletcher*, 48 Mich. 604, 12 N. W. 873; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315.

Covenants may be treated as independent. *Pollak v. Brush Electric Assn.* 128 U. S. 455, 32 L. ed. 478, 9 Sup. Ct. Rep. 119; *Commercial Union Teleg. Co. v. New England Teleg. & Teleg. Co.* 61 Vt. 241, 5 L. R. A. 161.

Illegal by-laws are not binding on a member, though he assents thereto.

Vierling v. Mechanics' & T. Sav. Loan & Bldg. Assn. 179 Ill. 527, 53 N. E. 979; *People ex rel. Elliott v. New York Cotton Exchange*, 8 Hun, 216; *People ex rel. Schmitt, v. Saint Francis Benev. Soc.* 24 How. Pr. 221; *Leech v. Harris*, 2 Brewst. (Pa.) 571.

The by-laws and contract, in so far as they restrain the sale of the stock, are void as being against public policy.

MaVulla v. Corn Belt Bank, 164 Ill. 427, 45 N. E. 954; *Morgan v. Struthers*, 131 U. S. 246, 33 L. ed. 132, 9 Sup. Ct. Rep. 726; *People v. Milk Exchange*, 145 N. Y. 267, 27 L. R. A. 437, 39 N. E. 1062; *Humphreys v. McKissock*, 140 U. S. 304, 35 L. ed. 473, 11 Sup. Ct. Rep. 779.

Appellee, by reason of the provisions of its charter giving to it the power of eminent domain, and the nature of its business, and the fact that it has a monopoly of that business, is bound to serve appellant without discrimination, if the contract shall be held by the court to be null and void.

New York & C. Grain & Stock Exchange v. Chicago Bd. of Trade, 127 Ill. 153, 2 L. R. A. 411, 19 N. E. 855; *Danville v. Danville Water Co.* 180 Ill. 235, 54 N. E. 224, 178 Ill. 299, 53 N. E. 118; *Rogers Park Water Co. v. Ferguson*, 178 Ill. 571, 53 N. E. 363; *Wagner v. Rock Island*, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 12 Sup. Ct. Rep. 468; *People ex rel. Cairo Teleg. Co. v. Western U. Teleg. Co.* 166 Ill. 15, 36 L. R. A. 637, 46 N. E. 731; *People ex rel. Jackson v. Suburban R. Co.* 178 Ill. 594, 53 N. E. 349; *American Waterworks Co. v. State ex rel. Walker*, 46 Neb. 194, 30 L. R. A. 447, 64 N. W. 711; *People v. Budd*, 117 N. Y. 1, 5 L. R. A. 559, 22 N. E. 670, 682; *Friedman v. Gold & Stock Teleg. Co.* 32 Hun, 4; *Smith v. Gold & Stock Teleg. Co.* 42 Hun, 454; *Western U. Teleg. Co. v. Call Pub. Co.* 44 Neb. 326, 27

L. R. A. 622, 62 N. W. 506; *Nash v. Page*, 80 Ky. 539, 44 Am. Rep. 490; *Commercial Union Tele. Co. v. New England Teleph. & Tele. Co.* 61 Vt. 241, 5 L. R. A. 161, 17 Atl. 1071; *State ex rel. Webster v. Nebraska Teleph. Co.* 17 Neb. 136, 52 Am. Rep. 404, 22 N. W. 237; *Euggles v. People*, 91 Ill. 256; *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448; *Munn v. People*, 69 Ill. 80; *State ex rel. Atty. Gen. v. Columbus Gaslight & Coke Co.* 34 Ohio St. 572; *Zanesville v. Zanesville Gaslight Co.* 47 Ohio St. 10, 23 N. E. 55.

Appellee in the conduct of its business, and as shown by its by-laws and contracts, is and has created to itself a monopoly, and is violating the laws of the state of Illinois, thereby subjecting its charter to forfeiture, against which any stockholder has the right to an injunction.

Holden v. Alton, 179 Ill. 318, 53 N. E. 556; *Adams v. Brennan*, 177 Ill. 194, 42 L. R. A. 718, 52 N. E. 314; *Fishburn v. Chicago*, 171 Ill. 338, 30 L. R. A. 482, 49 N. E. 532; *People ex rel. Molhany v. Chicago Live Stock Exchange*, 170 Ill. 556, 39 L. R. A. 373, 48 N. E. 1062; *Minnesota Tribune Co. v. Associated Press*, 55 U. S. App. 136, 83 Fed. Rep. 350, 27 C. C. A. 542; *Craft v. McConoughy*, 79 Ill. 348, 22 Am. Rep. 171; *United States v. Addyston Pipe & S. Co.* 54 U. S. App. 723, 85 Fed. Rep. 271, 29 C. C. A. 141, 46 L. R. A. 122; *Bishop v. American Preservers' Co.* 157 Ill. 284, 41 N. E. 859; *Ford v. Chicago Milk Shippers' Assn.* 155 Ill. 166, 27 L. R. A. 298, 39 N. E. 651; *People v. Milk Exchange*, 145 N. Y. 267, 27 L. R. A. 437, 39 N. E. 1062; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 22 N. E. 798; *More v. Bennett*, 140 Ill. 69, 15 L. R. A. 361, 29 N. E. 888; *Distilling & Cattle Feeding Co. v. People ex rel. Moloney*, 156 Ill. 448, 41 N. E. 188; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Marseilles Land & Water Power Co. v. Aldrich*, 86 Ill. 504; *Davis v. Old Colony R. Co.* 131 Mass. 259, 41 Am. Rep. 221; *Stewart v. Erie Transp. Co.* 17 Minn. 398.

Appellee is violating the anti-trust laws of the state of Illinois and of the United States.

United States v. Trans-Missouri Freight Assn. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *Hurd's Stat.* 1899, p. 596.

Appellant is entitled to injunction to enjoin appellee from prohibiting any of its members from dealing or having business relations with the appellant; or, in other words, it is entitled to enjoin a boycott.

Jackson v. Stanfield, 137 Ind. 592, 23 L. R. A. 588, 36 N. E. 345, 37 N. E. 14; *State v. Glidden*, 55 Conn. 46, 8 Atl. 890; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 42 L. R. A. 407, 77 N. W. 13; *Fegelman v. Guntner*, 167 Mass. 82, 35 L. R. A. 722, 44 N. E. 1077; *Minke v. Hopeman*, 87 Ill. 450, 29 Am. Rep. 63; *Barrett v. Mount Greenwood Cemetery Assn.* 159 Ill. 385, 31 L. R. A. 109, 42 N. E. 891; *Hopkins v. Owley Stave Co.* 49 U. S. App. 709, 83 Fed. Rep. 912, 28 C. C. A. 99; *People v. Milk Exchange*, 48 L. R. A.

145 N. Y. 267, 27 L. R. A. 437, 39 N. E. 1062.

Appellee should have been enjoined from depriving appellant of the news service.

New York & C. Grain & Stock Exchange v. Chicago Bd. of Trade, 127 Ill. 153, 2 L. R. A. 411, 19 N. E. 855; *Friedman v. Gold & Stock Tele. Co.* 32 Hun. 4; *Smith v. Gold & Stock Tele. Co.* 42 Hun. 454; *Huston v. Reutlinger*, 91 Ky. 333, 15 S. W. 867; *Walker v. Converse*, 148 Ill. 622, 36 N. E. 202; *McMillan v. James*, 105 Ill. 194; *Cushman v. Bonfield*, 139 Ill. 219, 28 N. E. 937; *Holden v. Holden*, 24 Ill. App. 106.

Appellee's contract with appellant, so far as relates to the sale of stock, and the by-laws of appellee in reference thereto, are void.

McNulta v. Corn Belt Bank, 164 Ill. 427, 45 N. E. 954.

The business of a telegraph company is a public business.

People ex rel. Cairo Teleph. Co. v. Western U. Tele. Co. 166 Ill. 15, 36 L. R. A. 637, 46 N. E. 731; *Danville v. Danville Water Co.* 180 Ill. 235, 54 N. E. 224, 178 Ill. 290, 53 N. E. 118; *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 363; *People ex rel. Molhany v. Chicago Live Stock Exchange*, 170 Ill. 556, 39 L. R. A. 373, 48 N. E. 1062; *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

The appellee has by its by-laws created a monopoly.

Minnesota Tribune Co. v. Associated Press, 55 U. S. App. 136, 83 Fed. Rep. 350, 27 C. C. A. 542; *Ford v. Chicago Milk Shippers' Assn.* 155 Ill. 166, 27 L. R. A. 298, 39 N. E. 651; *Bishop v. American Preservers' Co.* 157 Ill. 284, 41 N. E. 765; *Craft v. McConoughy*, 79 Ill. 348, 22 Am. Rep. 171; *More v. Bennett*, 140 Ill. 69, 15 L. R. A. 361, 29 N. E. 888; *Jackson v. Stanfield*, 137 Ind. 592, 23 L. R. A. 588, 36 N. E. 345, 37 N. E. 14.

Appellee should be enjoined from enforcing the by-laws so far as they tend to create a boycott against the appellant. We only need to refer to the case of—

Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 42 L. R. A. 407, 77 N. W. 13.

A corporation organized under the laws of this state can only adopt such by-laws as are necessary to carry out the object and purpose of its creation, and it cannot adopt by-laws that are illegal or contrary to public policy. Neither can it make any contract in furtherance of its business that is illegal or contrary to the public policy of this state.

In so far as by-laws are contrary to the laws of this state or in contravention of its public policy, any stockholder may enjoin the enforcement of the same.

McNulta v. Corn Belt Bank, 164 Ill. 427, 45 N. E. 954; *Morgan v. Struthers*, 131 U. S. 246, 33 L. ed. 132, 9 Sup. Ct. Rep. 726; *Feckheimer v. National Exchange Bank*, 79 Va. 80; *Re Klaus*, 67 Wis. 401, 29 N. W. 582; *Humphreys v. McKissock*, 140 U. S. 304, 35 L. ed. 473, 11 Sup. Ct. Rep. 779.

Appellee has instituted and proposes to carry out, as against the appellant, what is known as a boycott.

Such an act is criminal, and will injure and destroy to a great extent the rights of appellant to deal with the members of this Associated Press corporation.

Such proceedings on the part of a corporation, or even an individual, have been declared by the courts to be abhorrent to the spirit of our institutions, and cannot be too strongly condemned by the courts.

Jackson v. Stanfield, 137 Ind. 592, 23 L. R. A. 588, 36 N. E. 345, 37 N. E. 14.

The business of a telegraph and telephone company is a business public in its nature, upon which the public interest is impressed.

People ex rel. Cairo Teleph. Co. v. Western U. Teleg. Co. 166 Ill. 15, 36 L. R. A. 637, 46 N. E. 731.

Appellee should be bound to treat all persons and corporations alike and without discrimination in its business of collecting, transmitting, and selling news despatches.

Danville v. Danville Water Co. 180 Ill. 235, 54 N. E. 224, 178 Ill. 299, 53 N. E. 118; *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 363.

A business may be public in its nature, or it may be of that nature that it is impressed with the public interest; in either case no discrimination should be made.

Wagner v. Rock Island, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545; *Munn v. People*, 69 Ill. 80; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 12 Sup. Ct. Rep. 468; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 24 L. R. A. 141, 37 N. E. 247; *State ex rel. Atty. Gen. v. Columbus Gaslight & Coke Co.* 34 Ohio St. 572, 32 Am. Rep. 390; *Zanesville v. Zanesville Gaslight Co.* 47 Ohio St. 1, 23 N. E. 55; *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 363.

As to water companies, gas companies, telegraph, and telephone companies, they are all impressed with a public interest, and cannot select their patrons arbitrarily, but must serve all who apply, on equal terms, at reasonable rates.

Western U. Teleg. Co. v. Call Pub. Co. 44 Neb. 326, 27 L. R. A. 622, 62 N. W. 506; *American Waterworks Co. v. State ex rel. Walker*, 46 Neb. 194, 30 L. R. A. 447, 64 N. W. 711; *Williams v. Mutual Gas Co.* 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266; *Shepard v. Milwaukee Gaslight Co.* 6 Wis. 539, 70 Am. Dec. 479; *People ex rel. Jackson v. Suburban R. Co.* 178 Ill. 594, 53 N. E. 349; *Price v. Riverside Land & Irrig. Co.* 56 Cal. 431; *Haugen v. Albina Light & Water Co.* 21 Or. 411, 14 L. R. A. 424, 28 Pac. 244; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.* 121 Ill. 530, 13 N. E. 169; *People ex rel. Hunt v. Chicago & A. R. Co.* 130 Ill. 175, 22 N. E. 857; *St. Louis v. Bell Teleph. Co.* 96 Mo. 623, 2 L. R. A. 278, 10 S. W. 197; *State ex rel. National Subway Co. v. St. Louis*, 145 Mo. 551, 42 L. R. A. 113; 46 S. W. 981; *New York & O.* 48 L. R. A.

Grain & Stock Exchange v. Chicago Bd. of Trade, 127 Ill. 153, 2 L. R. A. 411, 19 N. E. 855; *Friedman v. Gold & Stock Teleg. Co.* 32 Hun. 4; *Smith v. Gold & Stock Teleg. Co.* 42 Hun. 454; *People ex rel. Cantrell v. St. Louis A. & T. H. R. Co.* 176 Ill. 512, 35 L. R. A. 656, 45 N. E. 824, 52 N. E. 292; *Olmstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221; *Nash v. Page*, 80 Ky. 539, 44 Am. Rep. 490; *State v. Edwards*, 86 Me. 102, 25 L. R. A. 504, 29 Atl. 947; *Blair v. Cuming County*, 111 U. S. 363, 28 L. ed. 457, 4 Sup. Ct. Rep. 449; *Head v. Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 10 Sup. Ct. Rep. 462, 702; *Stewart v. Great Northern R. Co.* 65 Minn. 515, 33 L. R. A. 427, 68 N. W. 208; *Commercial Union Teleg. Co. v. New England Teleph. & Teleg. Co.* 61 Vt. 241, 5 L. R. A. 161, 17 Atl. 1071; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 191, 23 L. ed. 875; *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448; *Ruggles v. People*, 91 Ill. 256; *People v. King*, 110 N. Y. 418, 1 L. R. A. 293, 18 N. E. 245; *Adams v. Brennan*, 177 Ill. 194, 42 L. R. A. 713, 52 N. E. 314; *Fishburn v. Chicago*, 171 Ill. 338, 39 L. R. A. 482, 49 N. E. 532; *People ex rel. McIlhenny v. Chicago Live Stock Exchange*, 170 Ill. 556, 39 L. R. A. 373, 48 N. E. 1062; *United States v. Trans-Missouri Freight Assn.* 16 U. S. 290; 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *Huston v. Reutlinger*, 91 Ky. 333, 15 S. W. 867; *Minnesota Tribune Co. v. Associated Press*, 55 U. S. App. 136, 83 Fed. Rep. 350, 27 C. C. A. 542.

It is not necessary that appellee should have a complete monopoly, to bring it within the law applying to monopolies.

United States v. E. O. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Craft v. McConoughy*, 79 Ill. 348, 22 Am. Rep. 171; *United States v. Hopkins*, 82 Fed. Rep. 529; *United States v. Addyston Pipe & S. Co.* 54 U. S. App. 123, 85 Fed. Rep. 271, 46 L. R. A. 122, 29 C. C. A. 121; *Bishop v. American Preservers' Co.* 157 Ill. 284, 41 N. E. 765; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 22 N. E. 798; *More v. Bennett*, 140 Ill. 59, 15 L. R. A. 361, 29 N. E. 888; *Ford v. Chicago Milk Shippers' Assn.* 155 Ill. 166, 27 L. R. A. 298, 39 N. E. 651; *People v. Milk Exchange*, 145 N. Y. 267, 27 L. R. A. 437, 39 N. E. 1062; *Judd v. Harrington*, 139 N. Y. 105, 39 N. E. 790; *People v. Sheldon*, 139 N. Y. 251, 23 L. R. A. 221, 34 N. E. 755; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190.

There is a right to injunction against boycott.

Jackson v. Stanfield, 137 Ind. 592, 23 L. R. A. 588, 36 N. E. 345, 37 N. E. 14; *State v. Gladden*, 55 Conn. 46, 8 Atl. 890; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 42 L. R. A. 407, 77 N. W. 13; *Vegeahn v. Guntner*, 167 Mass. 92, 35 L. R.

A. 722, 44 N. E. 1077; *Hopkins v. Osley* 912, 28 C. C. A. 99; *Barrett v. Mount Greenwood Cemetery Asso.* 159 Ill. 385, 31 L. R. A. 109, 42 N. E. 891; *Minke v. Hopeman*, 87 Ill. 450, 29 Am. Rep. 63.

The courts will restrain a party, upon proper cause, from doing certain acts in violation of his agreement, not requiring performance of skill, personal labor, or judgment.

Western U. Teleg. Co. v. Union P. R. Co. 1 McCrary, 558, 3 Fed. Rep. 429; *Singer Sewing-Mach. Co. v. Union Button-hole & Embroidery Co.* Holmes, 253, Fed. Cas. No. 12,904; Fry, Spec. Perf. § 863; *New York & C. Grain & Stock Exchange v. Chicago Bd. of Trade*, 127 Ill. 153, 2 L. R. A. 411, 19 N. E. 855; *Friedman v. Gold & Stock Teleg. Co.* 32 Hun, 4; *Smith v. Gold & Stock Teleg. Co.* 42 Hun, 454; *Nash v. Page*, 80 Ky. 539, 44 Am. Rep. 490; *Huston v. Reutlinger*, 91 Ky. 333, 15 S. W. 867; *Vincent v. Chicago & A. R. Co.* 49 Ill. 33; *Hagan v. Fayette Gas-Fuel Co.* 21 Pa. Co. Ct. Rep. 503; *Southern Exp. Co. v. St. Louis, I. M. & S. R. Co.* 3 McCrary, 147, 10 Fed. Rep. 210, 869; *Re Lennon*, 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. Rep. 658; *Robinson v. Byron*, 1 Bro. Ch. 588; *Hervey v. Smith*, 1 Kay & J. 389; *Beadle v. Perry*, L. R. 3 Eq. 465; *Whitecar v. Michenor*, 37 N. J. Eq. 6; *Broome v. New York & N. J. Teleg. Co.* 42 N. J. Eq. 141, 7 Atl. 851; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 54 Fed. Rep. 730, 19 L. R. A. 395; *Lough v. Outerbridge*, 143 N. Y. 271, 25 L. R. A. 674, 38 N. E. 292; *Gregsten v. Chicago*, 145 Ill. 451, 34 N. E. 426; *Brass v. North Dakota ex rel. Stoesser*, 153 U. S. 391, 38 L. ed. 757, 14 Sup. Ct. Rep. 857; *Keeler v. Clifford*, 165 Ill. 547, 46 N. E. 248; *Pollak v. Brush Electric Asso.* 128 U. S. 446, 32 L. ed. 474, 9 Sup. Ct. Rep. 119; *Paige v. Hieronymus*, 180 Ill. 637, 54 N. E. 583; *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808; *Heuitt v. Dement*, 57 Ill. 500; Pom. Eq. Jur. § 942; *Cox v. Donnelly*, 34 Ark. 762; *Thomas v. Richmond*, 12 Wall. 355, 20 L. ed. 456.

A court of equity will enjoin the breach of a negative covenant when it is expressed or can be fairly implied from the stipulations of the parties, and injury will result to the complainant by its breach.

Postal Teleg. Cable Co. v. Western U. Teleg. Co. 155 Ill. 335, 40 N. E. 587; *Consolidated Coal Co. v. Schmisser*, 135 Ill. 371, 25 N. E. 795.

When a corporation takes to itself the power of eminent domain it needs no further evidence to show that it is created for public purposes. Its public character is then and at once established. The fact that it does not see fit to exercise all of the powers conferred upon it does not change the character of its business which it does perform.

Gibbs v. Consolidated Gas Co. 130 U. S. 397, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; 4 Thomp. Corp. § 5367; *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L. 48 L. R. A.

R. A. 460, 50 Pac. 633; *Vincent v. Chicago & A. R. Co.* 49 Ill. 33.

Messrs. John P. Wilson and T. A. Moran for appellee.

Phillips, J., delivered the opinion of the court:

The Inter-Ocean Publishing Company, a corporation organized under the laws of the state of Illinois, is engaged in publishing two newspapers in the city of Chicago, known as the Daily Inter-Ocean and the Weekly Inter-Ocean, which have a wide circulation in the states and territories of the United States. The Associated Press is a corporation organized under the laws of the state of Illinois in 1892. The object of its creation was "to buy, gather, and accumulate information and news; to vend, supply, distribute, and publish the same; to purchase, erect, lease, operate, and sell telegraph and telephone lines and other means of transmitting news; to publish periodicals; to make and deal in periodicals and other goods, wares, and merchandise." It has about eighteen by-laws with about seventy-five subdivisions thereof. The stockholders of the Associated Press are the proprietors of newspapers, and the only business of the corporation is that enunciated in its charter, and is mainly buying, gathering, and accumulating news, and furnishing the same to persons and corporations who have entered into contract therefor.

It may furnish news to persons and corporations other than those who are its stockholders, and the term "members," used in its by-laws, applies to proprietors of newspapers, other than its stockholders, who have entered into contracts with it for procuring news. It does not appear that it has availed itself of any of the powers conferred by its charter other than that of gathering news and distributing the same to its members. Under the by-laws of appellee the Inter-Ocean Publishing Company became a stockholder. Among the by-laws having reference to stockholders are the following:

"Art. 11, § 8. Sale or Purchase of Specials. No member shall furnish, or permit anyone to furnish, its special or other news to, or shall receive news from, any person, firm, or corporation which shall have been declared by the board of directors or the stockholders to be antagonistic to the association; and no member shall furnish news to any other person, firm, or corporation engaged in the business of collecting or transmitting news, except with the written consent of the board of directors."

"Art. 14, § 1. Board May Suspend. The board of directors shall have the power, by a two-thirds vote of the whole board, to suspend a member, or impose upon him a fine of not exceeding \$1,000, for furnishing news to any person or association antagonistic or in opposition to the Associated Press, or for purchasing news from any person or organization formally declared by the board of directors or by the stockholders of the association, at any annual or special meeting, to be in such antagonism or opposition, or for any other violation of the by-laws or his

contract: provided always, that ten days' notice, in writing, of a complaint be first served upon the offending member; and said member shall have an opportunity to be heard in his own defense, and, if said member shows that the offense was unintentional, and shall have discontinued the same, he shall not be suspended."

On March 2, 1893, the Associated Press entered into an agreement with the Inter-Ocean Publishing Company, by which it sold to the latter its night news report for publication in the two newspapers for the term of ninety-two years, which the Inter-Ocean Company agreed to receive and pay for at the rate of \$102 per week, which sum was liable to be increased 50 per cent. The Associated Press agreed to furnish to the Inter-Ocean Company local and telegraphic news within a radius of 60 miles of Chicago, in accordance with its by-laws. The contract between the Inter-Ocean Company and the Associated Press, among other provisions contained the following: "Sixth. Said party of the second part covenants and agrees that it will not furnish, before publication, any news to any person or corporation engaged in the business of collecting or transmitting news, except upon the written consent of the board of directors of the party of the first part first had and obtained; and that it will not furnish to any person any of the news received by it under this contract before publication by it; and that it will not furnish its special or other news to or receive news from any person or corporation which shall have been declared by the board of directors of said party of the first part antagonistic to said party of the first part, after having received notice of such declaration. Seventh. It is further mutually agreed between the parties hereto that the rights, duties, and obligations of the respective parties hereto, except as hereinbefore specifically provided for, shall be controlled and governed by the by-laws of said party of the first part now or hereafter in force, during the life of this contract; and that the right to receive news under this contract may be suspended or terminated in the manner and for the causes specified in said by-laws." "Ninth. Said party of the first part promises and agrees not to furnish any news report to any newspaper published in the said territory described in this contract not now entitled to receive the same under the by-laws of said party of the first part without the written consent of the said party of the second part or its assigns. Tenth. Said party of the second part has assigned and transferred its stock in the said party of the first part to the said party of the first part, which stock is to be held by said party of the first part as security for the performance by said party of the second part of this contract on its part. Said party of the second part, in consideration of the making of this contract by said party of the first part, hereby covenants and agrees that it will not sell or part with any interest in said stock to any party who shall not be the proprietor of a newspaper which shall at the

time be on the membership roll of said party of the first part, and that it will keep and observe and perform all the requirements of the by-laws of said party of the first part now or hereafter in force during the life of this contract."

Contracts of substantially the same character have been entered into from time to time between the Associated Press and most of the leading newspapers throughout the United States, to whom, under its charter and by-laws and under its contracts, it sells and vends its news. Similar associations for gathering and selling and vending news, to a limited extent, exist in other cities than Chicago, but none of them so widely extended. Among these are the Sun Printing & Publishing Association of New York City, the New York Sun of New York City, and the Laffan News Bureau of New York City. These three latter associations have been declared to be antagonistic to the Associated Press by the board of directors of the latter. News of an important character not gathered by the Associated Press was gathered by a certain alleged antagonistic association, and the Inter-Ocean Publishing Company, for the purpose of furnishing its readers with information and news gathered from various points and sources, in addition to the news purchased by it from the Associated Press, also purchased and published news obtained by it from the Sun Printing & Publishing Association of New York City, but did not furnish news to the latter association, or to any of the associations antagonistic to the Associated Press. The Chicago Herald Company and the Chicago Daily News Company made complaint to the Associated Press that the Inter-Ocean Publishing Company was publishing news procured by it from the Sun Printing & Publishing Association of New York, the New York Sun of New York City, and the Laffan News Bureau of New York City, and asked that the Inter-Ocean Publishing Company's contract and § 8 of article 11 of the by-laws should be enforced. The Associated Press gave notice to the Inter-Ocean Publishing Company that a meeting of its board of directors would be held at a time and place mentioned, to take action on the complaints of the Chicago Herald Company and the Chicago Daily News Company. Before the time set for hearing, the Inter-Ocean Publishing Company filed its bill for an injunction against the Associated Press from suspending or expelling it from its membership, and from refusing to furnish it news according to the terms of its contract, and from doing any act or thing tending to deprive it of the news gathered by appellee, and for such other relief, general and special, as might be just and equitable. The bill set up the facts hereinbefore stated, and set out the by-laws of the appellee in full, and alleged that the appellee had been able to control the business of buying and accumulating news in Chicago and selling the same, and has thus created in itself an exclusive monopoly in that business, and, to preserve such monopoly, had declared the Sun Printing & Publishing Association a ri-

val or competitor in business, and antagonistic to it, and sought to prohibit its members from buying news therefrom, under pain of suspension or expulsion; alleged that appellee had at various times, by threats of suspension and expulsion, compelled divers of its members to cease buying the special news of the Sun Printing & Publishing Association under its contracts with its members. The bill set out the contracts and names of such members, and alleged that the notice served on appellant for a hearing on the complaints against it is similar to the action of appellee against other members who were forced to cease buying special news from the Sun Printing & Publishing Association; that appellant is in duty bound, both to its patrons and to the public, to publish all the news it can gather, and, if not able to obtain such news from one source, it must, in justice to its patrons and the public, resort to other sources; that the news which it obtained from appellee it was unable to obtain from any other source, and appellee would not furnish the same to appellant unless it executed the contract hereinbefore mentioned, because of which appellant was forced to and did execute such contract; that appellee does not furnish all the news obtainable and desired by appellant under that contract, and to obtain such other news appellant was forced to resort to the Sun Printing & Publishing Association of New York; that the right to receive the news gathered by appellee, and publish the same in its newspaper is a valuable property and property right, and appellant is forced to obtain the news not obtainable from appellee, and which is absolutely needed in publishing its newspaper, from the Sun Printing & Publishing Association; that the appellee is attempting to force appellant to cease taking news from the latter association, but to do so would work irreparable damage and injury to appellant, and would prevent it from furnishing needed, important, and necessary news to the public, and would tend to create in favor of appellee a monopoly. The appellee filed an answer to the bill. A hearing was had upon the bill and answer, both of which were sworn to, and certain affidavits which were read and used as depositions, and a decree was rendered dismissing the bill for want of equity. On appeal to the appellate court for the first district the decree was affirmed, and this appeal is prosecuted.

It has been uniformly held that a telegraph or telephone company is bound to treat all persons and corporations alike, and without discrimination, in its business of receiving and transmitting messages. The business of such a company is public in its nature, and a public interest is impressed thereon to such an extent that no discrimination can be made against persons or corporations. *People ex rel. Cairo Teleph. Co. v. Western U. Teleg. Co.* 168 Ill. 15, 36 L. R. A. 637, 46 N. E. 731. Where one is the owner of property which is devoted to a use in which the public has an interest, he, in effect, grants to the public an interest in such

use, and must, to the extent of that interest, submit to be controlled by the public for the common good, as long as such use is maintained. The manner in which it is devoted to a use in which the public has an interest may be very diverse, and the public interest in such use may be of a widely variant character; but where the use is one in which the public is interested, or has an interest, public control is necessary for the common good. *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77. The appellee corporation voluntarily sought corporate existence to engage in an enterprise which invested it with, among others, the power of eminent domain. It was organized, among other things, to purchase, erect, lease, operate, and sell telegraph and telephone lines,—a business which is essentially public in its nature, and renders a corporation so engaged amenable to public control. While under the averments of the bill and answer and affidavits, the appellee corporation has only engaged in business to the extent of its power “to buy, gather, and accumulate information and news; to vend, supply, distribute, and publish the same;” and has not attempted to purchase, erect, lease, or sell telegraph and telephone lines,—it is important to determine the character of the corporation under its charter and under the business in which it is actually engaged. The organization of such a method of gathering information and news from so wide an extent of territory as is done by the appellee corporation, and the dissemination of that news, require the expenditure of vast sums of money. It reaches out to the various parts of the United States, where its agents gather news which is wired to it, and through it such news is received by the various important newspapers of the country. Scarcely any newspaper could organize and conduct the means of gathering the information that is centered in an association of the character of the appellee, because of the enormous expense, and no paper could be regarded as a newspaper of the day unless it had access to and published the reports from such an association as appellee. For news gathered from all parts of the country the various newspapers are almost solely dependent on such an association, and, if they are prohibited from publishing it, or its use is refused to them, their character as newspapers is destroyed, and they would soon become practically worthless publications. The Associated Press, from the time of its organization and establishment in business, sold its news reports to various newspapers who became members, and the publication of that news became of vast importance to the public, so that public interest is attached to the dissemination of that news. The manner in which that corporation has used its franchise has charged its business with a public interest. It has devoted its property to a public use, and has, in effect, granted to the public such an interest in its use that it must submit to be controlled by the public for the common good, to the extent of the interest it has thus created in the public in its private property. The sole purpose for which

news was gathered was that the same should be sold, and all newspaper publishers desiring to purchase such news for publication are entitled to purchase the same without discrimination against them. It was held in *New York & C. Grain & Stock Exchange v. Chicago Bd. of Trade*, 127 Ill. 153, 2 L. R. A. 411, 19 N. E. 855 (on page 163, 127 Ill., page 414, 2 L. R. A., and page 859, 19 N. E.): "Assuming these market quotations and reports are property, and the private property of the board of trade, yet if they have been so used by the board, and by the telegraph companies with the knowledge and consent of the board, as to become affected with a public interest, then they are subject to such public regulation by the legislature and the courts as is necessary to prevent injury to such public interest. The doctrine in question has application both to the property of individuals and of corporations, and it is, therefore, immaterial that any such corporation may be a mere private corporation. If the interest is public, then it is, necessarily, to all alike, common to all, and upon equal terms. The doctrine, as applied to the matter of these market quotations, would forbid that a monopoly should be made of them by furnishing them to some and refusing them to others who are equally willing to pay for them and be governed by all reasonable rules and regulations, and would prevent the board of trade or the telegraph companies from unjustly discriminating in respect to the parties who will be allowed to receive them." This principle is sustained in *Friedman v. Gold & Stock Teleg. Co.* 32 Hun, 4, and, *Smith v. Gold & Stock Teleg. Co.* 42 Hun, 454. The appellee corporation being engaged in a business upon which a public interest is ingrafted, upon principles of justice it can make no distinction with respect to persons who wish to purchase information and news for purposes of publication, which it was created to furnish.

It is urged, however, that by the terms of the contract appellant cannot retain its membership and stock in the Associated Press, and have the right to purchase news accumulated by it at contract price, without complying with that part of the contract which requires appellant to refrain from receiving news from any person or corporation which has been declared by the board of directors of appellee to be antagonistic to the latter, and without appellant being controlled or governed by the by-law of appellee to the same effect. The character of appellee's business is not to be determined by the contract which it made respecting the liabilities which would attend it, but by the nature of the business, its fixed legal character, growing out of the manner in which that business is conducted, and the purpose of its creation. The legal character of the corporation and its duties cannot be disregarded because of any stipulation incorporated in a contract that it should not be liable to discharge a public duty. Its obligation to serve the public is not one resting on contract, but grows out of the fact that it is 48 L. R. A.

in the discharge of a public duty, or a private duty which has been so conducted that a public interest has attached thereto. In *Smith v. Gold & Stock Teleg. Co.* 42 Hun, 454, an action was brought to restrain the defendant from removing from complainant's office a ticker, or from doing any act which would in any way interfere with the receipts of quotations from the stock exchange. By one of the clauses of the contract the plaintiff agreed that the company might forthwith discontinue its service without notice, whenever, in its judgment, any breach of the terms of the contract should be made by him. It was held: "But so long as collecting and supplying quotations is carried on by them, as it is conceded to be at present, they should render equal and impartial service to those who comply with reasonable regulations. What regulations are reasonable may not, in all cases, be easy to determine. But there need be no hesitation in saying that the clause in their contract permitting them to discontinue the service when, in their judgment, a breach of conditions has been had, is not a reasonable regulation, and affords no defense to this action. No man can be judge in his own case, and, to justify defendants in refusing to perform service, there must be a reason that the court can pronounce sufficient." In *Commercial Union Teleg. Co. v. New England Teleg. & Teleg. Co.* 61 Vt. 241, 5 L. R. A. 161, 17 Atl. 1071, a question arose as to compelling a telephone company to furnish telephone service. In defense it was sought to set up a contract between the Bell Telephone Company and the respondent restricting the right to the use of their instruments, but the court held there was no right to discriminate, and that the restricting clause was invalid, and it was said: "On grounds of public policy, which controls all public carriers, that clause in the contract in question is held void, so that the license stands precisely as if the restricting clause was not contained in it." The clause of the contract in this case, which sought to restrict appellant from obtaining news from other sources than from appellee, is an attempt at restriction upon the trade and business among the citizens of a common country. Competition can never be held hostile to public interests, and efforts to prevent competition by contract or otherwise can never be looked upon with favor by the courts. In *People ex rel. McIlhenny v. Chicago Live Stock Exchange*, 170 Ill. 556, 39 L. R. A. 373, 48 N. E. 1062, it was said (page 566, 170 Ill., page 376, 39 L. R. A., and page 1065, 48 N. E.): "Efforts to prevent competition, and to restrict individual efforts and freedom of action in trade and commerce, are restrictions hostile to the public welfare, not consonant with the spirit of our institutions, and in violation of law." Section 8 of article 11 of the by-laws of the appellee sought to prevent any member of the appellee association from furnishing its special or other news to, or receiving such news from, any person declared by it hostile. In *People ex rel. McIlhenny v. Chicago Live Stock Exchange*, 170 Ill. 556, 39 L. R. A. 373,

48 N. E. 1062, in speaking of the power to enact by-laws, and their effect, we said (page 570, 170 Ill., page 377, 39 L. R. A., and page 1066, 48 N. E.): "When a corporation is created, there goes with it the power to enact by-laws for its government and guidance, as well as for the guidance and government of its members. This power is necessary to enable a corporation to accomplish the purpose of its creation. But by-laws must be reasonable, and for a corporate purpose, and always within charter limits. They must always be strictly subordinate to the Constitution and the general law of the state. They must not infringe the policy of the state, nor be hostile to public welfare. . . . Attempts to place restrictions on trade and commerce, and to fetter individual liberty of action by preventing competition, are hostile to public welfare, and affect the interests of the people. Such attempts by a corporation are an abuse of its corporate franchise. Public policy requires that corporations, in the exercise of powers, must be confined strictly within their charter limits, and not be permitted to exercise powers beyond those expressly conferred. The state provides for the creation of corporations. The corporation is its creature, and must always conform to its policy. This duty on the part of corporations, to do no acts hostile to the policy of the state, grows out of the fact that the legislature is presumed to have had in view the public interest when a charter was granted to the corporation, and no departure from its charter purposes will be allowed which would be hurtful to the public." The by-law of the appellee corporation, above referred to, is not required for corporate purposes, nor included within the purposes of the creation of that corporation. To enforce the provisions of the contract and this by-law would enable the appellee to designate the character of the news that should be published, and, whether true or false, there could be no check on it by publishing news from other sources. Appellee would be powerful in the creation of a monopoly in its favor, and could dictate the character of news it would furnish, and could prejudice the interests of the public. Such a power was never contemplated in its creation, and is hostile to public interests. That by-law tends to restrict competition, because it prevents its members from purchasing news from any other source than from itself. It seeks to exclude from publication by any of its members news procured from any other corporation or source than itself, which it declares antagonistic to it. Its tendency, therefore, is to create a monopoly in its own favor, and to prevent its members from procuring news from others engaged in the same character of work, and such provision is illegal and void. *Adams v. Brennan*, 177 Ill. 194, 42 L. R. A. 718, 52 N. E. 314. In *Holten v. Alton*, 179 Ill. 318, 53 N. E. 556, it was held that equity would enjoin the city from carrying out a contract for city printing at the suit of a taxpayer who was the lowest bidder on a contract, and whose bid was rejected because he did not employ mem-

bers of a certain labor organization, and could not show the label declared by the ordinance making such qualification to be essential, and it was held that such a combination or agreement was in violation of common right, and tended to create a monopoly, and that could not be tolerated. To the same effect is *Fishburn v. Chicago*, 171 Ill. 338, 39 L. R. A. 482, 49 N. E. 532. The clear effect of this by-law is to create a monopoly, which renders it void.

The provisions of the contract that the appellant should purchase news from no other source, and the restrictive clause of the by-law, are both null and void, and the contract is the same as if these provisions had not been incorporated therein. Rejecting entirely these illegal provisions, on which the right to suspend the appellant as a member and to refuse to furnish it news and information gathered by the Associated Press for publication rests, no reason is presented, under the pleadings and affidavits in this case, why the appellant is not entitled to an injunction, as prayed for in its bill. The bill alleges that the deprivation of such reports by the Associated Press would cause an irreparable injury and damage to the appellant, which is sought to be prevented by the injunction prayed for in the bill. We hold that the circuit court of Cook county erred in entering a decree dismissing the bill for want of equity, and the appellate court for the first district erred in affirming the same.

The judgment of the Appellate Court for the First District and the decree of the Circuit Court of Cook County are each reversed, and the cause is remanded to the Circuit Court of Cook county, with directions to enter a decree as prayed for in the bill.

Rehearing denied, April 6, 1900.

Robert C. BOEHM, *Plff. in Err.*,

v.

Henry L. HERTZ, Treasurer of Illinois,
et al.

(182 Ill. 154.)

1. Provisions of a statute which relate to a particular subject indicated in its title, and which are a part of or incident to it, or in some reasonable sense connected with or auxiliary to the object in view, must be deemed to be within the title of the act.
2. Appropriations of the money of the state for the general and other expenses of a private normal university, in consideration of the gratuitous instruction of teachers for the common schools, are not an assumption of the debts or liabilities of such corporation, or a loan or extension of credit in aid of it, in violation of Const. art. 4, § 20, but are within the legislative discretion as to the means of carrying out the provisions of Const. art. 8, § 1, requiring the legislature to provide for a system of free schools.

(October 16, 1899.)

(Craig, J., dissents.)

NOTE.—As to appropriation of public money to aid educational institution, see *State ex rel. Garth v. Switzler* (Mo.) 40 L. R. A. 280.

ERROR to the Circuit Court for Sangamon County to review a decree in favor of defendants in a proceeding brought to enjoin the payment of an appropriation to the Illinois State Normal University. *Affirmed.*

The facts are stated in the opinion.

Mr. Lewis F. Mason, with *Messrs. Grant Foreman* and *John C. Wilson*, for plaintiff in error:

The act of June 14, 1897, violates § 13, art. 4, of the Constitution.

People ex rel. Graff v. Institution of Protestant Deaconesses, 71 Ill. 229; *Binz v. Weber*, 81 Ill. 288; *Potwin v. Johnson*, 108 Ill. 70; *People ex rel. Meyer v. Hazelwood*, 116 Ill. 327, 6 N. E. 480; *Dolese v. Pierce*, 124 Ill. 149, 16 N. E. 218; *Hyde Park v. Chicago*, 124 Ill. 156, 16 N. E. 222; *Donnersberger v. Prendergast*, 128 Ill. 229, 21 N. E. 1; *People ex rel. Longenecker v. Nelson*, 133 Ill. 575, 27 N. E. 217; *Ritchie v. People*, 155 Ill. 120, 29 L. R. A. 79, 40 N. E. 454; *Bobel v. People*, 173 Ill. 25, 50 N. E. 322; *People ex rel. Chittenden v. Mellen*, 32 Ill. 181; *Burritt v. State Contract Comrs.* 120 Ill. 322, 11 N. E. 180.

The act of June 14, 1897, violates §§ 16, 20, and 22 of art. 4.

The legislature can make no appropriations out of the state treasury to private agencies, because of public benefits flowing therefrom.

St. Mary's Industrial School for Boys v. Brown, 45 Md. 310; *Citizens' Sav. & L. Assn. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Curtis v. Whipple*, 24 Wis. 353, 1 Am. Rep. 187.

That is a public purpose from the attainment of which will flow some benefit or convenience to the public, whether the whole commonwealth or a circumscribed community. In the latter case, however, the benefit or convenience must be direct and immediate from the purpose, and not collateral, remote, or consequential.

Weismer v. Douglas, 64 N. Y. 91, 21 Am. Rep. 586; *Cushing v. Newburyport*, 10 Met. 511; *People ex rel. Roman Catholic Orphan Asylum Soc. v. Brooklyn Bd. of Edu.* 13 Barb. 400; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Gove v. Epping*, 41 N. H. 539; *Crowell v. Hopkinton*, 45 N. H. 9; *Tyson v. Halifax Twp. School Directors*, 51 Pa. 9.

The board of education of the state of Illinois is a private corporation.

State Bd. of Edu. v. Greenebaum, 39 Ill. 618; *State Bd. of Edu. v. Bakewell*, 122 Ill. 339, 10 N. E. 378; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Society for Propagation of Gospel v. New Haven*, 8 Wheat. 464, 5 L. ed. 662; *Vincennes University v. Indiana*, 14 How. 277, 14 L. ed. 419; *Regents of the University v. Williams*, 9 Gill & J. 365, 31 Am. Dec. 72.

Section 1 of article 8 is violated by the act of June 14, 1897.

Powell v. Board of Education, 97 Ill. 375, 37 Am. Rep. 123; *People ex rel. Mooney v. Hutchinson*, 172 Ill. 486, 40 L. R. A. 770, 50 N. E. 599.

Messrs. Capen & Williams, C. A. Hill, 48 L. R. A.

and **B. D. Monroe**, with **Mr. E. C. Akia**, Attorney General, for defendants in error:

The Constitution is a limitation upon the powers of the legislature, and not a grant of power, and the legislature possesses every power not delegated to some other department or to the Federal government, or not denied to it by the Constitution of the state or United States.

Mason v. Wait, 5 Ill. 127; *People v. Wall*, 88 Ill. 75; *Harris v. Whiteside County Supers.* 105 Ill. 445; *Winch v. Tobin*, 107 Ill. 212; *Burritt v. State Contract Comrs.* 120 Ill. 322, 11 N. E. 180; *People ex rel. Longenecker v. Nelson*, 133 Ill. 565, 27 N. E. 217; *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610; *Gaines v. Williams*, 146 Ill. 450, 34 N. E. 934; *People ex rel. Bussey v. Gault*, 149 Ill. 47, 36 N. E. 576; *People ex rel. Woodyatt v. Thompson*, 155 Ill. 451, 40 N. E. 307.

The legislature of the state has authority to use the powers and funds of the state to secure the construction and maintenance of public highways, railroads, canals, bridges, telegraph lines, water and gas works, schools, colleges, and institutions of learning.

Morawetz, Priv. Corp. § 1114; *Sharpless v. Philadelphia*, 21 Pa. 168, 59 Am. Dec. 759; *Prettyman v. Tazewell County Supers.* 19 Ill. 410, 71 Am. Dec. 230; *Burr v. Carbondale*, 76 Ill. 468; *McLean County v. Humphreys*, 104 Ill. 383; *Briggs v. Johnson County*, 4 Dill. 163, Fed. Cas. No. 1,872; *Duffy v. New Orleans*, 49 La. Ann. 114, 21 So. 179; *Sedgw. Stat. & Const. L.* p. 409; *Hensley Twp. Super. v. People ex rel. Bailey*, 84 Ill. 544; *Stein v. Mobile*, 24 Ala. 591.

Contemporaneous construction by the legislature, acquiesced in by the other departments and by the people for over a quarter of a century, is entitled to great weight in sustaining the validity of such construction.

Cooley, Const. Lim. p. 67, 5th ed. pp. 81-85; *State v. Mayhew*, 2 Gill, 487; *Bunn v. People ex rel. Laffin*, 45 Ill. 398; *People ex rel. Lynch v. La Salle County Supers.* 100 Ill. 495; *People ex rel. Woodyatt v. Thompson*, 155 Ill. 485, 40 N. E. 307.

What is for the public good, and what are public purposes, are questions the legislature must decide upon its own judgment, which as to them cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, or where, under pretense of a public authority it has assumed to exercise, it is unlawful.

Cooley, Const. Lim. 129, 486; *Leavenworth County Comrs. v. Miller*, 7 Kan. 479, 12 Am. Rep. 425; *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. 490, 9 L. ed. 803; *People ex rel. Blanding v. Burr*, 13 Cal. 343.

The proper education of all its citizens vitally concerns the permanent prosperity and public welfare of the state, and the legislature is the sole arbiter as to what instrumentalities other than free schools will best carry out this purpose, except as clearly prohibited by the Constitution.

Curryer v. Merrill, 25 Minn. 1, 33 Am. Rep. 450; 2 Kent, Com. 305; 1 Dill, Mun. Corp. § 73.

Phillips, J., delivered the opinion of the court:

Plaintiff in error filed a bill in which it is alleged he is a taxpayer, etc., and that the general assembly of the state of Illinois, on June 14, 1897, passed a certain act, in which it was attempted to appropriate moneys for the ordinary and other expenses of the Illinois State Normal University, alleged to be a private corporation organized under an act of the general assembly of the state of Illinois passed February 18, 1857. It is alleged that the appropriation is unlawful and in contravention of the Constitution of the state, because it would be a misappropriation of the public funds, and a perversion thereof, to the injury of the complainant. The bill made defendants Henry L. Hertz, as state treasurer, James S. McCullough, as state auditor, and the board of education of the state of Illinois, and prayed for an injunction restraining the payment of any money by the board of education attempted to be appropriated under the act of June 14, 1897. The service on the board of education was quashed, and thereupon the complainant, by his solicitors, dismissed the bill as to that defendant. The other two defendants appeared and filed their demurrer to said bill for want of equity, which was sustained, and the bill dismissed. The complainant sued out this writ of error.

The constitutionality of an act entitled "An Act to Make an Appropriation for the Ordinary and Other Expenses of the Illinois State Normal University at Normal, Illinois, and for the Completion and Equipment of Its Gymnasium Building," approved June 14, 1897, is presented on this record. Plaintiff in error claims that the act above mentioned violates that part of § 13 of article 4 of the Constitution which provides: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." We do not concur in this view. The act of June 14, 1897, is entitled "An Act to Make an Appropriation for the Ordinary and Other Expenses of the Illinois State Normal University at Normal, Illinois, and for the Completion and Equipment of Its Gymnasium Building." The act appropriates, in addition to one half of the interest of the college fund, the sum of \$28,506.44 per annum for the expenses of the board of education, payment of salaries, etc., and makes further appropriations for the completion of the gymnasium building and for the proper heating and equipment of the same. It is the province of the legislature to determine the comprehensiveness of a statute, subject to the limitations prescribed by the Constitution. Without the restriction of the constitutional limitation above provided, the legislature might include in a single act any subject

which it saw proper to prescribe as to duties and provide as to punishments. The limitation of the above provisions of the Constitution goes no further than to declare that no matters are properly included in the act which are not germane to its title. Where all the provisions of the act relate to a particular subject indicated in its title, and are a part of or incident to it, or in some reasonable sense connected with or auxiliary to the object in view, it cannot be held such provisions are not within the title of the act. It was held in *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454 (on page 120, 155 Ill., and page 461, 40 N. E.): "All matters are properly included in the act which are germane to the title. The Constitution is obeyed if all the provisions relate to the one subject indicated in the title, and are parts of it, or incident to it, or reasonably connected with it, or in some reasonable sense auxiliary to the object in view. It is not required that the subject of the bill shall be specifically and exactly expressed in the title, or that the title should be an index of the details of the act. Where there is doubt as to whether the subject is clearly expressed in the title, the doubt should be resolved in favor of the validity of the act." We fail to see wherein the subject-matter of the act is not sufficiently expressed in the title; nor does plaintiff in error point out any special defect therein.

Plaintiff in error contends that by this enactment § 20 of article 4 of the Constitution is violated, which is as follows: "The state shall never pay, assume, or become responsible for the debts or liabilities of, or in any manner give, loan, or extend its credit to or in aid of, any public or other corporation, association, or individual." This contention results from the claim made by the plaintiff in error that the appropriation of money made by the act of June 14, 1897, to the Illinois State Normal University, is violative of the foregoing provision of the Constitution, inasmuch as that institution, it is insisted, is a private corporation. This position of plaintiff in error results from what has been said by this court in *State Bd. of Edu. v. Greenbaum*, 39 Ill. 610, where it was held that this board of education was an eleemosynary institution, founded for the purpose of the gratuitous distribution of knowledge in regard to teaching and conducting common schools, and erected, not at the expense of the state, but of individuals; and at the time of the opinion in that case the salaries of the instructors and other employees were fixed by the board, and no appropriation had then ever been made from the state treasury for its maintenance. By an act approved February 18, 1857, entitled "An Act for the Establishment and Maintenance of a Normal University," found in the Public Laws of Illinois for 1857, on page 298, it is provided that certain persons named shall constitute "the board of education of the state of Illinois," having perpetual succession, etc. By § 2 the superintendent of public instruction, by virtue of his office, is made a member and the secretary of the

board, and required to report to the legislature, at its regular sessions, the condition and the expenditures of the university. Section 3 relates to the meetings of the board of education. Section 4 provides that the object of the university shall be to qualify teachers for the common schools of this state, by imparting instruction in the art of teaching in all branches which pertain to a common-school education, etc. Section 5 provides as to the first meeting of the board of education, and further provides that they "shall visit the cities, villages, and other places in the state which may be deemed eligible, for the purpose to receive donations and proposals for the establishment and maintenance of a normal university," and provides, that the board shall fix the permanent location at the place where the most favorable inducements are offered for that purpose, provided that such location shall not be difficult of access or detrimental to the welfare or prosperity of the university. Section 6 provides as to the power of the board in the appointment of a principal, lecturers, and instructors, and prescribes their duties, with power of removal, and power to fix text-books and make regulations for management, etc. Section 7 provides for gratuitous instruction for certain pupils. Section 8 provides the interest of the university and seminary fund, or such part thereof as may be found necessary, shall be appropriated for the maintenance of the university. Section 10 provides the term of the board of corporators, and for the filling of vacancies by the governor by and with the consent of the senate. These are the several provisions declaratory of the purposes of the university, its manner of organization, the filling of vacancies in the board of corporators, and their powers, etc. Subsequently an act of the legislature was passed, February 14, 1861, entitled "An Act to Refund the Interest on the College or University Fund and Appropriate the Same, for the Use of the State Normal University," the preamble of which recites the act of admission of the state of Illinois into the Union, by which a certain percentage of the proceeds of public lands lying within this state was set apart to the state, to be appropriated by the latter for the encouragement of learning, of which one-sixth part was to be exclusively bestowed upon a college or university. The act of the legislature of 1861 then recites that one sixth of the per cent of those proceeds on the 1st of January, 1851, amounted to \$122,607.54, and interest thereon to January, 1857, amounted to the sum of \$98,956.82; and for the purpose of carrying out the intention of Congress the legislature passed the act establishing a normal university, and made an appropriation of a part of said sum so held under the act of admission, or rather the interest thereon, payable to this board of education for the use of the normal university, etc. Section 3 of the act of 1861 provides that this corporation shall have no power to sell or convey any part of the property acquired since the passage of the act incorporating it, nor to create any liability against

the state, without the express sanction of the legislature. Section 4 provides that each county shall be entitled to gratuitous instruction in the university of two pupils, instead of one, as provided in the original act. Shortly prior to the passage of the act of 1861, above mentioned, a contract for the construction of certain buildings was entered into in writing by the board of education above mentioned, through its building committee, and, by reason of default in payment of the amount to be paid the contractors, a petition for a mechanic's lien was filed, and under the legislation had prior to the entering into of such contracts, to wit, prior to the 3d day of March, 1860, it was held that this university was an eleemosynary institution, founded for the purpose of the gratuitous distribution of knowledge in the art of teaching and conducting common schools, and erected, not at the expense of the state, but of individuals, and it was held that this corporation was liable to be sued and was a private corporation. *State Bd. of Edu. v. Greenebaum*, 39 Ill. 610.

On February 25, 1858, Edwin W. Bakewell and Julia A. Bakewell, his wife, who joined in the deed for the purpose of relinquishing her inchoate right of dower, conveyed to the board of education of the state of Illinois 40 acres of land immediately adjoining the university grounds. The only condition named in the deed was the following: "Provided, the Normal University, under the control of the said board of education of the state of Illinois, shall forever remain where now located." On February 9, 1860, the said Edwin W. Bakewell and his wife united in another deed to the said board of education of the state of Illinois, which, after reciting the execution of the former deed and the condition therein, contained the following: "And whereas, the said Edwin W. Bakewell and Julia A. Bakewell, his wife, are willing and anxious to vacate and annul said condition to said deed, and to make the title of the said board of education of the state of Illinois to the said land conveyed by said deed become and be absolute in fee simple: Now, therefore, this indenture, made and entered into this 9th day of February, 1860, by and between the said Edwin W. Bakewell and Julia A. Bakewell, his wife, and the said board of education of the state of Illinois, witnesseth that they convey a full and complete and unconditional title in fee simple in and to the said 40 acres." After the above enactments, and after the execution of these two deeds, on February 28, 1867, the general assembly passed an act entitled "An Act Concerning the Board of Education and the Illinois Natural History Society," §§ 1 and 2 of which are as follows:

"Sec. 1. The State Normal University, established by an act approved February 13, 1857, is hereby declared a state institution, and the property, real, personal, and mixed, in the hands and standing in the name of the board of education of the state of Illinois, is the property of the state of Illinois, and is by said board held in trust for the state.

"Sec. 2. Said board of education is hereby

authorized to sell and dispose of the outlands and lots standing in the name of said board, lying in the counties of Jackson, Woodford, and McLean, except the site of the normal university, and the farm of 100 acres, more or less, in its immediate vicinity, and to appropriate the proceeds thereof towards the payment of the appropriations hereinafter named."

While this had been the precedent legislation with reference to this university, the general assembly, by a joint resolution passed in 1883, directed the state board of education to convey the above-mentioned 40 acres of land to Julia A. Bakewell. The board of education refusing to comply with that direction, the general assembly in 1885, by a joint resolution, declared the title to the 40 acres of land mentioned in the deed of Julia A. Bakewell and her husband to be and was vested in Julia A. Bakewell. Her demand for the possession of that land was refused by the board; whereupon she filed a petition in the circuit court of McLean county for a writ of mandamus commanding the board of education of the state of Illinois to execute to her a deed to the 40 acres of land, which, on hearing before the court without a jury, resulted in the awarding of the writ, and the board of education appealed to this court. On that appeal two questions were presented, viz.: Whether the legislature had the constitutional power to order the conveyance of this 40 acres of land to be made to Julia A. Bakewell; and, if so whether it could exercise such power by joint resolution. This court, in the discussion of the first branch of the case held in accordance with what had been previously held in *State Bd. of Edu. v. Greenebaum*, 39 Ill. 610, that this corporation was a private eleemosynary corporation, which was not to be deprived of its property by the above-mentioned joint resolutions of the legislature, and declined to pass upon the question whether the legislature could exercise the power of making the grant by a joint resolution. This is the effect of the opinion in *State Bd. of Edu. v. Bakewell*, 122 Ill. 339, 10 N. E. 378.

Under this legislation with reference to this university the members of the board of education are appointed by the governor, with the exception of the superintendent of public instruction, who is made one of its members, with special duties, and who is required to make biennial reports to the legislature. The object of the institution is to qualify teachers for the common schools of this state. Each county is entitled to gratuitous instruction of a certain number of pupils, and it is contemplated that each student shall agree to teach in the public schools of the state a certain period of time. The board of education is compelled to present to the governor a full statement of expenditures, with vouchers, which must be approved by him before the next quarter's appropriation can be drawn from the state treasury or an order therefor given by the state auditor.

Normal schools are public institutions, 48 L. R. A.

which the state has the right to establish and maintain. The purpose of their establishment is to advance the public-school system, and create a body of teachers better qualified for the purpose of carrying out the policy of the state with reference to free schools, and provide for a more thorough and efficient system of the schools, whereby all the children of this state may receive a good common-school education. They are the legitimate offspring of the school law entering into our plan of education, whereby teachers may be taught how best and most effectively to discharge their duties. *Burr v. Carbondale*, 76 Ill. 455. By § 1 of article 8 of the Constitution it is provided: "The general assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common-school education." In complying with this mandatory provision, the state has the right to select its own agencies or instrumentalities for the accomplishment of the purpose. To carry out this provision of the Constitution, there must be necessary expenditures of public moneys, resting upon considerations of the policy of the state with reference to the manner of compliance with this constitutional provision. Where a mandatory duty is imposed by the Constitution on the legislature of the state, without restriction as to methods, the policy of the state may be determined by the legislature only, and its action must be regarded as conclusive as to the state policy. Normal schools being a recognized method of advancing the interests of the public-school system, which is mandatorily required of the general assembly to be provided for, the legislature, having the power to prescribe the policy of the state with reference to such normal schools, had the power, before the present Constitution as well as since, to provide by legislation that donations might be offered and taken into consideration in determining the place where certain institutions that are in their nature of a public character should be located. This was done under the act establishing the State Normal University, under the Constitution of 1848, and has in more recent times been acted on by the legislature in the location of the Southern, Northern, and Eastern Normal Schools and the Soldiers' Home. Because such donations have been made with reference to the last four named institutions, they are not deprived of their public character. The normal university was authorized to receive donations by its act of incorporation, its powers and duties, to a certain extent, being prescribed in that act; and the extension of state aid by the appropriation of interest on the college or university fund, and by the requirement that the school shall give gratuitous education to certain scholars of different counties of the state, was the adoption of a means to advance education in the common schools.

The Constitution is merely a limitation upon the power of the legislature, which may do anything not forbidden by the express terms of the Constitution or by necessary im-

plication. The power of the legislature to adopt such agencies as it may deem proper to carry out the state policy would authorize it to provide for the education of teachers for the common schools, and this private corporation, created before the adoption of the present Constitution, benefited and aided by the legislation of the state by reason of its receipt of the interest on the college and university fund provided for by the act of admission of the state of Illinois into the Union, was an agency of the state, in the interest of the common schools, when the present Constitution was adopted, which included the provision of § 20 of article 4, that the state shall never pay, assume, or become responsible for, or loan or extend its credit to, any public or other corporation. That provision of the Constitution does not, by express terms or by necessary implication, prevent the state from using such agencies for the advancement of public-school education that may be deemed proper under the policy of the state, which is exclusively left to be determined by the legislature, under the provisions of § 1 of article 8, which necessarily require the expenditures of public moneys. It is a principle of construction of a Constitution that it is proper to take into consideration the uniform, continued, and contemporaneous construction given by the legislature, and generally recognized, as to its meaning or intention, and such contemporaneous construction affords a strong presumption that it rightly interprets the meaning and intention. *Bunn v. People ex rel. Laflin*, 45 Ill. 397; *People ex rel. Lynch v. La Salle County Supers.* 100 Ill. 405; *People ex rel. Woodyatt v. Thompson*, 155 Ill. 451, 40 N. E. 307; *State v. Mayhew*, 2 Gill, 487; *Cooley*, Const. Lim. 82.

After the act of 1867, appropriations were made form the state treasury for the erection of buildings and the purchase of apparatus and appliances for this institution. At the first session of the legislature after the adop-

tion of the present Constitution of this state, and at almost every session since that time, the legislature has passed appropriation bills, which have received the approval of the governor. Both the legislative and executive branches of the government have adopted a contemporaneous construction of the instrument, to the effect that this private corporation, authorized to receive donations from individuals for the purpose of advancing education, was a state agency for the instruction of teachers to be employed in public schools, which necessarily required expenditures of public money under an appropriation by the legislature, to be paid on warrants of the auditor drawn on the state treasury. Such expenditures, in consideration of benefits received by the state in the gratuitous instruction of teachers, could as properly be paid by the state to this private corporation as the appropriations made for the support of the Southern or the Northern or the Eastern Illinois Normal schools, as the expenditures in each case are for one and the same end, and such appropriations are not an assumption of the debts or liabilities of the institution, nor a loan or extension of credit in aid of this corporation.

Counsel for defendants in error present the question that this bill was obnoxious to a demurrer, for the reason that the bill did not make proper parties defendant those who were directly affected by the decree to be rendered. Under the view we take of this case, it is unnecessary to extend this opinion by discussing this question, as what has been said disposes of the case.

The decree of the Circuit Court of Sangamon County is affirmed.

Craig, J., dissenting:

In my judgment, this opinion overrules *State Bd. of Edu. v. Bakewell*, 122 Ill. 339, 10 N. E. 378, and for that reason I cannot indorse the doctrine of the opinion.

MICHIGAN SUPREME COURT.

Re Estate of Mary C. JONES, Deceased.

Almon L. MARKHAM

v.

Silas L. HUFFORD *et al.*, *Plffs. in Err.*

(.....Mich.....)

1. The interest of a legatee in a legacy to which he is entitled only on condition that he be declared by the executor to be a reformed man at the expiration of a certain period is not vested until such decision is made.

NOTE.—For condition of legacy, the breach of which will prevent its vesting, see *Phillips v. Ferguson* (Va.) 1 L. R. A. 837; *Conger v. Lowe* (Ind.) 9 L. R. A. 165, and *note*; *Bullard v. Shirley* (Mass.) 12 L. R. A. 110; and *Congregational Church Bldg. Soc. v. Everitt* (Md.) 35 L. R. A. 693.
48 L. R. A.

2. A condition in a legacy, that the legatee's right thereto shall depend upon the decision of the executors at the end of a certain time that he is a reformed man, is not void for uncertainty, and such decision is a condition precedent to his right to the legacy.

(March 27, 1900.)

ERROR to the Circuit Court for Kent County to review a judgment in favor of claimant in a proceeding to compel defendants as executors of the will of Mary C. Jones, deceased, to pay an alleged legacy to claimant. *Reversed.*

The facts are stated in the opinion.

Mcsars. Walker & Fitzgerald, for plaintiffs in error:

The intention of the testatrix is clear and should be given effect, unless some positive rule of law prevents.

The condition is not indefinite nor inoperative.

Rushmore v. Rushmore, 35 N. Y. S. R. 845, 12 N. Y. Supp. 776; *Cassem v. Kennedy*, 147 Ill. 660, 35 N. E. 738; *West v. Moore*, 37 Miss. 114; *Deu ex dem. Blean v. Messenger*, 33 N. J. L. 499; *Stark v. Conde*, 100 Wis. 633, 76 N. W. 600; *Wynne v. Wynne*, 2 Mann. & G. 8.

Almon L. Markham's legacy is contingent, and not vested.

2 Jarman, Wills, p. 456; 29 Am. & Eng. Enc. Law, p. 456, note 2; Theobald, Wills, 2d ed. 411; 2 Wms. Exrs. p. 520; Hawkins, Wills, pp. 222, 224; 2 Redf. Wills, p. 661; *Scott v. West*, 63 Wis. 529, 24 N. W. 161, 25 N. W. 8; *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353; *Willett v. Rutter*, 84 Ky. 317, 1 S. W. 640; *Stark v. Conde*, 100 Wis. 633, 76 N. W. 600.

The happening of the event—showing himself to be reformed—was "the motive" and "of the essence of the bequest."

29 Am. & Eng. Enc. Law, p. 457; 2 Jarman, Wills, p. 456.

The postponement of the payment of the legacy is upon the happening of an event of such a nature that it is to be presumed that the testatrix meant to make no gift unless the event happened, and it is therefore contingent.

Loder v. Hatfield, 71 N. Y. 98.

The legacy is contingent and in legal effect conditional.

Theobald, Wills, pp. 400, 263; 2 Jarman, Wills, p. 509, note 3, 511; *Tilley v. King*, 109 N. C. 461, 13 S. E. 936; *Johnson v. Warren*, 74 Mich. 491, 42 N. W. 74; *Carper v. Croul*, 149 Ill. 465, 36 N. E. 1040.

If the condition is absolutely void because of ambiguity and uncertainty, it is still a condition precedent; and if the condition precedent is impossible of performance, the bequest is void also.

Stark v. Conde, 100 Wis. 633, 76 N. W. 600; 2 Jarman, Wills, pp. 524, 525.

Messrs. Lombard & McAllister, for defendant in error:

The language in the first paragraph of the will constitutes an absolute and vested legacy.

Where there is a clear gift, distinct from a direction to pay when the legatee attains a given age, the direction to pay will not postpone the vesting of the gift, it being considered *debitum in presenti, solvendum in futuro*.

29 Am. & Eng. Enc. Law, p. 454; Theobald, Wills, 2d ed. 410; 1 Jarman, Wills, 5th ed. 837; *Jones v. Habersham*, 107 U. S. 177, 27 L. ed. 402, 2 Sup. Ct. Rep. 336; *Higgins v. Waller*, 57 Ala. 400; *Young v. McKinnie*, 5 Fla. 542; *Wardell v. Hale*, 161 Mass. 396, 37 N. E. 196; *Hathaway v. Leary*, 55 N. C. (2 Jones Eq.) 264; *Snow v. Snow*, 49 Me. 164; *Re Mahan*, 98 N. Y. 372; *Verrill v. Weymouth*, 68 Me. 318; *Bushnell v. Carpenter*, 92 N. Y. 273; *Loder v. Hatfield*, 71 N. Y. 92; *Rathbone v. Dyckman*, 3 Paige, 10; *Wood v. Cone*, 7 Paige, 471; *Bowman's Appeal*, 34 Pa. 19; *McClure's Appeal*, 72 Pa. 414; *Bayard v. Atkins*, 10 Pa. 18; *Schwartz's* 48 L. R. A.

Appeal, 119 Pa. 337, 13 Atl. 212; *Lightner v. Lightner*, 127 Pa. 468, 17 Atl. 986; *Maggoffin v. Patton*, 4 Rawle, 113; *Brown v. Brown*, 44 N. H. 281; *Nelson v. Pomeroy*, 64 Conn. 257, 29 Atl. 534; *Farnam v. Farnam*, 53 Conn. 281, 2 Atl. 325, 5 Atl. 682; *Colt v. Hubbard*, 33 Conn. 285; *Blackburn v. Hawkins*, 6 Ark. 58; *Shattuck v. Stedman*, 2 Pick. 468; *Furness v. Fox*, 1 Cush. 134, 48 Am. Dec. 593; *Warren v. Hembree*, 8 Or. 123; *Green v. Green*, 86 N. C. 546; *Perry v. Rhodes*, 6 N. C. (2 Murph.) 140; *Caldwell v. Kinkead*, 1 B. Mon. 231; *Scofield v. Olcott*, 120 Ill. 363, 11 N. E. 351; *Hancock v. Titus*, 39 Miss. 224; *Lowe v. Barnett*, 38 Miss. 329; *Tucker v. Ball*, 1 Barb. 94; *Kearney v. Kearney*, 17 N. J. Eq. 59; *Dyson v. Repp*, 29 Ind. 482.

The only difficulty in such cases is to determine whether it is a substantive gift and a direction to pay, or whether the only gift is in the direction to pay.

29 Am. & Eng. Enc. Law, 455, 456; Theobald, Wills, 2d ed. 410; *Atmore v. Walker*, 46 Fed. Rep. 429; *Van Camp v. Fowler*, 59 Hun. 311, 13 N. Y. Supp. 1; *Bushnell v. Carpenter*, 92 N. Y. 270; *Goebel v. Wolf*, 113 N. Y. 405, 21 N. E. 388; *McClure's Appeal*, 72 Pa. 414; *Schwartz's Appeal*, 119 Pa. 337, 13 Atl. 212; *Foster v. Holland*, 56 Ala. 474; *Furness v. Fox*, 1 Cush. 134, 48 Am. Dec. 593; *Scofield v. Olcott*, 120 Ill. 363, 11 N. E. 351.

If futurity is annexed to the substance of the gift, the vesting is suspended; but if it appears to relate to the time of payment only, the legacy vests instantaneously.

Bushnell v. Carpenter, 92 N. Y. 270; *Furness v. Fox*, 1 Cush. 134, 48 Am. Dec. 593; 3 Wooddeson, 512; Godolphin, part 3, chap. 17, § 11; 1 Roper, Legacies, chap. 10, § 2; *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814; *Calkins v. Smith*, 41 Mich. 409, 1 N. W. 1048.

The estates in wills, in the absence of any expressed provision to the contrary, are to take effect or become vested at the testator's death.

McCarty v. Fish, 87 Mich. 48, 49 N. W. 513; *Rivett v. Bourquin*, 53 Mich. 10, 18 N. W. 537; *Letchworth's Appeal*, 30 Pa. 175; *Johnson v. Ballou*, 28 Mich. 392.

The provision contained in the will is a mere discretionary power given to the executors, to be exercised by them at the end of two years, and for them to determine whether they shall pay the legacy or not.

The clause in this will relating to the time of payment is not a condition, but a power.

Perrin v. Lepper, 72 Mich. 454, 40 N. W. 859.

Even if the provision in the will constitutes a condition subsequent, it is absolutely of no force or effect for the reason that there is no gift over for breach of the condition.

Beach, Wills, p. 426; *Crawford v. Thompson*, 91 Ind. 266, 46 Am. Rep. 598; *Hough's Estate*, 13 Phila. 279; *Bostick v. Blades*, 59 Md. 231, 43 Am. Rep. 548; *Binnerman v. Weaver*, 8 Md. 517; *M'Ilvaine v. Gethen*, 3 Whart. 575; *Hoopes v. Dundas*, 10 Pa. 75; *Shackelford v. Hall*, 19 Ill. 212; *Parsons v.*

Winslow, 6 Mass. 169, 4 Am. Dec. 107; 2 Jarman, Wills, 59; 29 Am. & Eng. Enc. Law, p. 483; *Rock River Paper Mill Co. v. Fisk*, 47 Mich. 220, 10 N. W. 344.

Even granting that the provision is a condition of any character, it is so vague, indefinite, and uncertain that it is of no force or effect whatever.

Hooker, J., delivered the opinion of the court:

The testatrix, Mary C. Jones, left a will containing the following provisions: "(1) To Almon L. Markham, the son of my daughter, Julia J. Markham, deceased, I give and bequeath the sum of five hundred dollars (\$500), to be paid to him at the expiration of two years from the date of my demise; provided, that he shall be deemed a reformed man, in the judgment of the executors of this will. (2) To my granddaughter, Mary Maud Markham, I give and bequeath the sum of five hundred dollars (\$500), not to be paid to her until she has attained the age of twenty (20) years, unless it be necessary, in the opinion of the executors, and then not to exceed the sum of one hundred and fifty dollars (\$150); the balance to be paid at the time specified above, if any disbursement is made. (3) In the event of the demise of either or both of the aforementioned persons before the time for the payment of the several amounts due them, then I direct that their shares shall revert to the Society of Women's Christian Temperance Union, to be paid to the Union of Unions of the City of Grand Rapids, and to be by them used for the advancement of the temperance work, without reservation." Several other bequests followed, and then the following: "(8) And all the balance of my estate, both personal and real, or which may accrue or of which I may be possessed of at the time of my decease, I do give and bequeath unto my son, William Hoyle Jones. It is my request that the estate be settled up within three (3) years after my demise. I also give the executors the privilege of disposing of any or all of the estate at public or private sale, as they may deem best for the interests of the estate. I hereby appoint Silas L. Huford, of Walker, and William Hoyle Jones, both of the state of Michigan, executors of this, my will." The will was duly probated, and the persons named as executors accepted the trust and qualified. The inventory of the estate bears date May 20, 1892. In October, 1898, Almon L. Markham filed a petition in the probate court, praying an order that the executors pay him his legacy. This was followed by an amended petition. Upon a hearing the probate court denied the relief, and the cause was tried in the circuit court upon appeal. The findings of fact and law disclose, among other things, that on January 18, 1896, Almon L. Markham filed in probate court a petition alleging the will and its admission to probate, and that more than two years had expired, and that he was a reformed man, and was entitled to his legacy. It prayed that the executors be cited to show cause why they had not paid the leg-

acy, and, in case of their failure to do so, that they be discharged from their office, and petitioner be authorized to bring an action upon their bond in the circuit court. A hearing was had, and it was held that the petitioner was not entitled to the relief prayed. No appeal was taken, and such order stands unreversed. In the present proceeding the circuit court failed to pass upon the question of petitioner's reformation, and in the finding of law held that petitioner took a vested legacy, and that the conditions attached were indefinite, uncertain, and void. It was also found that petitioner was entitled to his legacy, with interest at 6 per cent from May 11, 1896, and costs, all to be paid out of the estate by the executors. The defendants have appealed. They claim (1) that the legacy was not a vested one; (2) that, regardless of that question, the condition was a valid condition precedent; (3) that the claim is barred by the former adjudication in the probate court.

The intention of the testatrix, if it can be ascertained, must settle the construction to be placed upon this bequest. The section, considered by itself, would, in our opinion, impress the average mind as not ambiguous, and would be interpreted to mean that if, at the expiration of two years from the demise of the testatrix, the executors should deem the petitioner a reformed man, they should pay him \$500 from the estate; otherwise, not. Very few would understand from this language that, if not deemed to be reformed, he should still receive the bequest at a later date, and that distant but a year. "A conditional legacy is defined to be a bequest whose existence depends upon the happening or not happening of some uncertain event, by which it is either to take place or to be defeated. No precise form of words is necessary in order to create a condition in wills, but, whenever it clearly appears that it was the testator's intent to make a condition, that intent shall be carried into effect." 2 Wms. Exrs. p. 558, and cases cited. We are satisfied that the intention of the testatrix was that her grandson should not have this money unless within two years after her death he should change his course of conduct, and she selected persons in whom she had confidence to determine the question at the proper time. It was left to their judgment, and the inference is that they knew the petitioner's faults. Unless at that time the executors should determine that he was a reformed man, the provision would be inoperative. It was unnecessary for her to make a record of petitioner's faults. It was a valid condition to require the reform of bad habits. *Dustan v. Dustan*, 1 Paige. 509; *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353. A condition which involves anything in the nature of consideration is, in general, a condition precedent. Theobald, Wills, 263. In *Finlay v. King*, 3 Pet. 346, 7 L. ed. 701, Chief Justice Marshall said: "It is certainly well settled that there are no technical appropriate words which always determine whether a devise be on a condition precedent or subsequent. The

same words have been determined differently, and the question is always a question of intention. If the language of the particular clause or of the whole will shows that the act upon which the estate depends must be performed before the estate can vest, the condition, of course, is precedent; and unless it is performed the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole will, the condition is subsequent." It is in all cases a question of intention, and not of phrase or form. In support of this, see 4 Kent, Com. 124; Flood, Wills, 283; 2 Redf. Wills, 283; 2 Washb. Real Prop. 8; *Nicoll v. New York & E. K. Co.* 12 N. Y. 121; *Barruso v. Madan*, 2 Johns. 145; *Robbins v. Gleason*, 47 Me. 259; *Burnett v. Strong*, 26 Miss. 116; *Ward v. New England Screw Co.* 1 Cliff. 565, Fed. Cas. No. 17,157; *Crennell v. Lawson*, 7 Gill. & J. 240; *Hayden v. Stoughton*, 5 Pick. 228; *Jackson v. Kip*, 8 N. J. L. 241; *Bowman v. Long*, 23 Ga. 247. The following have been held precedent conditions: If he lives three years, with limitation over if he dies within that time. *Buck v. Paine*, 75 Me. 582. If he attains the age of twenty-one years (*Jones v. Leeman*, 69 Me. 489; *Kelso v. Cuming*, 1 Redf. 392; *Bowman v. Long*, 23 Ga. 247), it being sufficient if he does so before testator's death (*Eisner v. Koehler*, 1 Dem. 277); or although twenty-one, and has in the meantime learned a trade, and is of good moral character, to be determined by executor (*Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353); or "shall be desirous and capable of entering into business for himself" (*Re Davidson's Estate*, 17 Phila. 424); or if he withdraws from the Roman Catholic priesthood (*Barnum v. Baltimore*, 62 Md. 275, 50 Am. Rep. 219; *Kenyon v. See*, 94 N. Y. 563, 29 Hun. 212); or releases testator's note held by him (*Houard v. Whately*, 15 Lea. 607); or survives testator (*Gibson v. Seymour*, 102 Ind. 485, 2 N. E. 305); or if he aid in the defense of a certain suit, to the satisfaction of the executor (*Cannon v. Apperson*, 14 Lea. 553); or to A for her support, "if she shall lose any part of her own property, and need more" for her support (*Ely v. Ely*, 20 N. J. Eq. 43); or "when she should be sick and unable to support herself" (*Reynolds v. Denman*, 20 N. J. Eq. 218). So, a power to sell "if income be not sufficient for support." *Minot v. Prescott*, 14 Mass. 496. In *Roper, Legacies*, 562, 563, it is said by an old and learned author that "a fifth instance of exception must be made out of the positive rule applicable to the vesting of legacies, where the gift of the legacy and the time of payment are in terms distinct, when the period for payment is contingent, as upon the marriage or the taking of holy orders of the legatee; for in neither of those instances will the legacy vest before the happening of the contingency, as we have seen it would have done had the time of payment been certain. The distinction is founded upon the following reasoning: It must be inferred that where the time is certain, as

when the legatee attains the age of twenty-one, the testator merely postponed the payment of the legacy in consideration of the legatee's unfitness to manage his affairs prior to that period; but when the event annexed to the payment may or may not happen, it is to be presumed that the expectation of its taking place was the sole motive, and therefore of the essence of the bequest." The provision under discussion was, in our opinion, intended as a condition precedent; and it should not be defeated by the failure to specifically provide for the disposition of the fund, or by an inaccurate use of the word "revert" in the 3d section of the will. We think that the bequest did not constitute a vested interest, and that the condition is not any more uncertain than it would have been had the will required payment of the legacy provided the executors should at a given date deem petitioner unworthy of it. The provision cannot be distinguished in principle from any other bequest depending upon the happening of an uncertain event.

It becomes unnecessary to decide the third question raised, though there is much force in the claim that this proceeding is barred by the former adjudication.

The order of the Circuit Court is reversed, and no new trial ordered.

The other Justices concur.

FIRST NATIONAL BANK of Chicago

v.

CITIZENS' SAVINGS BANK of Detroit,
Plff. in Err.

(.....Mich.....)

1. Sending a certificate of deposit directly to the drawer for collection, without instructions to do so, constitutes negligence on the part of a collecting bank, for which it will be liable in case of a resulting loss.
2. A collecting bank is impliedly instructed to send a certificate of deposit for collection directly to the bank which made it, when this is the only bank in the place and is rated and supposed to be responsible, and the instructions received by the collecting bank, after calling attention to the fact that it had a correspondent at that place, said, "Please collect for us at your best rate of exchange."

(March 13, 1900.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to hold defendant liable for negligence in making the collection of a certificate of deposit sent to it by plaintiff. *Reversed.*

The facts are stated in the opinion.

NOTE.—On the question of sending check directly to drawee bank, see *Anderson v. Rodgers* (Kan.) 27 L. R. A. 248, and *note*; also *Kershaw v. Ladd* (Or.) 44 L. R. A. 236; and *Minneapolis Sash & Door Co. v. Metropolitan Bank* (Minn.) 44 L. R. A. 504.

Messrs. Barbour & Rexford, for plaintiff in error:

The liability of a forwarder arises from his contract with his principal, and depends upon what that contract is.

Simpson v. Waldbly, 63 Mich. 439, 30 N. W. 199.

If the contract be that he is to undertake the collection and be responsible for all means used therefor, he is liable for all acts of his subagents or correspondents.

If the contract be that he is merely to transmit the claim to another for collection, he is required to use only proper care in selection of a correspondent.

If the contract be that he is to transmit the claim to a certain person, or the debtor himself, for collection, he is not liable if he does so.

If the contract be that he is to transmit the claim to the debtor for collection, if he has and is "warranted in having considerable confidence in him, he is not liable if, having such confidence and acting in good faith, he sends it to him for collection; and such confidence and good faith will be presumed until some fact to the contrary is shown.

Plaintiff's instructions to defendant were to send the certificate of deposit directly to Parsons for collection.

Mechem, Agency, § 295.

Where the language is ambiguous or susceptible of more than one construction, or is vague or general, or inappropriate to express the true intent, extraneous evidence is admissible to explain.

Bradner, Ev. 2d ed. p. 274.

Messrs. Bowen, Douglas, & Whiting, for defendant in error:

The defendant admits that the transmission by it of the certificate of deposit to Parsons, the maker, was negligence. It is negligence which made the defendant responsible for any loss resulting.

Merchants' Nat. Bank v. Goodman, 109 Pa. 428, 58 Am. Rep. 728, 2 Atl. 687; *Drovers' Nat. Bank v. Anglo-American Pkg. & Provision Co.* 117 Ill. 100, 57 Am. Rep. 855, 7 N. E. 601; *German Nat. Bank v. Burns*, 12 Colo. 539, 21 Pac. 714; *First Nat. Bank v. Fourth Nat. Bank*, 16 U. S. App. 1, 56 Fed. Rep. 965, 6 C. C. A. 183.

A certificate of deposit is in legal effect a promissory note payable on demand, and subject to all the incidents of negotiable paper.

Cate v. Patterson, 25 Mich. 191; *Tripp v. Curtenius*, 36 Mich. 494, 24 Am. Rep. 610; *Birch v. Fisher*, 51 Mich. 36, 16 N. W. 220.

And neglect to protest and give notice to the indorser is conclusively presumed to do injury, and the contrary cannot be shown.

Whitten v. Wright, 34 Mich. 92; *Smith v. Long*, 40 Mich. 555, 29 Am. Rep. 558.

A bank which holds itself out to collect paper for compensation, or its advantage, ought to be governed by the same rules of law that apply to other persons; and if it wishes to avoid such responsibility, it is very easy for it to accept such business only upon 4S L. R. A.

a special agreement as to its duties and liabilities.

Simpson v. Waldbly, 63 Mich. 439, 30 N. W. 199.

Long, J., delivered the opinion of the court:

On September 6, 1898, the plaintiff bank received for collection from the National bank of California, at Los Angeles, a certificate of deposit for \$1,650, and interest thereon, issued to the order of J. R. Wallace by D. F. Parsons, a private banker at Burr Oak, Mich., under date of February 2, 1898. The certificate was indorsed and made payable by Wallace to the order of the Bank of Whittier, Cal., by it to the National Bank of California, and by it to the First National Bank of Chicago. On September 6th, the day of its receipt, the First National Bank of Chicago indorsed and made it payable to the order of the defendant bank, and forwarded it by mail to that bank at Detroit, with the following instructions:

The First National Bank of Chicago.

Chicago, Ill. Sept. 6, 1898.

Citizens' Savings Bank, Detroit, Mich.

Dear Sir:

I inclose items as per statement below for collection and returns.

Yours, respectfully,

R. J. Street, Cashier.

Protest all paper unless otherwise instructed.

Burr Oak, 1050

and Int. 38.50

1688.50

Telegraph if not honored (rubber-stamped).

Do not hold any of our collections after due, for any reason whatever, except upon special instructions from us. Return at once if not paid.

Accompanying the above letter, and pinned to the certificate of deposit, there was a red slip, as follows:

Citizens' Savings Bank,

Detroit, Mich.:

We send this C—D for \$165,000 and Int. to you for collection, as we note that you have a correspondent at Burr Oak, Mich. Please collect for us at your best rate of exchange, and oblige.

First National Bank,

A. Chicago.

9-6-'98.

Kindly take this ticket off before forwarding to Burr Oak.

Also, accompanying the certificate, and pinned to it, were two slips, of which the following are copies:

GOS.

Telegraph if not honored. If telegraphing, communicate only with the First National Bank of Chicago, Ill. (giving date of their indorsement stamp), who will give instructions direct.

First National Bank, Chicago.

Collection. No. 8.

Ac't Nat'l Bank of Cal.,
Los Angeles, Cal.

Date, Sept. 6, 1898.

Burr Oak, \$1650.

Int.,

T. N. P.

8-3.

Do not write or mark or stamp on this ticket.

Protest.

Return promptly if not paid.

The agent of the First National Bank of Chicago, who forwarded the certificate to defendant, testified on cross-examination that "the certificate was sent to the defendant bank (a bank, as a rule, we never send anything to). We sent it to them for the simple reason that we presumed that they knew all about this D. F. Parsons, having had his account for several years, and we didn't know anything about him. He was a private banker in Burr Oak, Mich. I had sent items to Parsons for a number of years previous to this,—small items; but had never sent him as much money as that. I had no sufficient knowledge of him to send him more. Q. This red ticket states: 'We note you have a correspondent at Burr Oak.' Do you know who that correspondent was that you noted at that time? A. There being only one bank at Burr Oak, there could not be any question about it. He was D. F. Parsons."

It appears that the defendant bank, on receipt of the certificate of deposit from plaintiff, which was September 7, 1898, sent it forward to D. F. Parsons, Burr Oak, Mich., stating that it was inclosed for collection, and asking him to report promptly. Parsons received this certificate, and on the 12th of September handed it to his clerk, and told him to give the Citizens' Savings Bank of Detroit credit for it. The clerk testified that, according to the books of D. F. Parsons, there was a balance in the Citizens' Savings Bank due Mr. Parsons of about \$28,000. The clerk testified, further, that it was the custom of business that when the Citizens' Savings Bank sent collections to Mr. Parsons, if it was a certificate, they merely gave the bank credit on the books. If it was a check or draft for collection, they would collect it before they gave credit; that business had been conducted in this way for over five years. The witness further testified: "We would remit to the Citizens' Savings Bank every day, or twice a day, or once in two or three days. If our books showed a balance to the Citizens' Savings Bank in our favor, we would remit just the same. We would remit to the Citizens' Savings Bank for a draft or check drawn on our bank. The Citizens' Savings Bank had never sent anything on our bank for collection before that was drawn on us, and I didn't notice this until afterwards. My father made an assignment for the benefit of creditors on the night of the 13th of September, 1898. Mr. Himebaugh, the assignee, has the state-

ment the Citizens' Savings Bank rendered. On September 15, 1898, I did not know anything about my father's indebtedness to the Citizens' Savings Bank. What I have learned about it since is what has been told me. Within ten days or two weeks after his assignment, my father left Burr Oak, and does not live there now." The cashier of defendant bank testified that he received this certificate of deposit on September 7th, and on the same day he forwarded it on regular collection letter head to Parsons, with instructions to remit. The witness was then asked: "Q. What construction did you place upon Exhibit 3?" (Exhibit 3 is the letter to the defendant bank in which it was said: "We sent this C-D for \$1650.00 and Int. to you for collection, as we note that you have a correspondent at Burr Oak, Mich.") This was objected to, and objection sustained. "Q. How did you regard Mr. Parsons at that time financially?" This was objected to; and the court said: "It seems to me that this is not the point. If they thought that he was responsible, didn't they assume the risk? Here is a note one of us has made for a large amount. We all know the usual practice of sending a note for collection is not to send it to the maker of the note. While in a good many instances it would be safe to send a note to the maker of it, does not the bank always take the chances as a matter of law?" Counsel for defendant: "It does, unless its instructions are to the contrary. I do not claim here without instructions we were justified in sending this to Parsons; but what I claim is the instructions were positive to send it to him, and I wish to show that Mr. Tillotson (the cashier of defendant bank) so construed it, and that was his honest interpretation of the memorandum. Further, we have a letter from the First National Bank of Chicago in which they acknowledge that to be the construction." The Court: "I have ruled, in effect, that that memorandum is not susceptible to that construction. You have an exception to that." Counsel: "Your honor holds that that is not an instruction to the Citizens' Savings Bank to send it direct to Parsons." The Court: "Yes." The defendant bank, not having heard from Parsons, on the 12th of September wrote him to send funds sufficient to meet the certificate. Nothing further was heard from Parsons on the subject. He failed and left the state, and his estate as reported by his son was not worth eight cents on the dollar. The cashier of defendant bank was interrogated further in reference to his good faith in sending the certificate direct to Parsons, and the testimony ruled out. He further testified: "There was no arrangement between our bank and him by which he was authorized, instead of sending currency direct to our bank, to give the bank credit. That would not be allowed any more than we would pay his check if he did not have the money to his credit in our bank. I first learned that he was insolvent, or that his credit was not good, on September 15th. On September 7th when this collection was received from

Chicago, Parsons was owing our bank \$4,000." Some considerable correspondence was had between the plaintiff and defendant banks in reference to the matter. On September 21st the plaintiff wrote the defendant as follows:

Chicago, Sept. 21, 1898.
Citizens' Savings Bank, Detroit, Michigan.
Gentlemen:

We have your favor of the 19th inst. In sending the item to you as we did, we suppose that it was intended to have the advantage of your knowledge of Parsons. We were aware that his was the only bank at Burr Oak, but we thought you would know enough about him not to send to him an item on himself for \$1,650, unless you had and were warranted in having considerable confidence in him. You said nothing on this point. Kindly let us know how you regarded Parsons. Our correspondent in Los Angeles is inquiring sharply of us to see if there is not some responsibility "somewhere" for this loss.

Yours, truly,
R. J. Street, Cas. O. P.

The defendant replied to this letter as follows:

Detroit, Sept. 23d, '98.
R. J. Street, Cashier, Chicago, Ill.

Dear Sir:

In answer to yours of the 21st inst., regarding the certificate sent to D. F. Parsons, of Burr Oak, who recently failed. I would say that we have had entire confidence in Mr. Parson's integrity and ability to pay. We had heard nothing detrimental to his financial standing. His rating is from \$30,000 to \$35,000 in Dun's, and we were at the time carrying \$4,000 of loans to him, which was less than the original amount loaned him, and he has always been business-like in his dealings with us. If he had wanted to borrow money, we should have loaned it to him, and we had no intimation whatever that there was anything wrong there. I have requested the assignee to return the certificate, unless he would remit for same.

Yours, respectfully,
Frank F. Tillotson, Cashier.

The certificate was not protested, and the plaintiff bank was not notified of its nonpayment until September 15th. The declaration by which the suit was commenced counts upon the negligence of the defendant bank in sending the certificate to Parsons for collection, and also upon the negligence of defendant in not notifying plaintiff of its noncollection until September 15th also, for not protesting the certificate for nonpayment. The common counts in assumpsit are added. The court directed the jury to return a verdict in favor of the plaintiff for the amount of the certificate and interest. Counsel asked the court to direct the verdict in favor of defendant. This was refused, and the refusal constitutes the principal assignment of error.

The main question in the case, and in fact about the only question, is whether the defendant

was justified in sending the certificate directly to Parsons for collection. It is conceded by counsel for defendant that, in the absence of instructions to do so, it is negligence to send the collection directly to the drawer; and such negligence makes the sender liable for any loss resulting. We think this rule is sustained by the authorities: *Merchants' Nat. Bank v. Goodman*, 109 Pa. 428, 58 Am. Rep. 728, 2 Atl. 687; *Drovers' Nat. Bank v. Anglo-American Pkg. & Provision Co.* 117 Ill. 100, 57 Am. Rep. 855, 7 N. E. 601; *German Nat. Bank v. Burns*, 12 Colo. 539, 21 Pac. 714; *First Nat. Bank v. Fourth Nat. Bank*, 16 U. S. App. 1, 56 Fed. Rep. 965, 6 C. C. A. 183. But it is contended that the instructions from plaintiff to defendant were to send the certificate of deposit directly to Parsons for collection: that this is to be gathered from the terms of the letter; that the direction "collect at your best rate of exchange" implies this from the fact that there was no other bank at Burr Oak. We think in this defendant's counsel is correct. Any other mode of collection would not have been in compliance with instructions. The defendant could not send the certificate through the express company, as it could not be collected at the best rate of exchange in that way. The further direction, "Kindly take this ticket off before forwarding to Burr Oak," is consistent only with the idea that the collection was to be sent directly to the Parsons bank. The plaintiff, in its letter forwarding the certificate, calls attention to the fact that the defendant has a correspondent at Burr Oak, and then says: "Please collect at best rate of exchange." Under these circumstances we think the defendant was justified in sending the collection, especially as Parsons had a rating with R. G. Dun & Co. of from \$30,000 to \$35,000, and the defendant's officers had entire confidence in him. But aside from this, it is quite evident from the correspondence following that the plaintiff construed its own letter to mean that defendant was instructed to send the collection direct to Parsons. In the letter of plaintiff of September 16th the inquiry is made: "State whether the item was sent direct to Parsons or through some other agency at Burr Oak." On the 19th the defendant wrote plaintiff that it had been sent direct to Parsons, and on the 21st the letter is written by plaintiff heretofore quoted. In that letter it was said: "In sending the item to you as we did, we suppose that it was intended to have the advantage of your knowledge of Parsons. We were aware that this was the only bank at Burr Oak, but we thought that you would know enough about him not to send to him an item on himself unless you had and were warranted in having considerable confidence in him." In other words, it is apparent that the very purpose of the item's being sent to defendant was because it had knowledge of Parson's responsibility, and that it could be collected by defendant at better rates than plaintiff could collect it for from Chicago. As Parsons had the only bank at Burr Oak it must have been anticipated by plaintiff

that defendant would, if it believed Parsons responsible, send the collection directly to him, and thus obtain the best rates of exchange. No question is made but that the defendant acted in the utmost good faith in believing that Parsons was perfectly responsible. The collection was sent Parsons on the 9th. The 10th, being Saturday, was a half holiday. On Monday, the 12th, the defendant, not having heard from Parsons,

made inquiry about the collection, and learned that he had failed. The plaintiff was notified immediately. We think the defendant was not negligent in any particular; and the court below should have directed the verdict in favor of defendant.

The judgment must be reversed, and a new trial ordered.

The other Justices concur.

PENNSYLVANIA SUPREME COURT.

Re Estate of John Joseph CLARK.

APPEAL OF William J. McAULIFFE.

(195 Pa. 520.)

1. A constitutional provision against granting to any corporation any special or exclusive privilege is not infringed by an act allowing trustees, etc., to charge the estate a reasonable sum which they may have paid "to a company" authorized by law to do so, for becoming surety on their bonds.
2. A statute permitting trustees to charge against the estates in their hands such sums as they have paid to any company for becoming surety on their bonds gives no lien in favor of the company, in the absence of express provision to that effect.

(April 30, 1900.)

APPEAL by the guardian of a minor from a judgment of the Superior Court affirming a decree of the Orphans' Court for Philadelphia County refusing to allow an item in his account for the amount which he had paid to a guaranty company for becoming surety on his bond. *Reversed.*

The facts are stated in the opinion.

NOTE.—Legal powers and privileges of surety and trust companies.

- I. In general.
- II. Special act creating.
- III. Granting special or exclusive privileges to.
- IV. Power to act as guardian, etc., without bond.
- V. Power to act as surety.
 - a. In general.
 - b. On appeal bond.
- VI. Right to counter security.
- VII. Right to relief from suretyship.
- VIII. Right to tax amount paid to, as costs.
- IX. Right of personal representative, etc., to credit for amount paid to.
- X. Foreign companies.
 - a. Power to act as surety.
 - b. Power to act as trustee, etc.

This note does not include matters relating particularly to banking or insurance, or to the taxation of such companies.

I. In general.

A trust company is presumed to have corporate capacity to act as committee of a lunatic, in the absence of specific restrictions in its charter, by virtue of its general powers, under 48 L. R. A.

Messrs. Joseph Edward Murray, Lincoln L. Eyre, and John G. Johnson, for appellant:

A statute must be presumed to be valid and constitutional.

Craig v. First Presby. Church, 88 Pa. 42, 32 Am. Rep. 417.

If there is room in any given case for the exercise of a wise discretion by the legislative assembly, good faith, good reasons, and good motives should be imputed to that body.

State ex rel. Henderson v. Boone County Ct. 50 Mo. 317.

It has never been pretended that the legislature has not the right to classify in proper cases, and when such classification is within the legislative power it matters not how arbitrary the legislative enactment may appear to those who may feel dissatisfied with or injured by it.

Wheeler v. Philadelphia, 77 Pa. 338; *Kilgore v. Magee*, 85 Pa. 401.

While in contracts like this, the more natural attitude of a "surety" is assumed by the form, it is, in effect, one of insurance; and whatever indefiniteness of language or ambiguity of expression there may be, shall be resolved most favorably to the assured.

Guarantee Co. of N. A. v. Mechanics' Sav.

Pa. act May 9, 1889, P. L. 159, to "execute trusts of every description." *Equitable Trust Co. v. Garis*, 100 Pa. 544, 42 Atl. 1022.

And when authorized by its charter to execute all such trusts of every description as may be committed to it by any person or persons, or as may be transferred to it by a surrogate or any court of record, it may be appointed as a committee of the estate of an habitual drunkard. *Glaser v. Pfleest*, 20 Mo. App. 1.

And it may act as trustee under a mortgage, in a case germane to the purpose of its incorporation, under Ohio Rev. Stat. §§ 2831a, 2831b, empowering such companies to receive and hold money and property in trust on such terms or conditions as may be agreed upon, and providing that any such company may be appointed trustee under an instrument creating a trust for the care and management of property, under the same circumstances, in the same manner, and subject to the same control by the court as in the case of a legally qualified person. *Cincinnati Hotel Co. v. Central Trust & S. D. Co.* 25 Ohio L. J. 375.

But it will not be granted letters of administration with the will annexed, although guardian of the sole residuary legatee and only next of kin of the decedent, as against a general legatee, under N. Y. Laws 1873, chap. 781, providing for the appointment of such a company

Bank & T. Co. 47 U. S. App. 91, 80 Fed. Rep. 766, 26 C. C. A. 140.

As the surety company and the individual bondsmen were in no sense members of the same class, within the constitutional purview, the undoubted legislative power existed to confer an additional right upon the one without necessarily having to confer it upon the other.

Com. v. Vrooman, 164 Pa. 306, 25 L. R. A. 250, 30 Atl. 217; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079.

The words of the Constitution furnish the only test to determine the validity of a statute, and all arguments based on general principles outside of the Constitution must be addressed to the people, and not to the court.

Sharpless v. Philadelphia, 21 Pa. 147, 59 Am. Dec. 759.

on its application where it appears that there are no next of kin willing or properly qualified, as, by N. Y. Code Civ. Proc. § 2643, a general legatee is entitled to such administration in preference to such a company. *Re Milbau*, 28 Misc. 360, 59 N. Y. Supp. 910.

II. Special act creating.

The provision of Cal. act March 12, 1885, authorizing acceptance of any corporation incorporated for the purpose of guarantying bonds and undertakings, as sole and sufficient security on any bond or undertaking with one or more sureties required by law, does not violate the provision of Cal. Const. art. 4, § 25, subd. 3, against the passage of local or special laws regulating the practice of courts of justice, as it is general in its operation. *Cramer v. Tittle*, 72 Cal. 12, 12 Pac. 809.

An act incorporating a surety company and authorizing it to become sole surety in all cases where, by law, two or more sureties are required for the faithful performance of any trust or office, does not conflict with Md. Const. art. 3, § 33, forbidding the passage of local or special laws for any case for which provision has been made by an existing general law, where there is no general law providing for corporate security on a trustee's bond for the faithful performance of his duties. *Gans v. Carter*, 77 Md. 1, 25 Atl. 663; *Herzberg v. Warfield*, 76 Md. 446, 25 Atl. 664.

A special act incorporating a corporation empowered to accept and execute trusts of every description intrusted to it by any person or corporation or by the order of any court of record, and to act as executor, administrator, guardian, assignee, or receiver, collect the incomes of estates, and take custody of wills and legal documents, and providing that when appointed to act in any fiduciary capacity its capital stock and property as paid in shall be considered as the security required by law for the faithful performance of its duties, and that no bond or other security shall be required of it,—does not violate the provision of Md. Const. art. 3, § 48, that corporations shall not be created by special act except in cases where no general laws exist providing for the creation of corporations of the same general character, as no general law conferring such rights existed at the time of its passage. *Reed v. Baltimore Trust & Guarantee Co.* 72 Md. 531, 20 Atl. 194.

III. Granting special or exclusive privileges to.

The cases seem to be practically unanimous to the effect that an act authorizing a surety

The American legislatures possess the absolute legislative powers of the British Parliament.

Cooley, Const. Lim. pp. 86-92.

The remedy for an unfair act of assembly, if the majority so think, is in an appeal to the legislature or at the ballot box for its repeal.

Ervine's Appeal, 16 Pa. 256, 55 Am. Dec. 499.

The constitutional provision prohibiting the deprivation of property is not infringed by a proper law regulating a business, which may render property used to carry on the business less valuable.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

The courts cannot impute to the legislature any other but public motives for their acts.

company to become sole surety on a bond or undertaking, or to act in a fiduciary capacity without other security than that afforded by its capital stock, is not invalid as granting a special or exclusive privilege.

A statute authorizing such companies to act as assignee for creditors without bond such as is required of natural persons, but requiring them to give security by depositing securities with the state treasurer, is not invalid as an unjust discrimination in favor of a class. *Roane Iron Co. v. Wisconsin Trust Co.* 99 Wis. 273, 74 N. W. 818.

The provision of Minn. Gen. Laws 1883, chap. 107, § 9, subd. 4, authorizing them to act as guardians of the estates of lunatics, is not unconstitutional as in derogation of the common law, or impolitic, nor because it does not require the corporation to take an oath or give a bond as in the case of natural persons, nor on the ground that it grants special or exclusive privileges, immunities, or franchises to any particular corporation. *Minnesota Loan & T. Co. v. Beebe*, 40 Minn. 7, 2 L. R. A. 418, 41 N. W. 232.

A provision in the charter of a corporation authorized to act as administrator, that its capital stock shall be considered as the security required by law for the faithful performance of its duties, and that no other security shall be required on its appointment as administrator except when required by the court or the parties in interest, is not unconstitutional as conferring an exclusive privilege on the corporation, or discriminating in its favor. *Coleman v. Parrott*, 11 Ky. L. Rep. 947, 13 S. W. 525.

The principal case of *RE CLARK*, Reversing 10 Pa. Super. Ct. 423, holds that Pa. act June 24, 1895, P. L. 248, authorizing a receiver, assignee, guardian, committee, trustee, executor, or administrator to include as part of his lawful expenses in executing the trust such reasonable sum paid to a surety company for becoming his surety as may be allowed by the court, is not invalid as granting a special or exclusive privilege or immunity, on the ground that no provision is made for allowing amounts so paid to individual sureties, as there is a sufficient distinction between the two kinds of sureties to authorize the discrimination.

The provision of La. act 41 of 1894, that any corporation duly incorporated under the laws of Louisiana or any other state for transacting the business of guarantying the fidelity of persons, and the performance of contracts, bonds, or undertakings, may become surety on bonds, etc., is not unconstitutional as granting

Sunbury & E. R. Co. v. Cooper, 33 Pa. 278.

The act of 1895 is not in violation of the Federal Constitution.

Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Re Lockwood*, 154 U. S. 116, 38 L. ed. 929, 14 Sup. Ct. Rep. 1082; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Pacific Exp. Co. v. Sibert*, 142 U. S. 339, 35 L. ed. 1035, 12 Sup. Ct. Rep. 250.

A discrimination in the imposing of certain conditions upon foreign corporations of

other states, as predicated upon their admission into the state, is not unconstitutional.

Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 10 Sup. Ct. Rep. 958.

The police laws have been declared by the courts constitutional.

Specht v. Com. 8 Pa. 312, 49 Am. Dec. 518; *Waldo v. Com.* 9 W. N. C. 200; *Board of Health v. Loyd*, 1 Phila. 20; *Respublica v. Duquet*, 2 Yeates, 493; *Byers v. Com.* 42 Pa. 89; *Wright v. Com.* 77 Pa. 470; *Com. v. Schoenhutt*, 3 Phila. 20; *Com. v. Wilson*, 9 W. N. C. 291; *Dabbs v. State*, 39 Ark. 353, 43 Am. Rep. 275.

In *Hamacker v. Commercial Bank*, 95 Wis. 350, 70 N. W. 295, the court said: "We think the court was right in allowing the charge for obtaining the signature of the American Surety Company as surety on the bond."

security. Phelan v. Louisville Safety Vault & T. Co. 88 Ky. 24, 10 S. W. 10.

V. Power to act as surety.

a. In general.

For special act giving such power, see *supra*, II.

For act granting such power, as a special or exclusive privilege, see *supra*, III.

For foreign companies, see *infra*, X. a.

A surety company may become a surety on a recognizance, as well as on other bonds, under Conn. Pub. Acts 1883, p. 468, providing that any company authorized to transact business as surety on obligations may be accepted as surety upon the "bond" of any person or corporation required by law to execute a bond. *Lovejoy v. Isbell*, 70 Conn. 557, 40 Atl. 531.

An undertaking executed by a surety company is equivalent to one executed by two sureties, under N. Y. Code Civ. Proc. § 811, as amended in 1893. *Tobey v. McDermott* (Surrogate's Court 1896) 1 N. Y. Law Rec. 51.

A surety company whose charter empowers it to become "sole surety" in all cases where two or more sureties are required, and making it lawful for any court, clerk, or other officer to approve such company as sole surety in all such cases, may be approved as sole surety on the bond of a trustee for the benefit of creditors, although Md. Code, art. 16, § 203, requires in such case a bond with "sureties" to be approved by the clerk. *Miller v. Matthews*, 87 Md. 464, 40 Atl. 176.

A surety company may become sole surety on the bond of a railroad company as security for land which it proposes to take under the power of eminent domain, under Pa. act May 9, 1889, § 12, authorizing such a company to "become security" for land damages. *Re Philadelphia & R. Terminal R. Co.* 28 W. N. C. 117.

The receipt of a bond by a saloon keeper with a surety company as sole surety is not compulsory, under Mich. Pub. Acts 1895, act No. 266, providing that a bond or undertaking executed by a surety company qualified to act as surety shall be in all respects a full and complete compliance with every requirement of every law requiring such a bond to be executed by one or more sureties, and § 2, providing that where more than one surety is required it shall be lawful for the court or person authorized or required to accept such bond to accept a bond with one surety only, if it is a surety company, although § 4 provides that the insurance commissioner shall, on proof that such a

the privilege of becoming surety to certain kinds of corporations to the exclusion of all others. *Standard Cotton Seed Oil Co. v. Matheson*, 48 La. Ann. 1321, 20 So. 713.

Such act does not grant an exclusive privilege, as it applies to all of a certain class without any exception. *Holmes v. Tennessee Coal, I. & R. Co.* 49 La. Ann. 1405, 22 So. 403.

An act authorizing a surety company incorporated thereby to become sole surety in all cases where by law two or more sureties are required for the faithful performance of any office or trust is not unconstitutional as conferring upon it a privilege or right not enjoyed by natural persons, as the legislature has power to confer privileges and franchises upon a corporation not enjoyed by individual persons. *Gans v. Carter*, 77 Md. 1, 25 Atl. 663; *Hertzberg v. Warfield*, 76 Md. 446, 25 Atl. 664.

IV. Power to act as guardian, etc., without bond.

For special act giving such power, see *supra*, II.

For act giving such power, as a special or exclusive privilege, see *supra*, III.

For foreign companies, see *infra*, X. b.

The legislature has power to provide that a trust company created by it shall be authorized to qualify and act as statutory guardian of infants, upon the security of its capital stock for the faithful discharge of its duties. *Johnson v. Johnson*, 88 Ky. 275, 11 S. W. 5.

A provision in the charter of such a company, that its capital shall be considered as the only security required by law for the faithful performance of its duties, and that no other security shall be required on its appointment to any office or duty except when required by the courts or by the parties in interest, is not necessarily in conflict with Ky. Gen. Stat. chap. 109, § 1, providing that it shall not be lawful for an assignee for creditors to proceed to execute the trust until he shall appear in court and take an oath to execute the duties confided to him, and shall likewise execute a covenant with sufficient security, to be approved by the court, to the effect that he will faithfully discharge all the duties of assignee imposed upon him, as the court may in its discretion require the company at the time the bond is executed to give personal security, or may dispense with it. *Bank of Commerce v. Payne*, 86 Ky. 446, 8 S. W. 836.

And such a provision is valid, as the legislature has power to determine that the capital stock of such a company is safer than individual & L. R. A.

Holmes v. Tennessee Coal, I. & R. Co. 49 La. Ann. 1465, 22 So. 403.

Messrs. Thomas James Meagher and George Henderson, for appellee:

Before this statute a surety, whether individual or company, of any of the fiduciaries mentioned therein, could not obtain compensation from the fiducial estate; the remuneration must be from the fiduciary personally.

Eby's Estate, 164 Pa. 249, 30 Atl. 124; *Wilson's Estate*, 18 W. N. C. 483.

This act is a forbidden special act under the Constitution of this commonwealth.

An arbitrary classification renders an act special, while a reasonable one—that is, one based on characteristic peculiarities necessitating the legislation in question—is essential to a general act.

Wheeler v. Philadelphia, 77 Pa. 338;

Clark v. Jancsville, 10 Wis. 136; *Kilgore v. Magee*, 85 Pa. 401; *Re New York Eler. R. Co.* 70 N. Y. 327; *State ex rel. Lionberger v. Tolle*, 71 Mo. 645; *Topcka v. Gillett*, 32 Kan. 431, 4 Pac. 800; *Consumers' Gas Trust Co. v. Harless*, 131 Ind. 446, 15 L. R. A. 505, 29 N. E. 1062; *Com. ex rel. McKirdy v. Macfarren*, 152 Pa. 244, 19 L. R. A. 568, 25 Atl. 556; *Lehigh Valley Coal Co.'s Appeal*, 164 Pa. 44, 30 Atl. 210.

Classification which is grounded on no necessity, and has for its sole object an evasion of the Constitution, will not be encouraged.

Scotcken's Appeal, 96 Pa. 422; *Daris v. Clark*, 106 Pa. 377; *Ayars' Appeal*, 122 Pa. 266, 2 L. R. A. 577, 16 Atl. 356; *Re Wyoming Street*, 137 Pa. 494, 21 Atl. 74; *Seabolt v. Northumberland County Comrs.* 187 Pa. 318, 41 Atl. 22; *Com. ex rel. Fertig v. Put-*

company possesses the necessary qualifications. Issue to it a certificate that it is authorized to become and be accepted as sole surety on all bonds and undertakings required by law, which certificate is made conclusive proof of its solvency and credit for all purposes, and of its right to be accepted as such sole surety. *Schmitt v. Clinton*, 111 Mich. 99, 69 N. W. 153.

b. On appeal bond.

For foreign companies, see *infra*, X. a.

A guaranty of an appeal undertaking by a surety company is sufficient and legal, and is of binding force. *White v. Rintoul*, 19 Jones & S. 512.

A surety company may be accepted as sole surety on an appeal undertaking, under N. Y. Laws 1881, chap. 486, authorizing any judge or other officer having authority or required to approve the sufficiency of any bond or undertaking to approve of a bond or undertaking whenever its conditions are guaranteed by a company duly organized or authorized to guarantee the fidelity of persons holding positions of trust, and vesting such corporations with full power to guarantee such bonds and undertakings, although two sureties had previously been required on such an undertaking. *Hurd v. Hannibal & St. J. R. Co.* 33 Hun, 109.

But *Nichols v. MacLean*, 98 N. Y. 458, holds an undertaking so signed insufficient, as an undertaking on appeal is not one requiring the approval of any judge or officer.

And *Travis v. Travis*, 48 Hun, 343, 1 N. Y. Supp. 357, without reference to either of the preceding cases, holds that such an undertaking is insufficient unless approved by the judge, under N. Y. Laws 1886, chap. 416, authorizing such companies to undertake for the two sureties when two are required, "provided the same is approved" by the judge of the court in which the undertaking is given.

The provision of Minn. Gen. Laws 1883, chap. 107, as amended by Gen. Laws 1885, chap. 3, § 7, making it lawful for any annuity, safe-deposit, and trust company to become the sole surety on any bond in any action or special proceeding where a bond is necessary, without any other bondsman or surety and without justification or qualification, does not make it compulsory on the court to approve and accept an appeal bond with such a company as surety, or deprive the court of the power to require the company to justify if its sufficiency as surety is excepted to. *State ex rel. Mutual Investment Co. v. Hennepin County Dist. Ct.* 58 Minn. 351, 59 N. W. 1055.

48 L. R. A.

The court is not required to accept a surety company as sole and sufficient security on an undertaking to stay pending appeal a money judgment for more than \$1,000,000, which, under Cal. Code Civ. Proc. § 942, must for such purpose be twice the amount of the judgment appealed from, under §§ 1056, 1057, which provide that any corporation with a paid-up capital of not less than \$100,000, incorporated for the purpose of becoming a surety on bonds or undertakings required or authorized by law, "may become and shall be accepted as surety, or as sole and sufficient surety," upon such undertaking or bond; and that in all cases except that of such a corporation the officer taking the undertaking or bond must require the sureties to accompany it with an affidavit that they are residents or householders and are each worth the amount specified in the undertaking or bond, and, where there are several sureties, that they are severally worth amounts which shall be equivalent to that of two sufficient sureties; that any such corporation may become one of such sureties; and that no such corporation shall be accepted as a surety whenever its liabilities shall exceed its assets. The provision of § 948, authorizing an exception to the sufficiency of the surety, in which case the surety must justify on notice, and, if required, show surplus assets equal to the amount of its undertaking, is as applicable to surety companies as to individual sureties. *Fox v. Hale & N. Silver Min. Co.* 97 Cal. 353, 32 Pac. 446.

A corporation is not prohibited from becoming surety on an appeal bond by the provision of the Louisiana Code that a judicial surety must be a "person able to contract," as La. Rev. Civ. Code, art. 433, declares that corporations legally established are substituted for persons, and can make valid contracts, and obligate others and themselves toward others. *Standard Cotton Seed Oil Co. v. Matheson*, 44 La. Ann. 1321, 20 So. 713.

A surety company need not possess the qualifications required of sureties, to act as surety on an appeal undertaking, under N. Y. Laws 1871, chap. 486, although the manner of justification is the same, and it is the duty of the judge in each case to exercise his discretion in determining whether the actual state of the company's business justifies an approval of the undertaking. *Earle v. Earle*, 17 Jones & S. 55.

A surety company will not be accepted as security on a writ of error to the United States Supreme Court, where there is fair ground for questioning whether power to bind itself by such a contract is conferred by the acts under-

ton, 88 Pa. 258; *McCarthy v. Com. ex rel. Griffiths*, 110 Pa. 234, 2 Atl. 423; *Morrison v. Bachert*, 112 Pa. 322, 5 Atl. 739; *Scranton v. Silkman*, 113 Pa. 191, 6 Atl. 146; *Philadelphia v. Haddington M. E. Church*, 115 Pa. 291, 8 Atl. 241; *Weinman v. Wilkinsburg & E. L. Pass. R. Co.* 118 Pa. 192, 12 Atl. 288; *Safe Deposit & T. Co. v. Fricke*, 152 Pa. 231, 25 Atl. 530; *Perkins v. Philadelphia*, 156 Pa. 539, 27 Atl. 356; *State ex rel. Van Riper v. Parsons*, 40 N. J. L. 1; *State, Anderson, Prosecutor, v. Trenton*, 42 N. J. L. 486; *State ex rel. Rutgers v. New Brunswick*, 42 N. J. L. 51; *State ex rel. Richards v. Hammer*, 42 N. J. L. 435; *Hammer v. State ex rel. Richards*, 44 N. J. L. 667; *Bronson v. Oberlin*, 41 Ohio St. 476, 52 Am. Rep. 90; *State ex rel. Randolph v. Wood*, 49 N. J. L. 85, 7 Atl. 286; *State ex rel. Oblinger v. Spaude*, 37 Minn. 322, 34 N.

W. 164; *State ex rel. Patterson v. Donovan*, 20 Nev. 75, 15 Pac. 783; *Atlantic City Waterworks Co. v. Consumers' Water Co.* 44 N. J. Eq. 427, 15 Atl. 581; *State, Dobbins, Prosecutor, v. Northampton Twp. Committee*, 50 N. J. L. 496, 4 Atl. 584; *Lodi v. State*, 51 N. J. L. 402, 6 L. R. A. 56, 18 Atl. 749; *Edmonds v. Herbrandson*, 2 N. D. 270, 14 L. R. A. 725, 50 N. W. 970; *Vermont Loan & T. Co. v. Whitted*, 2 N. D. 82, 49 N. W. 318; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781; *State v. Walsh*, 136 Mo. 400, 35 L. R. A. 231, 37 S. W. 1112.

The determination of the character of an act as general or restricted—i. e., local or special—is for the judiciary.

Ayers' Appeal, 122 Pa. 266, 2 L. R. A. 577, 16 Atl. 356; *State ex rel. Peck v. Riordan*, 24 Wis. 484; *State ex rel. Henderson v. Boone County Ct.* 50 Mo. 317; *State ex rel.*

which it is incorporated. *Black v. Black*, 53 Fed. Rep. 985.

The court may in its discretion refuse to accept an appeal bond on which a corporation authorized to guarantee the fulfillment of the conditions of appeal undertakings is sole surety, where it does not possess sufficient information as to the actual state of the company's business to determine as to its sufficiency, under N. Y. Laws 1881, chap. 486, providing for the justification of such companies as is required of other sureties, and that a company shall not be accepted whenever its liabilities exceed its assets. *McGeau v. MacKeller*, 67 How. Pr. 273.

In *Rosenwald v. Phoenix Ins. Co.* 9 N. Y. Civ. Proc. Rep. 444, it was held that a surety company was sufficient surety on a bond to stay execution pending appeal, although its capital stock was only \$550,000, and its liability on bonds and undertakings given in actions amounted to \$5,000,000, and its liability on bonds for the fidelity of employees amounted to \$12,000,000, where its losses on fidelity bonds did not exceed one eighth of the premiums received, and it had full collateral security for all the former.

But in *Gregory v. New York, L. E. & W. R. Co.* 9 N. Y. Civ. Proc. Rep. 444, note, the same surety company was held insufficient on substantially the same showing, the court writing no opinion.

VI. Right to counter security.

A provision in the charter of a surety company, that it shall be lawful for it to stipulate and provide for indemnity from the parties for whom it becomes responsible, and to enforce any bond, contract, agreement, pledge, or other security made or given for that purpose, does not deprive it, when it becomes the surety on an administrator's bond, of the benefit of Md. Code, art. 90, § 1, authorizing "any security" of an administrator, who shall conceive himself in danger of suffering from the suretyship, to apply to the orphans' court granting the administration, which may require the administrator to give counter security. *March v. Fidelity & D. Co.* 79 Md. 309, 29 Atl. 521.

VII. Right to relief from suretyship.

A surety company which for a valuable consideration has become a surety on the committee of the estate of an incompetent person will not be relieved as such surety, in the absence of any malfeasance or breach of contract on the part of the committee, as the provision S. L. R. A.

of N. Y. Code Civ. Proc. § 812, that the "surety or sureties" on such a bond may be discharged on complying with its provisions, refers only to sureties who have become such without consideration. *Re Thurber*, 43 App. Div. 528, 60 N. Y. Supp. 198.

A surety company which agrees for compensation to become surety on a government contract for a term of years is liable to the contractor for the damage resulting from its refusal to carry out such contract, as a result of which the contractor is required to obtain other sureties at an increased expense. *Samuels v. Fidelity & C. Co.* 49 Hun, 122, 1 N. Y. Supp. 850.

VIII. Right to tax amount paid to, as costs.

An amount paid by plaintiff in replevin to a surety company for furnishing the requisite statutory undertaking cannot be taxed as a disbursement, as no such provision is made in the case of amounts paid to ordinary sureties, and nothing in the New York statutes indicates an intention to prefer surety companies over private persons who act as sureties. *Blick v. Reese*, 52 Hun, 125, 5 N. Y. Supp. 121.

IX. Right of personal representative, etc., to credit for amount paid to.

Wilson's Estate, 18 W. N. C. 483, holds that no credit can be allowed an administrator for an amount paid by him to a surety company for its becoming surety on his administration bond.

Re Miller, 2 Pa. Dist. R. 410, holds that a nonresident executor cannot recover from the estate as part of his expenses an amount paid by him to a surety company as a condition of having letters granted to him. The court in this case stated that it was optional with him to give security or renounce the trust, and the credit was therefore properly refused, but states that it sometimes happens that an executor or administrator, after having entered upon the performance of his duties, has other duties thrust upon him which he could not anticipate and for the performance of which security is required, and that in such case it would be proper that the cost of the security should be borne by the estate.

But *Eby's Estate*, 164 Pa. 249, 30 Atl. 124, holds that an administrator cannot recover from the estate for an amount paid to a surety company for becoming surety on his bond as administrator, nor for an amount paid to such company for becoming his surety as trustee to

Pell v. Newark, 40 N. J. L. 72; *Re Ruan Street*, 132 Pa. 257, 7 L. R. A. 193, 19 Atl. 219; *Perkins v. Philadelphia*, 156 Pa. 539, 27 Atl. 356.

The act is forbidden.

The fiduciaries specified in the act are entitled to a lien on their fiducial estates for disbursements properly made by them in the administration thereof. There is palpably no difference in this respect among those mentioned in the statute.

Beckwith v. Carroll, 56 Ala. 12; *Heise v. Starr*, 44 Ill. App. 406; *Pennsylvania Co. for Ins. on Lives & G. A. v. Walter*, 30 U. S. App. 188, 66 Fed. Rep. 421, 13 C. C. A. 550; *Ex parte James*, 1 Deacon & C. Bankr. 270; *Woodward's Appeal*, 38 Pa. 322; *Johnston v. Fletcher*, 32 Ill. App. 589; *Cecil v. Korbman*, cited in 1 Binn. 134; *Murray v. De Rottenham*, 6 Johns. Ch. 52; *Deitzler v. Mishler*,

37 Pa. 82; *King v. Cushman*, 41 Ill. 31, 89 Am. Dec. 366; *Hill, Trustees*, 567; *Lewin*, Tr. 639; *Perry, Tr.* § 970; *Cobaugh's Appeal*, 24 Pa. 143; *Demmy's Appeal*, 43 Pa. 155.

As the cost of the specified fiduciary's procuring a company surety is made a lawful expense by the statute, it *ipso facto* becomes a lien on the fiducial estate. A lien is, therefore, created where a company is his surety, which does not exist if the specified fiduciary has an individual as such.

The act violates that clause of the 1st section of the 14th Amendment to the Federal Constitution which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. Rep. 385; *Barbier v. Connelly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Hayes v. Missouri*, 120 U. S.

sell real estate in proceedings in partition, as his commissions as administrator were intended as compensation for the responsibility involved in the acceptance of the trust, as well as for services rendered in the administration of it, and that he might have declined to execute the order of sale, thus vesting in the court the duty of appointing someone else to make it.

And *Re Pickering*, 4 Pa. Dist. R. 263, holds that executors were not entitled to credit for an amount paid to a surety company for the necessary security in order to receive the proceeds of real estate sold, the court stating that it was bound by the decision in *Re Eby's Estate*, and that the rule laid down therein was intended to apply to all trustees, whether executors, testamentary trustees, administrators, or guardians, whenever it became necessary to enter security for the application of the proceeds of sale of real estate.

The Pennsylvania act of June 24, 1895, P. L. 248, providing that any receiver, assignee, guardian, committee, trustee, executor, or administrator required to give bond may include as a part of the lawful expense of executing his trust such reasonable sum paid a company authorized to do so, for becoming his surety on such bond, as may be allowed by the court, not exceeding a specified amount, was evidently passed to avoid the effect of such decisions.

And the principal case of *RE CLARK*, in which a guardian claimed a credit for an amount paid to a surety company as premium on his surety bond, holds, reversing the decision in the court below, 10 Pa. Super. Ct. 423, that such act does not violate the provision of Pa. Const. art. 3, § 7, prohibiting the legislature from passing any local or special law granting to any corporation any special or exclusive privilege or immunity. In the opinion the court points out the distinction between an individual surety and a surety company, and holds that the difference between the two authorizes the discrimination in the act in allowing credit for amounts paid to such companies, without providing for a corresponding allowance for amounts paid to individual sureties.

X. Foreign companies.

a. Power to act as surety.

The justification of a foreign surety company as surety on proposed bonds to obtain the discharge of a lien will be deemed sufficient, as against an objection which presents no facts sufficient to overcome the presumption of its solvency, where it appears that such company has

been duly authorized to transact the business of fidelity and guaranty insurance within the state, and has been found solvent on an examination pursuant to N. Y. Laws 1893, chap. 720, as amended by N. Y. Laws 1895, chap. 178, and has subsequently filed a sworn statement showing its continued solvency. *Re Keogh*, 22 Misc. 747, 50 N. Y. Supp. 998.

A foreign trust company which has complied with the law in relation to doing business in the state may become the surety on a bond in an attachment suit, under Mo. Rev. Stat. 1889, § 2839, authorizing the creation of corporations which shall have power to execute as principal or surety any bond or bonds required to be given in any proceeding in law or equity in any court, and § 2848a, providing that any company doing business in the state may become sole guarantor or surety on any bond required by the laws of the state, any other statute to the contrary notwithstanding, although § 327, relating specially to attachment bonds, provides that there shall be one or more sureties, "resident householders" of the county in which suit is to be brought. *Steppacher v. McClure*, 75 Mo. App. 135.

A foreign surety company duly authorized to transact business in the state as surety on the obligations of persons may be accepted as surety on the bond of a nonresident plaintiff in a civil action, under Conn. Pub Acts 1885, p. 482, authorizing corporations of other states, organized for the purpose of transacting business as surety on obligations of persons or corporations, to transact such business in Connecticut under specified conditions, and Conn. Pub Acts 1887, p. 469, providing that any company authorized to transact business as surety on obligations of persons or corporations may be accepted as surety on the bond of any person or corporation required by law to execute a bond, "in lieu of any surety or sureties as now required by law," it being the intent and meaning of such act to enable corporations created for the purpose to become the surety on bonds required by law, although Conn. Gen. Stat. § 896, requires that, before a magistrate can issue process in a civil action in which the plaintiff is a nonresident, the latter shall enter into a recognizance, with "some substantial inhabitant of this state" as surety. *Lovejoy v. Isbell*, 70 Conn. 557, 40 Atl. 531.

Less v. Gholo, 92 Tex. 631, 51 S. W. 502, which reverses the decision of the court of civil appeals, 49 S. W. 635, holds that a foreign corporation may become a surety on a guardian's bond, under Tex. Gen. Laws, 25th Legis. p. 24, chap. 165, authorizing specified corporations to

68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Missouri v. Lewis*, 101 U. S. 22, sub nom. *Borman v. Lewis*, 25 L. ed. 989; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Tinsley v. Anderson*, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805; *Ho Ah-Kow v. Nunan*, 5 Sawy. 560, Fed. Cas. No. 6,546; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Gulf, C. & S. F. R. Co. v. Ellis*, 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 255; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Fraser v. McConway & T. Co.* 6 Pa. Dist. R. 555.

This act is not a police law.

Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep.

273; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *Sayre v. Phillips*, 148 Pa. 482, 16 L. R. A. 49, 24 Atl. 76; *Fraser v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Com. v. Zacharias*, 181 Pa. 126, 37 Atl. 185; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Com. v. Snyder*, 182 Pa. 633, 38 Atl. 356; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Collins v. New Hampshire*, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; *Hawker v. New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573.

Mitchell, J., delivered the opinion of the court:

The single question in this case is the con-

become sureties on various classes of bonds, including that of guardians' bonds, and making no distinction between domestic and foreign corporations, as such provision is not in conflict with Tex. Gen. Laws, 25th Legis. p. 52, authorizing any bond required to be given by a guardian to be subscribed by at least two good and sufficient sureties, with the proviso that such bond may be made by corporations organized or created under the laws of Texas for the purpose of issuing surety, guaranty, or indemnity bonds.

The provision of the act of Congress of August 13, 1894, § 1, that any bond or undertaking required to be given with one or more sureties shall be sufficient when executed solely by a corporation incorporated under the laws of the United States or of any state, having power to guarantee the fidelity of persons holding positions of public or private trust, and to execute and guarantee bonds and undertakings in judicial proceedings, applies to all parts of the United States, including Indian territory, and to all its courts, so far as their judicial proceedings are concerned, and to that extent modifies *Manaf. (Ark.) Dig.* § 5301, adopted in the Indian territory, providing that the surety in every bond must be a resident of the state, worth double the amount to be secured, and have property liable to execution in the state equal to the sum to be secured. *Ranney-Alton Mercantile Co. v. Mineral Belt Constr. Co. (Ind. Terr.)* 48 S. W. 1028.

The provision of Pa. act. June 26, 1893, P. L. 343, that a company incorporated under the laws of any state or foreign country, authorized by its laws to guarantee the fidelity of persons holding places of trust and to execute bonds and undertakings, which has deposited in such state or county, with the proper officer, a fund of \$100,000 of a specified character, shall, after satisfying the insurance commissioner of Pennsylvania that this has been done, and procuring his certificate, be authorized to become and be accepted as sole surety on all bonds, undertakings, and obligations required or permitted by law, without any reference to the amount of the undertaking or the extent to which such company has already entered into other obligations,—is invalid. *Re American Banking & T. Co.* 4 Pa. Dist. R. 757.

Such act is held in *Re Surety Bonds*, 4 Pa. Dist. R. 669, to apply only to foreign corporations, and not to domestic corporations, for which provision is made by Pa. act May 9, 1899, Pub. Laws, 159, and Pa. act June 27, 1893, P. L. 399.

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A foreign surety company which has filed with the insurance commissioner a designation of some person residing in the state on whom service of summons may be made may become a surety on an undertaking on appeal, although it has not filed such designation with the secretary of state, as required by Cal. Stat. 1871-72, p. 826, which relates to foreign corporations, as Cal. Code Civ. Proc. § 1056, provides that the insurance commissioner shall have the same powers to examine the affairs of corporations organized for the purpose of becoming surety on bonds or undertakings as he has in other cases, and shall require them to file similar statements, and issue to them a similar certificate that they are authorized to transact business in the state. *Gutzell v. Pennie*, 95 Cal. 598, 30 Pac. 836.

b. Power to act as trustee, etc.

A trust company organized under the laws of a state, which complies with the provisions of the act of Congress of October 1, 1890, providing for the incorporation of trust companies within the District of Columbia, is included within the provision of § 31, that no bond or other collateral security, except as hereinafter stated, shall be required from any trust company "incorporated under this act," as such company thereafter does business only by virtue of its incorporation under such act, and not under any previous incorporation under a state law. *Re Turley*, 9 Mackey, 315.

A foreign trust corporation cannot act in Illinois as a trustee under a trust deed, with active duties to perform, without complying with the provision of the Illinois trust companies act of 1887, as amended in 1889, relating to Illinois corporations incorporated for the purpose of accepting or executing trusts, and requiring such companies before accepting any appointment to deposit \$200,000 with the auditor of public accounts for the benefit of its creditors, as the Illinois general incorporation law, § 26, providing that foreign corporations doing business in the state shall be subject to all the liabilities, restrictions, and duties imposed on domestic corporations, makes the act regulating trusts applicable to foreign as well as domestic corporations. *Farmers' Loan & T. Co. v. Lake Street Elev. R. Co.* 173 Ill. 439, 51 N. E. 55.

The Illinois appellate court took substantially the same view in 68 Ill. App. 666, and also the Cook county superior court as reported in 12 Nat. Corp. Rep. 428.

J. H. H.

stitutionality of the act of June 24, 1895 (P. L. 248), authorizing a receiver, assignee, guardian, committee, trustee, executor, or administrator, required by law or by order of court to give bond as such, to include as part of his lawful expenses in executing the trust such reasonable sum as he may have paid to a company authorized by the law of this state to do so, for becoming his surety, as may be allowed by the court in which he is required to account. It is objected principally that this act contravenes the clause of § 7, art. 3, of the Constitution, which prohibits the legislature from passing any local or special law "granting to any corporation . . . any special or exclusive privilege or immunity." But the objection wholly fails to observe the fundamental distinction between corporations and natural persons. All corporate franchises are special and exclusive privileges or immunities, discriminative against individuals. The act of incorporation itself is a discrimination as to privileges, powers, and liabilities against the natural person. Under the general corporation act of April 29, 1874 (P. L. 73), constructed with great care for the express purpose of carrying out the provisions of the Constitution, any five persons, only three of whom need be citizens of this commonwealth, may procure themselves to be a corporation for any one of thirty-seven different classes of purposes of business, charity, or entertainment, and thereby acquire privileges and immunities which they did not have before as natural persons, and which no individuals, singly or collectively, can obtain except through the same process. And if the incorporators are as many as nine in number, they may, under the same or other acts, as canal, railroad, plank-road, turnpike, or other companies, assume for themselves still greater privileges, even to that of the state's power to take private property against the owner's will for a nominal public use, which, everybody knows, is in substance nothing but a purely commercial venture for the benefit of the private persons engaging in it. The Constitution does not prohibit these special privileges of corporations as compared with individuals. On the contrary, it intends throughout to provide that they shall be put freely within common reach by means of general laws. The evils of special legislation were so apparent that, whether with wise forethought or not, is perhaps not yet clear, the Constitution threw down the bars and opened the gates to the free entry of those gigantic combinations of capital with corporate privileges which are beginning to assume, not only supreme business, but important political aspects. The special legislation at which the constitutional prohibition was aimed was wholly different from this. In Price's Index to Local Legislation in Pennsylvania there are 1,032 pages containing references to more than 45,000 local acts (not including special acts not local in character), more than 10,000 of which are 48 L. R. A.

acts relating to special corporations by name. In *Ayars' Appeal*, 122 Pa. 266, 2 L. R. A. 577, 16 Atl. 356, it was said by Sterrett, J., that, "during the session of the legislature immediately preceding the adoption of the present Constitution, nearly 150 local or special laws were enacted for the city of Philadelphia, more than one third that number for the city of Pittsburgh, and for other municipal divisions of the state about the same proportion. This was by no means exceptional." An examination with some care, though by no means exhaustive, of the Pamphlet Laws of 1873, shows a list of over 400 acts granting, amending, extending, and enlarging charters, and conferring upon particular corporations, by name, certain special franchises and privileges, not enjoyed by others under the general law. Among the latter are seven acts, specially exempting corporations named from taxation (mostly, it may be said, upon parsonages and church lots),—one exempting a dramatic association from license tax; one releasing the collateral-inheritance tax upon a bequest to a learned society; one releasing building restrictions on land contained in a patent from the commonwealth; four authorizing the sale of burial grounds and other lands held upon trusts; one confirming purchases and sales of land by saving-fund and building associations in a single county; another legalizing an overissue of stock by two building associations named; one to enable a foreign corporation named to hold land in Pennsylvania; one to authorize an agricultural society to allow public and private sales of merchandise on its grounds; one to enable a bridge company to construct a turnpike road; another to permit an iron company to build a telegraph line for its own use; two making penal offenses of trespassing on railroad cars in certain counties, and of loitering about the depots, etc., of railroads in a particular borough; one authorizing a railroad named to occupy a particular street in the city of Philadelphia; and another permitting a particular street-railway company in the same city to salt its tracks to aid in keeping them clear of snow. These were the product of a single session, and are a fair sample of one class of the special laws at which the constitutional prohibition was directed. Many of these acts—perhaps a large majority of them—were just and proper, and the privileges conferred could now be obtained under the general laws. But the system was inherently liable to favoritism, and was open to the popular suspicion that it was practically governed by influences not beneficial to the public interests. Therefore the Constitution did away with it at one sweep. The methods and forms of favoritism, as of other fraud, are legion, and no enumeration of them in advance could be complete. Therefore the constitutional restrictions had, to a great extent, to be expressed in general terms, and the inadequacy of language to express the purpose with entire precision, as

well as the determination of the framers of the instrument to make the prohibition effective at all hazards, led to its embodiment in terms that are liable to cover with the letter cases that are not within the spirit and the real intent. Constitutions are not to receive a narrow, or technical, or too literal construction. They get their authority from the adoption of the people, and they are to be read in a broad, and, as far as possible, untechnical, way, to carry out their real purpose. We have recently had occasion to consider with great care the analogous restriction upon local and special laws in relation to school districts in *Com. v. Gilligan*, 195 Pa. 504, 46 Atl. 124, and, without further enlarging on the subject here, may refer to the remarks and the conclusion there expressed, that in cases of this character, where no legislative effort to evade the restrictions appears, the courts will look beyond the mere form of the act, and examine its true intent and effect, in the light of the purpose of the constitutional restriction. Viewed in this light, the act of 1895 is not at all within the prohibition. The objection is chiefly based on the assumption that the suretyship of a corporation and that of an individual are identical, and that the act, therefore, makes a discrimination between equally qualified sureties for the same service. But this assumption is not sustained by the facts, and overlooks the material distinctions between the qualities of the security afforded. These distinctions are obvious. The individual surety as formerly known was usually a relative or friend who had confidence in the principal, and voluntarily assumed the obligation of answering for the latter's faithful performance of duty. I need not speak of the individual who became surety for pay, for the very name of "professional bail-goer" is a reproach to every branch of the administration of justice which he was allowed to contaminate with his presence. But the voluntary surety, however honest and well qualified at the time of his approval by the court, is liable to the contingencies of business, the changes of value in property, and the inexorable chance of death, which brings his estate into the administration of the law under wholly changed circumstances. Of the happening of any of these contingencies, the only person in position to keep close watch is the principal, and his interest is adverse to making known any doubt as to the sufficiency of his friend, or to assuming the burden of finding a new surety. These are some of the disadvantages even of an honest surety; and if we add to them the risk of a dishonest one, who may dispose of his property on his own scent of danger, or on a friendly hint from his principal, we may have a fair idea of the dangers of which our reports present many illustrations. On the other hand, the surety company included in the provisions of the act of 1895 must have a capital, the amount, nature of investment, and management of

which are known and within constant sight of the court and the parties interested. It is obliged to make reports of its condition to the courts and to the commonwealth, and is at all times subject to the visitatorial power of the latter; and, finally, it has the sharp incentive of prevention of loss by looking closely after the administration of his trust by its principal, for whom it has become responsible, not from friendly personal confidence, but as a strict business venture. It was said in this case by the learned president of the orphans' court, whose experience entitles his opinion to great weight, that "corporation suretyship is another product of modern thought and ingenuity, and may be said to possess many advantages over individual bail or security. . . . Our daily experience has proved that corporate security and the oversight and management by expert officers of the trust and security companies are highly advantageous, not only to the fiduciary, but to all the parties interested, whether creditors, legatees, or distributees," but, even if this be not so it is plain that while the duties and liabilities of the surety, whether corporation or individual, are the same, and in those respects they stand upon the same plane, yet the qualities and advantages of the security afforded are materially different. It is on this difference that the discrimination in the act of 1895 is founded, and it is a fair and constitutional basis for the legislative discretion. The case is far stronger than *Com. v. Vrooman*, 164 Pa. 306, 25 L. R. A. 250, 30 Atl. 217, for the act there sustained absolutely prohibited certain business previously lawful to individuals, while the act of 1895 debars no one, but merely gives an incidental advantage to what the legislature held to be a better security.

A second objection considered by the learned judge of the orphans' court, but evidently as a mere makeweight, was that the act creates a special lien in favor of the surety company. This cannot be maintained. Apart from the common-law liens of artisans and vendors dependent on possession, liens must rest on clear statutory authority. There is none here. The act does not give a lien, or even a claim of any kind, to the surety company against the estate. The trustee is allowed a credit, not for what he owes or has agreed to pay, but for what he has paid. Payment by the trustee is a necessary prerequisite to any claim against the estate, and even then it does not come in as a new lien, but on the footing of an ordinary item of expense in the administration of the trust.

The further objection that the act contravenes the 14th Amendment of the Constitution of the United States is too far-fetched to require notice.

Judgment reversed, and record remitted, with directions to consider and determine the item excepted to on its merits, as a reasonable sum paid under the act of 1895.

MISSOURI SUPREME COURT.

STATE of Missouri *ex rel.* George R. KENAMORE

v.

Horatio D. WOOD *et al.*

(.....Mo.....)

1. A claim of the right to inspect beer under a statute cannot constitute a cloud upon title which equity may prevent, even if a cloud upon title can arise with reference to personal property, when the inspection law makes no charge against property, and provides for no remedy except by indictment or criminal information against individuals.
2. An allegation that inspection of beer as required by statute would cause irreparable damage is insufficient basis for equity jurisdiction, when it has no other foundation than a legal conclusion from the statute, and the statute properly construed is satisfied by inspection of the beer while in vats in a manner that would cause no damage.
3. Setting up unconstitutionality of a statute in defense of a criminal information or indictment gives an adequate remedy at law against the statute, which will preclude equitable relief, where it can be enforced only by such criminal proceedings.
4. An injunction against the enforcement of a statute requiring the inspection of beer cannot be granted on the ground that the statute is unconstitutional, where the statute is enforceable only by criminal proceedings, since equity has no jurisdiction to enjoin criminal prosecutions.

(Burgess, J., dissents.)

(March 5, 1900.)

APPPLICATION for a writ of prohibition to arrest further action in certain injunction proceedings to restrain the enforcement of the act providing for the inspection of beer and malt liquors. Writ awarded.

The facts are stated in the opinions.

Messrs. Edward C. Crow, Attorney General, *Samuel B. Jeffries*, and *W. M. Williams* for relator.

Messrs. Boyle, Priest, & Lehmann, Kehr & Tittmann, G. A. Finkelburg, and Koehler & Reiss, for defendants:

The court is not bound by the terms of the bill, but will inquire into its practical operation and necessary effect, in order to determine its character.

Cooley, Const. Lim. 164; *Ho Ah Kow v. Nunan*, 5 Sawy. 552. Fed. Cas. No. 6546;

NOTE.—For injunction to restrain criminal proceedings, see *Crighto v. Dahmer* (Miss.) 21 L. R. A. 84, and *note*; also *Paulk v. Sycamore* (Ga.) 41 L. R. A. 772.

For injunction against enforcement of ordinance, see *Rushville v. Rushville Natural Gas Co.* (Ind.) 15 L. R. A. 321; *Georgia Packing Co. v. Macon* (C. C. S. D. Ga.) 22 L. R. A. 775; *Augusta v. Burum* (Ga.) 26 L. R. A. 340; *Deems v. Baltimore* (Md.) 26 L. R. A. 541; *Farmer v. St. Paul* (Minn.) 33 L. R. A. 199; and *Cicero Lumber Co. v. Cicero* (Ill.) 42 L. R. A. 696.
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Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 405, 24 L. ed. 527; *Minnesota v. Barber*, 130 U. S. 313, 34 L. ed. 453, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 11 Sup. Ct. Rep. 213; *Littlefield v. State*, 42 Neb. 223, 28 L. R. A. 533, 60 N. W. 724; *Vansant v. Harlem Stage Co.* 59 Md. 330; *State, North Hudson County R. Co., Prosecutor, v. Hoboken*, 41 N. J. L. 71; *State v. Wheelock*, 95 Iowa, 577, 30 L. R. A. 429, 64 N. W. 620; *St. Louis v. Boatmen's Ins. & T. Co.* 47 Mo. 150.

As in its practical operation and by its necessary effect the bill will produce revenue many times exceeding the expenses of inspection, it must be held to be a revenue measure, and judged accordingly.

Ho Ah Kow v. Nunan, 5 Sawy. 552. Fed. Cas. No. 6546; *United States v. Tilting Yag'l*, 9 Utah, 273, 34 Pac. 59; *Willis v. Standard Oil Co.* 50 Minn. 290, 52 N. W. 652; *Vanmeter v. Spurrer*, 94 Ky. 22, 21 S. W. 337; *American Fertilizer Co. v. North Carolina Bd. of Agri.* 43 Fed. Rep. 609, 11 L. R. A. 179, 3 Inters. Com. Rep. 532; *Patapsco Guano Co. v. North Carolina Bd. of Agri.* 171 U. S. 354, 43 L. ed. 194, 18 Sup. Ct. Rep. 362.

Being a revenue as well as an inspection measure, the bill is invalid because not confined to one subject which is clearly expressed in its title.

Mo. Const. art. 4, § 28; *Ewing v. Hoblitzelle*, 85 Mo. 64; *State ex rel. Atty. Gen. v. Miller*, 100 Mo. 439, 13 S. W. 677; *State v. Morgan*, 112 Mo. 202, 20 S. W. 456; *State ex rel. Wolfe v. Bronson*, 115 Mo. 271, 21 S. W. 1125; *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774; *Witzmann v. Southern R. Co.* 131 Mo. 612, 33 S. W. 181; *State v. Persinger*, 76 Mo. 346; *State ex rel. Kansas City Park District v. Jackson County Ct.* 102 Mo. 531, 15 S. W. 79; *State ex rel. Steel v. Baker*, 129 Mo. 482, 31 S. W. 924; *State ex rel. Kirkwood v. Hcege*, 135 Mo. 112, 36 S. W. 614; *State ex rel. Hixon v. Schofield*, 41 Mo. 39; *State ex rel. Garth v. Switzler*, 143 Mo. 287, 40 L. R. A. 280, 45 S. W. 245.

As a revenue or taxing measure the bill is invalid because it imposes a tax on property for general state purposes in excess of the constitutional limitations.

Mo. Const. art. 10, § 8; *St. Louis v. Boatmen's Ins. & T. Co.* 47 Mo. 150; *St. Louis v. Spiegel*, 75 Mo. 145; *State ex rel. St. Louis Public Schools v. Tracy*, 94 Mo. 217, 6 S. W. 709; *Brookfield v. Tooley*, 141 Mo. 619, 43 S. W. 387; *State ex rel. Garth v. Switzler*, 143 Mo. 287, 40 L. R. A. 280, 45 S. W. 245; *State ex rel. Armour Packing Co. v. Stephens*, 146 Mo. 662, 48 S. W. 929.

The tax imposed by the bill violates the constitutional provision requiring equality and uniformity in taxation.

Mo. Const. art. 10, §§ 3, 4, 6, 7; *Gibbons v. Oaden*, 9 Wheat. 1, 6 L. ed. 23; *Deal v. Mississippi County*, 107 Mo. 464, 14 L. R. A. 622, 18 S. W. 24; *State ex rel. Garth v.*

Switzler, 143 Mo. 287, 40 L. R. A. 280, 45 S. W. 245; *Turner v. Maryland*, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781; *State v. Granneman*, 132 Mo. 326, 33 S. W. 784; *State v. Walsh*, 136 Mo. 400, 35 L. R. A. 231, 37 S. W. 1112.

The act in prohibiting the brewing of malt liquors out of any other cereals than barley and rice is a wanton and unwarranted interference with the freedom of industry and rights of property.

Mo. Const. art. 2, §§ 4, 30; U. S. Const. 14th Amend.; *State v. Addington*, 12 Mo. App. 214; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29.

The mode of inspection provided by the bill is destructive of the property inspected.

Mo. Const. art. 2, §§ 4, 30; U. S. Const. 14th Amend.; *People v. Compagnie Générale Transatlantique*, 107 U. S. 59, 27 L. ed. 383, 2 Sup. Ct. Rep. 87.

The bill is incapable of being enforced according to its terms.

State, Crow, v. West Side Street R. Co. 146 Mo. 155, 47 S. W. 959.

Gantt, P. J., delivered the opinion of the court:

This is an original proceeding for a writ of prohibition out of this court to arrest further action by the circuit court of the city of St. Louis in a certain suit now pending therein to obtain a perpetual injunction against the relator herein, as state beer inspector, to restrain him and his deputies from taking any steps whatever to carry out and enforce an act of the general assembly of Missouri entitled "An Act to Create the Office of Inspector of Beer and Malt Liquors of the State, and Providing for the Inspection of Beer and Malt Liquors Manufactured and Sold in this State," approved May 4, 1899.

It appears from the petition of relator that eight corporations and one individual separately engaged in the manufacture of beer in the city of St. Louis joined as plaintiffs in a suit in the St. Louis circuit court for the injunction. Relator alleges his appointment to the office of beer inspector by the governor, and his qualifications as required by the act; that the said eight corporations and single individual were all engaged in the business of brewing beer and other malt products in this state, with the purpose of offering the same for sale; that Judges Horatio D. Wood and Franklin Ferris are two of the circuit judges of the said city of St. Louis, duly elected and qualified, and acting as such. It then avers that in September, 1899, said bill for injunction was filed in division No. 5 of the said circuit court, over which Judge Wood presides, and was, in substance, as follows:

Plaintiffs, in behalf of themselves and all others in the state similarly situated, stated they were, and for many years had been, engaged in the manufacture and sale of beer and other malt liquors; that defendant,

George R. Kenamore, had been recently appointed beer inspector under the act of May 4, 1899; and then set out the act itself *in hæc verba* as it is found in the Laws of Missouri of 1899, pp. 228 to 231, inclusive; that said Kenamore had qualified under the terms of said act, and claimed to be entitled to discharge the duties thereof, and enforce and carry out the provisions thereof, and has issued a circular letter notifying plaintiffs and all others similarly situated that he intends to enforce said act of May 4, 1899, and every provision thereof, and requiring plaintiffs and all other persons similarly situated to submit their products of beer and other malt liquors to his inspection, and threatens to exact the tax imposed by said act under the name of inspection fees. They then allege that besides themselves there are other brewers at other cities in the state, also engaged in the manufacture and sale of beer, giving a list of them. They then aver that the said brewers of this state annually manufacture not less than 2,250,000 barrels of beer of thirty-one gallons each, of which they sell in Missouri not less than 975,000 barrels of thirty-one gallons each; that of said brewers twelve sell their entire product in this state, and of the remainder the majority sell the largest portion of their product in this state, but that one of them sells more than two thirds of its product, and another four fifths of its product, and another one half of its product outside of this state; that, in addition to the persons named as manufacturing beer in this state, there are persons, firms, and corporations engaged in manufacturing beer in other states, particularly Illinois and Wisconsin, who annually ship into and sell in this state not less than 165,000 barrels of thirty-one gallons each, and about 1,500 barrels of beer and ale are imported from Germany and England; that certain named corporations, firms, and persons are engaged in the manufacture of weiss beer to the amount of 5,200 barrels, of which 4,000 are sold in this state and 1,200 exported; that weiss beer is a malted fermented liquor brewed from wheat, and cannot be made from any other cereal; that lager beer is made commonly of hops, malted barley, and of barley, rye, corn, and any other farinaceous cereal which it is convenient for the brewer to use, and may properly be made of any farinaceous cereal used in conjunction with hops and malt, and such materials so used are entirely wholesome; that beer, whether weiss beer or lager beer, and whatever its manufacture, must, for the purposes of sale, be inclosed in tight packages of glass or wood, and when so prepared for sale by inclosure cannot be opened without injury to the contents, and is never opened except for immediate consumption; that the average price of beer manufactured in this state, exclusive of United States revenue stamps, is \$5 per barrel. Plaintiffs then alleged in said bill for injunction that said act of May 4, 1899, was unconstitutional and void, and then proceeded to specify that it violated § 28, art. 4, of the Constitution of Missouri, in that it contained more than one subject in its

title, and because the title did not indicate the subject of taxation and revenue; that it also violated § 8, art. 10, of the Constitution of Missouri, in that it exceeded the maximum rate of taxation allowed by the Constitution; that it is violative of § 3, art. 10, of the Constitution, in that it violates the principle of uniformity ordained by the Constitution in said section; that it violates § 4, art. 2, of the Constitution of Missouri, which provides that all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry, etc., and of § 30, art. 2, which provides that "no person shall be deprived of life, liberty, or property without due process of law;" that said act violates said two last-mentioned sections of the Constitution in this: that the 4th section of said act, which provides that no manufacturers of beer in this state shall use any substance, material, or chemical in the manufacture of beer or other malt liquors "other than pure hops, or pure extract of hops, or of pure barley, malt, or wholesome yeast or rice," is an unreasonable, oppressive, and unconstitutional restraint upon a lawful occupation, and excludes the use of water, which forms the major part of all beer; that the inspection required by the act is of sealed packages, and such an inspection, if carried out, will be destructive of plaintiffs' products, and render them unsalable, and prevent them from pursuing their occupation in this state; that said act is violative of the 14th Amendment to the Constitution of the United States and § 2, art. 4, of the Constitution of the United States, among other things, in that it discriminates between the brewer who sells in this state and one who exports his products, taxing the first 30 cents a barrel, and the other nothing; that said act of May 4, 1899, is inoperative and void because incapable of execution for the reason that inspection will not determine of what cereals beer is manufactured, and because the inspector and his deputies cannot inspect all the beer manufactured from day to day without subjecting the brewers to ruinous delays; that said act is violative of the Constitution of the United States concerning interstate commerce, being § 8, art. 1, as well as § 2, art. 4, § 10, art. 1, and § 1 of the 14th Amendment; that said act violates the order prescribed by the Constitution of Missouri as to appropriations by the general assembly; that the enforcement of said act would work irreparable injury to plaintiffs and their business. "And the plaintiffs further state that, besides the irreparable damage which will be inflicted upon their property and business by the inspection of beer, as hereinbefore more fully set out, the act in question provides for heavy fines and penalties and the imprisonment of all brewers who fail to conform to its provisions, and who sell their product without submitting the same to such inspection, and who fail to pay the unconstitutional tax imposed by said act; and said act provides that a prosecution and conviction for failure to comply with the terms of said act and of the payment of said tax shall be 48 L. R. A.

followed by a forfeiture of the brewer's right to manufacture and sell beer or other malt liquors in this state for a period of two years thereafter, which would cause ruinous damage to plaintiffs' business, and that of others similarly situated, in which much capital is invested, and in which many thousands of persons are employed; that said pretended right to enforce said act and to inflict said penalties and forfeitures, and the said circular letter, constitute a cloud on plaintiffs' title to their property and their business, and a constant menace thereto." The said plaintiffs then conclude their petition as follows: "Wherefore, plaintiffs say that they are without an adequate remedy at law, and they now come into a court of equity, and pray for relief under the facts and circumstances herein stated; and plaintiffs say that, unless the relief hereinafter prayed for is granted, the damage to them and all others similarly situated will be irreparable; wherefore they now pray that an order of injunction may issue out of this court directed to the defendant, the said George R. Kenamore, claiming to be inspector of beer, enjoining and restraining him, his deputies, servants, and agents, and each of them, from enforcing or attempting to enforce said act of the general assembly of May 4, 1899, and from inspecting or attempting to inspect the beer or other malt liquors manufactured or offered for sale by plaintiffs, or others similarly situated, and from collecting or attempting to collect any tax or inspection fees under said act, and from attempting to enforce said act as against the said retail dealers, customers of plaintiffs, and others similarly situated; and that said act of the general assembly be declared null and void, and for such other and further relief as to this honorable court may seem meet and proper under all the circumstances of the case."

It is then averred by relator herein that the Honorable Horatio Wood, judge of the circuit court of St. Louis, division No. 3, granted the following temporary injunction or restraining order:

In the Circuit Court, City of St. Louis, June Term, 1899.

Wednesday, September 27, 1899.

The American Brewing Company *et al.* v. George R. Kenamore, State Inspector of Beer and Malt Liquors. (No. 54, Dec. T. '99.)

Now come the plaintiffs, and present their petition and application for a temporary injunction herein, and upon consideration thereof it is ordered by the court that the defendant, George R. Kenamore, state inspector of beer and malt liquors, show cause on Wednesday, the 4th day of October, 1899, at 10 o'clock A. M., in courtroom No. 5, why a temporary injunction should not be granted in accordance with the terms of said petition; pending the final hearing of this cause, and that pending the hearing and determination of said application for a temporary injunction, and upon plaintiffs' giving bond in the sum of five thousand dollars,

to be approved by the clerk, said defendant, George R. Kenamore, inspector of beer as aforesaid, his deputies, servants, and agents, be and hereby are restrained from enforcing or attempting to enforce the act of the general assembly of May 4, 1899, entitled "An Act Creating the Office of Inspector of Beer and Malt Liquors of This State, and Providing for the Inspection of Beer and Malt Liquors Manufactured and Sold in This State;" and the said George R. Kenamore, his deputies, servants, and agents, are hereby restrained from inspecting or attempting to inspect the beer or other malt liquors manufactured or offered for sale by plaintiffs or others similarly situated, and from collecting or attempting to collect any tax or inspection fees under said act of May 4, 1899, and from attempting to enforce said act as against the retail dealers, customers of plaintiffs, and others similarly situated, referred to in the petition in this cause.

Thereupon relator applied to one of the judges of this court in vacation, and procured a provisional writ of prohibition against further action in said injunction proceeding. Relator avers that by said injunction he and his deputies were restrained and forbidden to perform their duties under the act of May 4, 1899, that the said circuit court exceeded its jurisdiction, and prayed that it might be prohibited from taking or further entertaining jurisdiction of said injunction.

1. The question for decision is whether this court can properly and lawfully prohibit the circuit court from further taking cognizance of the application made to it by the plaintiffs in said injunction case. This depends upon whether that court was entirely wanting in jurisdiction to grant said injunction on the showing made in the petition, or whether, granting it had jurisdiction in that class of cases, it has not exceeded its jurisdiction. Whether the circuit court was without jurisdiction altogether, or, having jurisdiction of the class of cases in which the injunction was sought, exceeded its jurisdiction, is only ascertainable in this case by the averments in the bill filed in that court and the orders made thereon. The fact that said court was a court of general equity jurisdiction, and has the power to issue or direct writs of injunction to issue, will not of itself answer the contention made in this case. Courts of equity are not invested with power to enjoin in any and every case, but there must be some special circumstances bringing the case under some recognized head of equity jurisdiction before it will wield the powerful writ of an injunction. By means of the process of exclusion and inclusion we will be greatly aided in reaching the sufficiency of the petition to state a case belonging to a class in which courts of equity are authorized to grant injunctive relief. *State ex rel. McCaffery v. Aloe*, 152 Mo. 460, 47 L. R. A. 193, 54 S. W. 494. The bill obviously seeks relief upon the idea of the unconstitutionality of the law, irreparable damage, multiplicity of

suits, and a cloud upon title. The act of May 4, 1899, is incorporated in the bill as the foundation of all the various grounds of relief.

The allegation as to "cloud upon title" is simply that the circular letter of the state beer inspector, notifying plaintiffs therein that they must submit their product for inspection, and his pretended right to enforce the said act, will constitute a cloud upon their title to their property and business, and a menace thereto. That this averment, taken in connection with the statement of the provisions of the law itself, fails to bring the plaintiffs within that class of cases in which equity will interpose to prevent a cloud upon title, seems too clear to doubt. That jurisdiction is limited to cloud upon title to real estate. It would seem to be elementary that, in legal parlance cloud upon title arises with reference to real estate only. 6 Am. & Eng. Enc. Law, p. 150, and cases cited. This is the settled law of this state. *Lockwood v. St. Louis*, 24 Mo. 20; *Leslie v. St. Louis*, 47 Mo. 474; *Warrensburg ex rel. Colbern v. Miller*, 77 Mo. 56; *Sayre v. Tompkins*, 23 Mo. 443; *Mechanics' Bank v. Kansas*, 73 Mo. 555. But in this case the bill negatives all idea of this inspection law affecting the property of plaintiffs therein, in that it is made a purely personal charge against individuals only, and can form no basis, either in law or equity, of a proceeding against their property or business. A failure to pay it can result neither in a judgment, levy, nor seizure of their property, generally or specially; and the bill wholly fails to charge that any suit, lien, levy, or seizure is threatened by the inspector in case of a failure or refusal to submit their product to his inspection. On the contrary, the sole and exclusive remedy is by an indictment or information in a court having jurisdiction over criminal cases. A court of equity, moreover, has no jurisdiction to enjoin the collection of a personal tax or fee when the bill shows no ground for apprehending that the officer will attempt to enforce its collection against the property of the complainant. We desist from further discussion of this point, because, in our opinion, no precedent for an injunction under such a state of facts can be found, and because such an allegation discloses no equity whatever.

In the natural connection, let us now examine the allegation of "irreparable injury." As to this ground, the jurisdiction rests upon well-settled principles. A mere allegation that irreparable injury will ensue is insufficient. Traversable facts must be stated in the bill, which show that plaintiffs cannot have an adequate remedy at law, or that the injury cannot be compensated by an action for damages as such. 1 High, Inj. 3d ed. § 34; *Clarke v. Ganz*, 21 Minn. 387. That a court of equity may enjoin upon some other ground is not the question now, but does this petition aver traversable facts sufficient to state a cause of "irreparable injury?" *Dows v. Chicago*, 11 Wall. 108, 20 L. ed. 65; *Shelton v. Platt*, 139 U. S. 596, 35

L. ed. 273, 11 Sup. Ct. Rep. 646; *Verdin v. St. Louis*, 131 Mo. loc. cit. 106, 107, 33 S. W. 480, 36 S. W. 52. The statement of such essential facts is jurisdictional. *Dows v. Chicago*, 11 Wall. 108, 20 L. ed. 65. When we recall that by no possibility can the property of plaintiffs therein be disturbed for the collection of the inspection fee, it is plain we must look elsewhere in the petition for the traversable facts which would work irreparable damage. If found at all, it must be in the allegation that the inspection would necessarily render the beer stale, flat, and unsalable by opening the vessels containing it, for that purpose. It is plain, however, that this averment has no other foundation than the act itself, and is a legal conclusion drawn by learned counsel from the law. Section 7 of the act is the basis of this contention, and is in these words: "It shall be the duty of such inspector to cause to be inspected all beer or other malt liquors brewed or manufactured or sold in this state, and if he shall find that such beer or other malt liquor has been made from pure hops or the pure extract of hops, or of pure barley, malt, or wholesome yeast, or rice, to place upon the package containing such beer or malt liquor his label certifying the same has been inspected and made from wholesome ingredients." The interpretation of this section is one of law. It should receive a reasonable construction,—one which would conform to common sense, and at the same time render the act operative, if possible. So construed, it does not require each barrel or bottle to be opened after it is closed. The learned counsel for the state beer inspector, the officer charged with this inspection, say: "There is but one practical and intelligent method by which the output of lager beer in this state can be inspected; that is, by going direct to the brewery, and taking a sample of their mash, and of the beer that they are fermenting. This method would not, in the slightest manner, interfere with or hinder them in their operations, and would at the same time enable the inspector to inspect hundreds and thousands of gallons of beer from the one sample; for, as the mash is, so must the beer be. The 'mash' is the material from which the beer is brewed. But, should they change the mash after the inspection, they could not possibly change the beer after it was brewed in the fermenting tubs. The fermenting vats are great cooperages, holding each from 500 to 5,000 gallons. Into these the beer is placed for the purpose of fermentation, which is the last act of the brew. After the fermentation, the beer is run off into hogsheads, barrels, and kegs for the market." We think the counsel have given a satisfactory and reasonable construction of the act. So that, if the brewers elect to stand upon their construction that the act is unconstitutional, they need not submit to an inspection, but may refuse to pay the fees therefor, and defend the indictments and informations, if any are found, on the ground of the unconstitutionality of the act. On the other hand, if they submit to the law, and their

brew is inspected in the vats and large cooperages, no damage whatever can result to their beer from the inspection, and so this court can say there is no case of irreparable damage made out on the face of the petition in the circuit court.

There being, then, neither allegations of traversable facts showing irreparable damage, nor the absence of an adequate remedy at law, or cloud upon title, the case stands upon the allegations of the unconstitutionality of the act of May 4, 1899, and the complaint that they would be annoyed by a multiplicity of prosecutions for the violation of said act. Now, a court of equity has no jurisdiction to enjoin criminal prosecutions, and yet the petition for the injunction in the circuit court asked and the restraining order prohibited the inspector and his deputies from doing anything to carry out the provisions of the act. He can make no inspections, collect no fees, nor institute any prosecution for violation of the act. Injunctions to prevent criminal prosecutions have been held so completely beyond the jurisdiction of courts of chancery that their decrees in such cases have been disregarded as absolutely void in collateral proceedings, and parties arrested for contempt for violating their injunctions discharged on habeas corpus. *Re Sawyer*, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482. In this case the mere fact that the injunction is not asked against the prosecuting attorney of the state *eo nomine* can make little or no difference. This court must look at the effects of said restraining order and prayer for injunction, and determine whether or not it enjoins, or will enjoin, if granted, the institution of criminal proceedings to enforce the act. Thus, in *Crighton v. Dahmer*, 70 Miss. 602, 21 L. R. A. 84, 13 So. 237; *Re Sawyer*, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; *Yellowstone Kit v. Wood*, 18 Tex. Civ. App. 683, 43 S. W. 1008; and *New Home Searing Mach. Co. v. Fletcher*, 44 Ark. 139,—the prosecuting or circuit attorneys were not made parties to enjoin the prosecutions, but this did not deter the courts from holding that the purpose of the bills was to enjoin criminal prosecutions, and that courts of equity had no such jurisdiction. A case strikingly in point is *Fitts v. McGhee*, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269. An act of the general assembly of Alabama, approved February 9, 1895, prescribed certain maximum rates of toll to be charged on the bridge across the Tennessee river between the counties of Colbert and Lauderdale, in that state, known as the "Florence Bridge." It also provided that if the owners, lessees, or operators of the bridge, by themselves or their agents, demanded or received from any person a higher rate of toll than was prescribed by the act, they should forfeit \$20 for each offense, to be recovered before any justice of the peace in either of said counties. McGhee and Fink, receivers of the Charleston & Memphis Railroad, filed a bill in the circuit court of the United States for the northern district of Alabama against the state of Alabama, William C.

Oates, governor thereof, and Fitts, the attorney general of said state, alleging, among other things, that the rates of toll fixed by said act were arbitrary, unreasonable, and amounted virtually to confiscation of plaintiff's property; that said act was unconstitutional, and deprived them of their property without due process of law, and denied them the equal protection of the law; that the provision imposing the penalty for demanding or receiving higher tolls than prescribed by the act was intended to deter from questioning the validity of said act; that they were remediless, except by a bill in equity, and prayed for an injunction. The circuit court granted the injunction, and on appeal the Supreme Court of the United States, through Mr. Justice Harlan, held: First, that the state of Alabama could not be sued in this manner without its assent, at the suit of private persons; and, secondly, that the circuit court of the United States, sitting in equity, was without jurisdiction to enjoin the institution or prosecution of criminal proceedings commenced in the state courts; that to do so would be to invade the domain of the courts of common law. Said the court: "The plaintiffs state that the toll gatherers in their service had been indicted in a state court for violating the provisions of the act of 1895 in respect of tolls. Let them appear to the indictment, and defend themselves upon the ground that the state statute is repugnant to the Constitution of the United States. The state court is competent to determine the question thus raised, and is under a duty to enforce the mandates of the supreme law of the land. *Robb v. Connolly*, 111 U. S. 624, 28 L. ed. 542, 4 Sup. Ct. Rep. 544. And if the question is determined adversely to the defendants in the highest court of the state in which the decision could be had, the judgment may be re-examined by this court upon writ of error. That the defendants may be frequently indicted constitutes no reason why a Federal court of equity should assume to interfere with the ordinary course of criminal procedure in a state court." To the same effect is the decision in *Hemaley v. Myers*, 45 Fed. Rep. 283, in which Judge Caldwell says: "A man who has a full and complete remedy at law to recover the damages he suffers cannot be heard to say that the damage is irreparable." But counsel for respondents insist that the act copied into and made part of their bill in the circuit court is not, and does not purport to be, a criminal statute. By the 12th section of said act it is provided that all prosecutions for fines and penalties under said act shall be either by indictment or information in any court of competent jurisdiction, and by the 10th section it is provided that "any person who shall sell any beer or malt liquors within this state which has not been inspected according to the provisions of this act," etc., "shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding \$500 or by imprisonment in the county jail not less than six months," etc. If these words do not define a criminal offense, then it will be

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difficult to find appropriate language for that purpose. Plaintiffs in the injunction cannot be proceeded against in any other manner than by indictment or information. This is not a mere quasi-criminal proceeding, as the prosecution for violation of a city ordinance; it is a criminal statute of the state; and the allegations of the bill as to "heavy fines and imprisonment" can have no reference to the staying of any other proceeding, and the object in view can only be to enjoin these criminal prosecutions. Such prosecutions will not affect defendants' property rights, and an injunction is not necessary to preserve their rights to any of their property. *Yellowstone Kit v. Wood*, 18 Tex. Civ. App. 683, 43 S. W. 1068; *New Home Sewing Mach. Co. v. Fletcher*, 44 Ark. 133; High, Inj. §§ 20, 68, 272, 1244; Beach, Inj. §§ 59, 60, 574. The result of our examination is that the petition in the circuit court did not, and in the very nature of the case could not, under the act of May 4, 1890, allege facts which brought the case under any recognized head of equity jurisprudence.

The case stands upon the naked averment that the law is unconstitutional, and the inspection fee illegal; the remaining averments wholly failing to make a case under any decision of this court for injunctive relief. In *Dove v. Chicago*, 11 Wall. 108, 20 L. ed. 65, Mr. Justice Field, voicing the unanimous judgment of the Supreme Court of the United States in a suit to restrain the collection of a tax levied by the city of Chicago on the ground of its unconstitutionality, said: "Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax, and the threatened sale of the shares for its payment, constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers upon whom the duty is devolved of collecting the taxes may derange the operations of government, and thereby cause serious detriment to the public. No court of equity will, therefore, allow its injunction to issue to restrain their action except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked. In the cases

where equity has interfered in the absence of these circumstances it will be found, upon examination, that the question of jurisdiction was not raised, or was waived." This explicit statement of the law is fully sustained by the great weight of authority in this country. *Cruickshank v. Bidwell*, 176 U. S. 73, 44 L. ed. 377, 20 Sup. Ct. Rep. 280; *Shelton v. Platt*, 139 U. S. 591, 35 L. ed. 273, 11 Sup. Ct. Rep. 646; *Allen v. Pullman's Palace Car Co.* 139 U. S. 661, 35 L. ed. 303, 11 Sup. Ct. Rep. 682; *Union P. R. Co. v. Cheyenne*, 113 U. S. 516, 28 L. ed. 1098, 5 Sup. Ct. Rep. 601; *Cooley*, Taxn. p. 536; *United Lines Teleg. Co. v. Grant*, 137 N. Y. 7, 32 N. E. 1005; *Franklin v. Appel*, 10 S. D. 391, 73 N. W. 259; *Thomas v. Rowe* (Va.) 22 S. E. 157. Nowhere is the doctrine more forcibly and correctly stated than in *Heywood v. Buffalo*, 14 N. Y. 534.

Having examined the various allegations of the bill for injunction, in our opinion it did not state a case which fell within the class of which the circuit court had jurisdiction to grant an injunction, for the reason that the alleged unconstitutionality of the law alone furnishes no ground for injunction; and because the circuit court had no jurisdiction to prevent the institution of criminal proceedings by the inspector by information to punish violations of said act, and because, in our opinion, the bill otherwise charges no traversable facts showing a want of an adequate remedy at law, but, on the contrary, shows that the courts of law are open to the plaintiffs in said case to make their defense to any prosecution under said act, and that the act of May 4, 1899, does not require an inspector to open sealed packages of beer after they are closed to inspect the same, but may inspect said beer or malt liquors before put in the closed barrels or bottles. For these reasons we think the provisional rule of prohibition should be made absolute against Judge Wood and the circuit court over which he presides, but, as Judge Ferris took no part in the case, it is ordered dismissed as to him.

Brace, Marshall, and Valliant, JJ., concur.

Sherwood, J., not being present at the hearing, takes no part in the decision.

Burgess, J., dissenting:

I respectfully dissent from the opinion rendered in this case by a majority of the court, which holds that the St. Louis circuit court was without jurisdiction of the subject-matter of controversy in the injunction proceeding of the American Brewing Company against George R. Kenamore, state inspector of beer and malt liquors, and that prohibition would lie against the judge of the court before whom the proceeding was pending to prevent him from proceeding with the case, and to annul the restraining order which had theretofore been issued in the case. The petition in that case, omitting the formal parts, is as follows:

"Plaintiffs bring this suit on behalf of themselves and all others in the state of Mis-

souri similarly situated, and state that the American Brewing Company, the Anheuser-Busch Brewing Association, the Columbia Brewing Company, the Consumers' Brewing Company, the Home Brewing Company, the National Brewery Company, the St. Louis Brewing Association, and the Wm. J. Lemp's Brewing Company, the above-named plaintiffs, are business corporations duly organized under the laws of the state of Missouri, and are each and all of them authorized by their charters to engage in the manufacture and sale of beer and other malt liquors, and they are now, and have been for many years past, engaged in that occupation in the city of St. Louis, and state of Missouri; and also that Louis Obert is a citizen of this state, and is engaged in the manufacture and sale of beer and other malt liquors, and is now, and has been for many years past, engaged in that occupation in the city of St. Louis and state of Missouri. Plaintiffs further state that the defendant, George R. Kenamore, has recently been appointed by the governor of the state of Missouri as beer inspector, under and by virtue of an act of the general assembly entitled 'An Act Creating the Office of Inspector of Beer and Malt Liquors of the State, and Providing for the Inspection of Beer and Malt Liquors Manufactured and Sold in This State,' approved May 4, 1899. [The act is then set out in full, and is to be found in Mo. Laws 1899, pp. 223-231, inclusive.] Plaintiffs state that the said defendant, Kenamore, had qualified under the terms of said act of the general assembly, and claims to be entitled to act as such beer inspector, and entitled to discharge the duties thereof, and claims to be entitled to enforce and carry out the provisions of said act of the general assembly, and to that end has appointed his deputies as therein provided, and has also issued a circular letter notifying plaintiffs and all other persons in this state similarly situated that he intends to enforce said act of May 4, 1899, and each and every provision thereof, and requiring plaintiffs and all others similarly situated to submit their products of beer and other malt liquors to his inspection, and also threatens to exact the illegal tax imposed by said act under the name of inspection fees as hereinafter more fully set forth. And plaintiffs state that defendant has also sent a circular letter to the retail dealers in beer and malt liquors in this state,—that is to say, to plaintiffs' customers,—pretending that said act of May 4, 1899, is applicable to them, and threatening them with the penalties of said act if they continue to sell beer or malt liquors not stamped in accordance with said act of May 4, 1899. Plaintiffs further state that, besides these plaintiffs, there are other persons, firms, and corporations engaged in the manufacture and sale of beer in the state of Missouri, as follows: At Kansas City, Missouri: The Ferdinand Heim Brewing Company, J. D. Her Brewing Company, G. Muehlbach Brewing Company. At St. Charles, Missouri: Jacob Moersel, Charles Schibi. At Ste. Genevieve, Missouri: The Ste. Genevieve Brewing &

Lighting Association. At St. Joseph, Missouri: The M. K. Goetz Brewing Company, John Jester, the St. Joseph Brewing Company. At Sedalia, Missouri: The Moerschel Brewing Company. At Springfield, Missouri: The Springfield Brewing Company. At Washington, Missouri: John B. Busch. At Weston, Missouri: The Weston Brewing Company. At Cape Girardeau, Missouri: The Cape Brewing & Ice Company. At Hannibal, Missouri: Herl-Rodlin Brewing Company, Elizabeth Reidel. At Hermann, Missouri: Hugo Kropp. At Jefferson City, Missouri: The Capital Brewing Company. At Appleton, Missouri: Casper Ludwig. That the plaintiffs and the persons, firms, and corporations last hereinbefore named manufacture annually not less than 2,500,000 barrels of beer of thirty-one gallons each; of which amount they sell in the state of Missouri not less than 1,275,000 barrels of thirty-one gallons each; and outside of the state of Missouri not less than 975,000 barrels of thirty-one gallons each. That of the parties plaintiff and the persons, firms, and corporations named, twelve sell their product in the state of Missouri, and that a majority of the remainder sell the largest portion of their product in this state, but that one of the parties above mentioned sells more than two thirds of its product, and another of the parties sells about four fifths of its product, outside of the state, and that another one of said parties sells more than one half of its product outside of this state; that, with the exception of the three companies last referred to, all the brewers manufacturing in the state of Missouri sell either all or the greater portion of their product in the state. That, in addition to the persons, firms, and corporations hereinbefore mentioned as manufacturing and selling beer in the state of Missouri, there are persons, firms, and corporations engaged in manufacturing beer in other states, and particularly in the states of Illinois and Wisconsin, who annually ship into and sell in the state of Missouri not less than 165,000 barrels of beer of thirty-one gallons each, all of which will more fully appear by affidavits herewith filed. That, in addition, there are large quantities of ale imported from other states in the Union. That, in addition to the foregoing, there are imported into the state by various persons, firms, and corporations engaged in the sale of beer, large quantities of beer from foreign countries, and especially beer from Germany and ale from England, and that the aggregate amount of beer and ale thus imported from Germany and from England, together with the ale imported from other states of the Union and sold in this state, amounts in the aggregate to an annual importation and sale of about 1,500 barrels. That there are engaged in the manufacture of beer known as 'weiss beer' the following persons, firms, and corporations: At St. Louis, Missouri: The St. Louis Weiss Beer Brewing Company, Schradler-Berlina Valena Company, Stecher & Thomas, Wittman-Rost Brewing Company, American Weiss Beer Company, Berliner Import-

ed Weiss Beer Company, Columbia Weiss Beer Company. At Kansas City, Missouri: W. L. Schnick, P. Seltzer & Sons, Bremer & Thoma. That about 5,200 barrels of weiss beer are manufactured in this state annually, of which about 4,000 barrels are sold in Missouri, and 1,200 barrels are exported. That weiss beer is a malted and fermented liquor, brewed from wheat, and has always been so brewed, and cannot be made from any other cereal. That lager beer is made commonly of hops, of malted barley, and of barley, rye, corn, and other farinaceous cereals which it may be convenient for the brewer to use, and it may be properly made of any farinaceous cereal used in conjunction with hops and malt in the production of lager beer; and such cereals when so used are entirely wholesome. That beer, whether weiss beer or lager beer, and whatever cereals may be used in its manufacture, must, for purposes of sale, be inclosed in tight packages of glass or wood, and when so prepared for sale by enclosure in such tight packages the packages cannot be opened without injury to the contents, and are never opened except for purposes of immediate consumption. That to open the same prior to the consumption thereof is to render the beer stale, flat, unpalatable, and sour. And plaintiffs say that the average price or value of beer manufactured and sold in this state, exclusive of United States revenue stamps, is \$5 per barrel of thirty-one gallons. Plaintiffs further state that they are advised and believe, and so charge, that said act of the general assembly of May 4, 1899, hereinabove fully set out, is unconstitutional, inoperative, and void, and that it is against common right, and of no binding force, validity, or effect so far as these plaintiffs and all others similarly situated are concerned, for the following reasons, to wit:

"(1) The said act of the general assembly of May 4, 1899, violates § 28, art. 4, of the Constitution of the state of Missouri, which provides that no bill (except certain bills therein specifically designated) shall contain more than one subject, which shall be clearly expressed in its title. Plaintiffs state that the said act of May 4, 1899, does not come within any of the exceptions in said constitutional provision enumerated, but that said act, nevertheless, does contain more than one subject, in that it provides specifically of what material beer and other malt liquors shall be manufactured in this state, and also provides for an inspection of all beer and malt liquors sold in this state; and said act further contains a revenue measure, in this: that the inspection fee authorized by the said act to be charged on account of the inspection of beer and malt liquors is in fact a tax. The entire expense of the inspection, as provided by the act itself, amounts to \$12,000 a year, while the inspection fees upon the beer annually sold in this state, as hereinbefore set forth, amount to not less than \$555,000, an excess of more than half a million dollars above the cost of inspection, which excess of half a

million of dollars is, by the terms of the act, and by its necessary operation and effect, a specific tax upon beer sold in this state, and is levied for the purpose, and is required by the said act to be turned into the general revenues of the state for the uses of such general revenue. And plaintiffs state that said bill as introduced in the senate of the state of Missouri was recognized by its framer to be a revenue bill, and was entitled when the same was introduced, 'An Act Creating the Office of Inspector of Beer and Malt Liquors, and Providing for an Increase in the General Revenue of the State,' and that the said bill was treated throughout as a revenue measure, and was supported as such by those who advocated it and voted for it in the senate and in the house of representatives of the Missouri general assembly; but, nevertheless, the title of the said act, while the same was pending in the senate, was amended to read as it now stands, and to mention the inspection of beer only, and was left silent as to the other subjects in said act contained, and as thus amended the said act passed the senate, and was sent to the house, and there passed, and as the said bill passed the senate and house there was nothing in its title to express or indicate that it relates to the subject of taxation or revenue.

"(2) Because said act of the general assembly is violative of § 8, art. 10, of the Constitution of Missouri, which provides that 'the state tax on property, exclusive of the tax necessary to pay the bonded debt of the state, shall not exceed 20 cents on the \$100 valuation; and whenever the taxable property of the state shall amount to \$900,000,000, the rate shall not exceed 15 cents.' And plaintiffs show to the court that in the year 1892 the taxable property of this state reached the sum of \$900,000,000 in value, of which fact the governor made due proclamation, and thereupon the rate of taxation for state purposes, exclusive of the special tax levied to pay interest on the bonded debt, was by the act of March 24, 1892, reduced to 15 cents on the \$100, being the maximum rate allowed by the Constitution, and the general assembly cannot now constitutionally tax property for general state purposes in excess of that rate; that said maximum rate of taxation is now, and has ever since said year 1892 been, imposed upon all property in this state, including beer and all articles entering into the manufacture of beer and other malt liquors. And plaintiffs state that all taxes hitherto imposed by the general assembly up to said maximum limit upon beer and other malt liquors have been duly paid by plaintiffs as they have become due and payable; that under existing laws they are duly authorized and licensed by the state to manufacture and sell beer and malt liquors, for which authority they, and each of them, pay a license fee, and they will be obliged to pay said license fee and the said state tax of 15 cents on the \$100 valuation for the current year, and as long as said maximum rate continues to be imposed; but that the act of the general assembly afore-

said, under the guise of an inspection law, proposes to levy an additional tax of 1 cent per gallon, which is equal to \$6.20 on the \$100 valuation on all beer or other malt liquors manufactured, owned, or offered for sale by plaintiffs and others similarly situated, besides a tax of 2 cents upon each package containing 8 gallons or less of such beer or other malt liquors, which latter is equal to \$1.60 on the \$100, making a total of \$7.80 on the \$100 valuation; that this additional tax is not needed for inspection purposes, but, if enforced, would yield a net revenue of more than half a million dollars per annum to the state, after deducting the expenses of inspection and collection, which are limited to \$12,000 per annum in said act; that said act is in truth and in fact a revenue measure, and the proposed levy imposed, or tax upon all beer or other malt liquors in this state, is a tax on property, to be paid into the state treasury, and to be credited to the general revenue fund, and, as shown by the above figures, is enormously in excess of the limit imposed by said § 8, art. 10, of the Constitution of this state, being in fact fifty-two times as large, and is therefore illegal, unconstitutional, and void.

"(3) Because said act of May 4, 1899, violates § 3, art. 10, of the Constitution of Missouri, which provides that taxes may be levied and collected for public purposes only, and that they shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax; and is also in violation of § 4 of said article 10, which provides that all property subject to taxation shall be taxed in proportion to its value; and plaintiffs state that said act of May 4, 1899, selects one species of property in this state, and imposes an onerous tax of more than 7 per cent on the same for state purposes, which tax is not imposed upon any other property within this state; and said proposed tax, if enforced, would impose double taxation upon one and the same species of property viz., the general property tax of 15 cents on the \$100 levied upon all property alike, including beer and the materials entering into its manufacture, and a special property tax of 780 cents on \$100 on the same beer, imposed by the act of May 4, 1899. And plaintiffs state that said act of May 4, 1899, selects the finished product of the manufacturers of beer and malt liquors in this state, and imposes upon them an onerous tax of 780 cents on the \$100, which tax is not imposed upon the finished product of any other manufacturer in the state, nor upon the goods, wares, and merchandise of any merchant in the state, in violation of the above-recited provision of the Constitution and laws of the state: that no other or greater amount of tax is now levied by law upon merchants in this state, or upon manufacturers in this state, than was levied and assessed upon them by law prior to August 20, 1899, except upon the manufacturers of beer and malt liquors, as against whom said act of May 4, 1899, creates an arbitrary and unwarranted discrimination in taxation, contrary to the Constitu-

tion and laws of the state. And plaintiffs state that said act of May 4, 1899, is not uniform in its character as to brewers, but discriminates between the persons engaged in the manufacture and sale of beer in this state, in this: that under the provisions of said act the brewer in Missouri who manufactures for sale within the state is taxed 39 cents per barrel upon his product, while the brewer in Missouri who manufactures for exportation from the state is exempt from such tax, and thereby in fact receives a bounty, which is denied the manufacturer whose product is consumed in this state. And plaintiffs say that, besides being a discrimination in violation of the rule of uniformity imposed by the Constitution, the act is in violation of §§ 6, 7, art. 10, of the Constitution of Missouri, relating to exemptions from taxation, and which prohibit all exemptions of property from taxation except the classes therein specially enumerated, and to which the proposed exemptions in this act do not belong. And plaintiffs state that said act of May 4, 1899, also violates said § 4, art. 10, in this: that it imposes a specific tax on personal property according to quantity and without regard to value. And plaintiffs further state that the beer sold in this state is not all of the same value, nor is it sold upon the market at the same price, but such beer is of different values, and is sold at different prices; but, nevertheless, the tax imposed upon the same by said act of May 4, 1899, is 1 cent per gallon and 2 cents per package, regardless of value.

"(4) Because said act of May 4, 1899, is violative of § 4, art. 2, of the Constitution of Missouri, which provides 'that all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of government, and that when government does not confer this security it fails of its chief design;' and also § 30, art. 2, which provides that 'no person shall be deprived of life, liberty, or property without due process of law.' And plaintiffs say that said act of May 4, 1899, violates said provisions of the Constitution of Missouri in this: that said act provides that no person or persons engaged in the brewing or manufacture of beer other than malt liquors shall use any substance or material in the manufacture of brewing of beer or other malt liquors other than those mentioned in § 4 of said act, and thereby imposes an unreasonable, oppressive, and unconstitutional restraint upon a lawful occupation, and which plaintiffs have been expressly authorized to engage in by the charters and franchises granted to them by the state of Missouri, and an occupation which every citizen of the United States has a right to engage in; that wholesome and harmless ingredients other than those specified in said § 4 may be properly used in the manufacture of beer. And plaintiffs further state that said § 4 excludes corn, wheat, rye, and other farinaceous cereals, which are properly used in the manufacture of malt liquors, and that weiss beer cannot be made without the use

of wheat. And plaintiffs further state that said § 4 excludes the use of at least one ingredient, to wit, water, which is absolutely required, and which forms the major part of all beers and malt liquors; and plaintiffs say that the limitations aforesaid are in violation of the rights secured to the people of this state by the provisions of the Constitution above referred to, and are also against common right, independent of any constitutional provisions. Also in this: that the inspection provided for in said act is an inspection of beer in the packages in which the same is to be put up for sale, and that, owing to the nature of beer and malt liquors, such an inspection, if carried out, will be destructive of plaintiffs' products, and render the same unsalable, and cause great and irreparable damage to their property and business, and prevent them, and each of them, from properly pursuing their occupation as brewers in this state.

"(5) Because said act of May 4, 1899, is violative of § 1 of the 14th article of Amendments to the Constitution of the United States, which provides that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' And also violates § 2, art. 4, of said Constitution, which provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. And plaintiffs say that said act of May 4, 1899, violates said provisions of the Constitution of the United States in that said act provides that no person or corporation engaged in the brewing or manufacture of beer or other malt liquors shall use any substance or material in the manufacture or brewing of beer or other malt liquors other than those mentioned in § 4 of said act, and thereby imposes the unreasonable, oppressive, and unconstitutional restraint upon a lawful occupation, and upon an occupation which plaintiffs have been expressly authorized to engage in, and which every citizen of the United States has a right to engage in; that wholesome or harmless ingredients other than those specified in said § 4 may be properly used in the manufacture of beer; that corn, wheat, rye, and other farinaceous cereals are wholesome and are properly used in the manufacture of malt liquors; and that weiss beer cannot be made at all without the use of wheat. And plaintiffs further state that said § 4 of the act of May 4, 1899, also excludes one ingredient, to wit, water, which is absolutely required, and which forms the major part of all beer and malt liquors. And plaintiffs say that said act of May 4, 1899, is an unwarranted, arbitrary, and oppressive exercise of government interference in the lawful occupation of a portion of the citizens of the United States, and that the limitations and restrictions contained in said act are in violation of the rights secured to the people of the United States by the

provisions of the Federal Constitution above referred to, and are also against common right, independent of any constitutional provision. Also because the said act of May 4, 1899, violates the above provision of said 14th Amendment to the Constitution of the United States, in this: that said act arbitrarily selects the finished product of the manufacturer of beer and malt liquors, and imposes upon such product a tax other and greater than is imposed upon the finished product of any other manufacturer in the state, or upon the property of any other person or class of persons in the state; that by reason of such arbitrary, unjust, and unreasonable discrimination and class legislation said act denies the manufacturers of beer and malt liquors equality before the law, and deprives them of the protection of equal laws to which they are entitled. Said act, moreover, discriminates between the manufacturers of beer and malt liquors in this state, in that the brewer who manufactures for sale within this state is taxed 39 cents per barrel upon his product, while the brewer who exports his product from the state is exempt from such tax.

"(6) Because said act of May 4, 1899, is inoperative and void for uncertainty and for want of adequate and practical provision in the act to carry it into execution; that it is practically, as well as scientifically, impossible by any inspection or analysis of beer or malt liquors to determine whether cereals other than those enumerated in the said act have been used in its manufacture, as will more fully appear from affidavits herewith filed. And plaintiffs state that one inspector and four deputies cannot inspect all the beer manufactured from day to day in the state of Missouri, without subjecting the brewers to ruinous delays; also that beer cannot be made exclusively of the ingredients and substances specified in § 4 of said act, and may properly be made of cereals other than those named in said act; also that, in order to inspect beer in the packages in which it is put up for the market as required by said act, viz., barrels, kegs, and bottles, such barrels, kegs, and bottles must be opened, which would so damage the contents as to render the same unsalable, and unfit for consumption, as will more fully appear from affidavits herewith filed.

"(7) Because said act of May 4, 1899, is repugnant to the provisions of the Constitution of the United States concerning the regulations of interstate commerce, being § 3, art. 1, of said Constitution, as well as § 2, art. 4, of said Constitution, declaring that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states; and to the 2d clause of § 10, art. 1, of said Constitution, which provides that no state shall, without the consent of Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws; and is also repugnant to § 1 of the 14th Amendment to said Constitution of the United States, which provides that 'no state shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' And plaintiffs say that said act of May 4, 1899, violates the above provisions of the Constitution of the United States in this: that it requires all beer and malt liquors imported into the state of Missouri from other states and territories or foreign countries, while still in original package, and before being offered for sale, to be inspected and labeled, and said tax of 1 cent per gallon and 2 cents per package thereon to be paid; and also to be accompanied by an affidavit from the manufacturer or other reputable person having actual knowledge thereof that no material other than those specified in said act was used in the manufacture of said beer or malt liquor; and also that the person or corporation receiving beer or malt liquors for sale from other states and territories or foreign countries shall, before offering the same for sale, submit the same for inspection as aforesaid, and procure from said inspector a certificate that such beer or malt liquor has been made exclusively of the ingredients specified in said act,—all of which plaintiffs state is in violation of the provisions of the Constitution of the United States hereinbefore set forth. Plaintiffs state that they were on the 20th day of August, 1899, and now are, taxpayers of this state, and as such are interested in the revenue collected and received by the state; that § 43, art. 4, of the Constitution of Missouri, under the head *Limitation of Legislative Power*, prescribes the order in which the appropriations of the state's revenue shall be made, and provides that 'no general assembly shall have power to make any appropriation of money for any purpose whatever, until the respective sums necessary for the purposes in said section specified have been set apart and appropriated, or to give priority in its action to a succeeding over a preceding item' in the order of appropriation established by said section. And plaintiffs state that the appropriation made by § 14 of the act of May 4, 1899, is illegal and void, because made in disregard of the order of appropriation fixed by said section of the Constitution, and was passed before the respective sums necessary for the seven subjects of appropriation enumerated in said section had been made. Plaintiffs state that the enforcement of said act of the general assembly of May 4, 1899, would, for reasons hereinabove stated, cause irreparable damage to the business and property of these plaintiffs and all other persons similarly situated in this state; that the number of breweries and persons engaged in the brewing of beer and malt liquors in this state, and who are affected by the terms of said act, is large; and that this action is brought by these plaintiffs for themselves and on behalf of all persons similarly situated, in order to avoid a multiplicity of suits and to prevent irreparable damage to the property and business of each of them. And

plaintiffs further state that, besides the irreparable damage which will be inflicted upon their property and business by the inspection of beer as hereinbefore more fully set out, the act in question provides for heavy fines and penalties and the imprisonment of all brewers who fail to conform to its provisions, and who sell their product without submitting the same to such inspection, and who fail to pay the unconstitutional tax imposed by said act; and said act provides that a prosecution and conviction for failure to comply with the terms of said act and of the payment of said tax shall be followed by a forfeiture of the brewer's right to manufacture and sell beer or other malt liquors in this state for a period of two years thereafter, which would cause ruinous damage to plaintiffs' business, and that of others similarly situated, in which much capital is invested, and in which many thousands of persons are employed. And plaintiffs say that the pretended right of defendant to enforce said act of May 4, 1899, and to inflict the penalties and forfeitures aforesaid, and the circular letter issued to plaintiffs' customers, constitute a cloud upon the title to their property and upon their right to carry on business, and upon their credit, and constitute a constant and continuous menace to and interference with their business, and a threatened invasion of plaintiffs' right to carry on their lawful avocation as manufacturers. Wherefore plaintiffs say that they are without an adequate remedy at law, and they now come into a court of equity, and pray for relief under the facts and circumstances herein stated; and plaintiffs say that, unless the relief hereinafter prayed for is granted, the damage to them and all others similarly situated will be irreparable. Wherefore they now pray that an order of injunction may issue out of this court directed to the defendant, the said George R. Kenamore, claiming to be inspector of beer, enjoining and restraining him, his deputies, servants, and agents, and each of them, from enforcing or attempting to enforce said act of the general assembly of May 4, 1899, and from inspecting or attempting to inspect the beer or other malt liquors manufactured or offered for sale by plaintiffs, or others similarly situated, and from collecting or attempting to collect any tax or inspection fees under said act, and from attempting to enforce said act as against the said retail dealers, customers of plaintiffs, and others similarly situated, and that said act of the general assembly be declared null and void, and for such other and further relief as to this honorable court may seem meet and proper under all the circumstances of the case."

The other material facts are substantially as stated in the opinion.

I make no serious criticism upon the first paragraph in the opinion when taken as a whole, yet there are statements in it, unnecessary to mention, to which I do not subscribe. While it is conceded that the court granting the injunction is one of general jurisdiction, possessing power to grant such writs, and that it had jurisdiction over the

parties, it is held that the court had no jurisdiction of the subject-matter, because there were no "traversable facts stated in the bill which show that the plaintiffs could not have an adequate remedy at law, or that the injury cannot be compensated by an action of damages as such, or facts which state a cause of 'irreparable injury.'" 1 High, Inj. 3d ed. § 34; *Clarke v. Ganz*, 21 Minn. 587; *Douss v. Chicago*, 11 Wall. 108, 20 L. ed. 65; *Shelton v. Platt*, 139 U. S. 596, 35 L. ed. 273, 11 Sup. Ct. Rep. 646, and *Verdin v. St. Louis*, 130 Mo. loc. cit. 106, 107, 33 S. W. 480, 36 S. W. 52,—are relied upon as sustaining this position. But these authorities merely go to the sufficiency of a petition to authorize the granting of an injunction, a matter with respect to which the court to whom application is, in the first place, made, is the sole judge, and that this court has no right to pass upon except as an appellate tribunal. My position is that the petition in the injunction case can only be looked to in this proceeding for the purpose of determining whether or not the circuit court had jurisdiction of the subject-matter of controversy, and, if it had, then the question of its sufficiency is one for its determination, and, if found to be defective, the plaintiffs had the right to amend the same. Rev. Stat. 1899, § 663. And "proceedings which are amendable are not void. The very fact that the court can make the amendment shows *ex vi termini* that the proceedings are merely erroneous, or irregular, and that the court has jurisdiction." *Hardin v. Lee*, 51 Mo. 241; *Hunt v. Loucks*, 38 Cal. 372, 99 Am. Dec. 404; *Parmelee v. Hitchcock*, 12 Wend. 96; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931. The same rule is announced in *Ellis v. Jones*, 51 Mo. 180: "Whether the particular facts on which the court proceeds in that regard are or are not sufficient to justify its exercise of jurisdiction is a question of law, the solution of which either way cannot impair the court's right to apply its judicial power in the premises according to its view of the law and of the facts before it. For instance, where a court has jurisdiction to render judgments in ordinary civil causes, it would be manifestly improper to issue a writ of prohibition against it on an application alleging that it was about to pronounce such a judgment on a petition which did not state a cause of action, but which the trial court had held sufficient, or because the latter had ruled erroneously that the plaintiff had a legal capacity to maintain the action. A mistaken exercise of a jurisdiction with which the court is by law invested does not furnish a sufficient basis for a prohibition. Such mistake may be reviewed as other errors; for example, by appeal, but not in a proceeding like this." *State ex rel. Union Depot R. Co. v. Southern R. Co.* 100 Mo. 59, 13 S. W. 398. In *Bishop v. Los Angeles County Super. Ct.* 87 Cal. 226, 25 Pac. 435, it was held that a writ of prohibition would not lie to restrain the prosecution of an action by city authorities to condemn a right of way for a sewer on account of the absence of an averment or proof that the city au-

thorities were unable to agree with the defendant, or that the local board of the municipal corporation had expressly directed the institution of the proceeding, although the statute under which the proceedings were had provided that "wherever it shall become necessary for the city or town to take or damage private property for the purpose of . . . rights of way for drains, sewers, and aqueducts, . . . and the board of trustees cannot agree with the owner thereof as to the price to be paid, the trustees may direct proceedings to be taken . . . to procure the same." The Missouri statute in regard to the condemnation of land for public use is substantially like that of California, and it has always been held in this state that, in case no agreement can be made with the owner of the land as to compensation, the proceedings are absolutely void if no attempt is made before beginning them to come to an agreement with the owner. *Moses v. St. Louis Sectional Dock Co.* 84 Mo. 242; *Graf v. St. Louis*, 8 Mo. App. 562; *Wilkinson v. St. Louis Sectional Dock Co.* 102 Mo. 130, 14 S. W. 177. And the proceedings must show the offer and failure to make such agreement. *Graf v. St. Louis*, 8 Mo. App. 562; *Moses v. St. Louis Sectional Dock Co.* 84 Mo. 242. But, notwithstanding the absence of this jurisdictional question in the condemnation proceedings in the superior court of California, the supreme court refused to prohibit it from proceeding with the case. In *Croly v. Sacramento*, 119 Cal. 220, 51 Pac. 323, the writ of prohibition was applied for because of alleged insufficiency of the grounds of the accusation. The court said: "But, if the board has jurisdiction to try appellant upon the matters alleged if properly stated, it has power to determine, in the first instance, at least, their formal sufficiency; and this objection should have been made to the board." So in *State ex rel. Reid v. Fournet*, 45 La. Ann. 943, 13 So. 185, it was said that "the nature of a cause of action is not to be confounded with its sufficiency. The nature of the action determines jurisdiction, and, when that sustains the jurisdiction, the latter cannot be defeated by mere insufficiency of the allegations or of the proofs."

But even if this court had the right to pass upon the sufficiency of the petition for injunction as an original proposition other than for the purpose before stated, it stated a good cause for injunctive relief. The words "irreparable injury," in passing upon this question, are not to be considered by themselves, but are to be considered along with all other allegations of which they form a part. The petition alleges "that the inspection provided for in said act is an inspection of beer in the packages in which the same is put up for sale, and that, owing to the nature of beer and malt liquors, such an inspection, if carried out, will be destructive of plaintiffs' products, and render the same unsalable, and cause great and irreparable damage to their property and business, and prevent them, and each of them, from properly pursuing their occupation as brewers in 48 L. R. A.

this state." These are issuable facts, and which it is alleged will cause the "irreparable injury." How could they be more specific? And, if true, it is perfectly clear to my mind that the damages resulting from such acts would be irreparable. But it is said that this averment has no other foundation than § 7 of the act itself, and is a legal conclusion drawn by counsel from the law. The court then construes that section, to the exclusion of all others, as meaning that "there is but one practical and intelligent method by which the output of lager beer in this state can be inspected; that is, by going direct to the brewery, and taking a sample of this mash, and of the beer that they are fermenting. This method would not in the slightest manner interfere with or hinder them in their operations, and would at the same time enable the inspector to inspect hundreds and thousands of gallons of beer from one sample; for, as the mash is, so must the beer be. The 'mash' is the material from which the beer is brewed. But, should they change the mash after the inspection, they could not possibly change the beer after it was brewed in the fermenting tubs. The fermenting vats are great cooperages, holding each from 500 to 5,000 gallons. In these the beer is placed for the purpose of fermentation, which is the last act of the brew. After the fermentation, the beer is run off into hogsheads, barrels, and kegs for the market." It may not be out of place to inquire how the court arrives at these conclusions, in the absence of evidence tending to prove them. They are not matters of which it will take judicial notice, but are susceptible of proof, which the court below had the exclusive right to hear. This section, however, provides that it shall be the duty of the inspector to cause to be inspected all beer, and to place upon the package containing such beer his label certifying that the same has been inspected, etc. There is not one word said in the act about taking a sample of the mash or of the beer that is fermenting, but the only method indicated by this section of the act is inspection by the package, as the words "it shall be the duty of such inspector to cause to be inspected all beer or other malt liquor, and to place upon the package containing such beer or malt liquor his label, certifying that the same has been inspected," etc., clearly mean. By § 8 it is provided that the "inspector shall be entitled to receive for inspecting and gauging 1 cent for each gallon contained in each package. . . . The word 'package,' as used in this act, shall be construed to mean any vessel of any kind other than pint and quart bottles in which any beer or malt liquor may be placed for sale, containing 8 gallons or less; when said beer or malt liquors are placed in pint or quart bottles, a package, as used in this act, shall be construed to mean not to exceed forty 8-pint bottles or twenty 4-quart bottles of beer or malt liquors, which when manufactured and so bottled must, before sale, be placed in suitable cases containing said number and size of bottles, for inspection and stamping by

said state inspector." It is utterly inconceivable to me how there can be a difference of opinion as to the meaning of these sections when taken together, for, if the 7th be thought to be indefinite, the 8th says in so many words that the inspector shall be entitled to receive for inspecting and gauging 1 cent for each gallon contained in each package, and 2 cents for labeling each package, and then construes the word "package" to mean any vessel of any kind other than pint or quart bottles, which, when put up in bottles other than pint, must, before sale, be placed in suitable cases containing the requisite number and size of bottles, for inspecting and stamping by the inspector, and, when beer is placed in vessels containing more than 8 gallons, the word "package" shall be construed to mean each 8 gallons, or fractional part thereof, so contained in said vessel. Gauging means to measure, and it is illogical to say that beer could be measured in a package before it is put in it. And with respect to bottled beer, the act in so many words requires that it shall be put up in cases for inspection before sale, and, when placed in vessels containing more than 8 gallons, the word "package" shall be construed to mean each 8 gallons, or fractional part thereof, so contained in said vessel. The act thus in the plainest of terms provides for the inspection of beer when in some of the vessels indicated by it, and it cannot by any fair-construction be said that taking a sample of the mash, and the beer which is fermenting, is or would be an inspection of beer within the meaning of the act. But this is not all. By the 5th section of the act (and all of them must be construed together) with respect to beer and other malt liquors other than those manufactured in this state, the inspector is required to inspect and label the packages containing it just as he is the packages of beer manufactured in this state, but no one will contend that he could sample the mash or the beer manufactured out of the state while fermenting. It seems to me that, when these sections are considered *in parimateria*, there is no escape from the conclusion that the legislature intended that the beer should be inspected after it is put in packages. But, if there were any doubt upon this question, the legislature placed its own construction upon the act by defining what a "package" is, and that construction is binding upon this court. Thus it is said: "Any provision in a statute which declares its meaning or purpose is authoritative. Whether it relates to the objects of a whole act, or of a single section, or of a word, it is a declaration having the force of law. It is binding on the courts, though otherwise they would have understood the language to mean something different. . . . It has been said that an interpretation clause should be used for the purpose of interpreting words which are ambiguous or equivocal, not so as to disturb the meaning of such as are plain. It is often inserted for this purpose, or for abundant caution, that there may be no misapprehension, though the in-

terpretation so directed is not different from that which the language used would otherwise receive. In such cases this provision leads to no difficulties of construction." Sutherland, Stat. Constr. § 402. But, even if the statute were of doubtful construction, the court below should have been permitted to pass upon it.

It is also held that injunction to prevent criminal prosecutions will not lie, and numerous authorities are cited to sustain this position. That this is the law except where the criminal prosecution will affect property rights, and the writ is necessary to preserve such rights, and to prevent repeated prosecutions wrongfully instituted for the purpose of vexing and harassing the defendant therein, will not be controverted. But when property rights will be affected by such a prosecution, and the writ is necessary to protect such rights, injunction will lie. *State ex rel. Wood v. Schweickardt*, 109 Mo. 496, 19 S. W. 47, and authorities cited. "The subject-matter of the jurisdiction of equity being the protection of private property and of civil rights, courts of equity will not interfere for the punishment or prevention of merely criminal or immoral acts, unconnected with violations of private right. Equity has no jurisdiction to restrain the commission of crimes, or to enforce moral obligations and the performance of moral duties; nor will it interfere for the prevention of an illegal act merely because it is illegal. And in the absence of any injury to property rights it will not lend its aid by injunction to restrain the violation of public or penal statutes, or the commission of immoral and illegal acts." 1 High, Inj. 3d ed. § 20; *Re Debs*, 158 U. S. 593, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; *Cranford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514; *Port of Mobile v. Louisville & N. R. Co.* 84 Ala. 115-126, 4 So. 106. So, in *Hamilton-Brown Shoe Co. v. Sazcy*, 131 Mo. 212, 32 S. W. 1106, this court held that, while a court of equity will not interfere by injunction simply for the purpose of preventing a crime, it may enjoin acts threatening irreparable injury to property rights, notwithstanding such acts may also be in violation of the criminal law. But interference in such cases is predicated solely upon the ground of injury to property and the protection of property rights. 1 High, Inj. 3d ed. § 68. In *Atlanta v. Gate City Gaslight Co.* 71 Ga. 106, it was held that a court of equity will not enjoin the prosecution of a criminal proceeding, unless it is evident that private property and civil rights will be invaded thereby; then equity will interfere to protect them. "A court of equity has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property. If a charge be of a criminal nature, or an offense against the public peace, and does not touch the enjoyment of property, jurisdiction cannot be entertained. . . . But if an act which is criminal touches also the enjoyment of property, the court has jurisdiction, but its interference is founded solely on the ground of injury to property." Kerr, Inj. 3d ed. 5.

And in *Hamilton v. Whitridge*, 11 Md. 128, 69 Am. Dec. 184, the court said: "But it would be strange, indeed, if, when the court's powers are invoked for the protection and enjoyment of property, and may be rightfully exercised for that purpose, its arms should be paralyzed by the mere circumstance that, in the exercise of this jurisdiction, it might incidentally be performing the functions of a moral censor by suppressing a shocking vice denounced by the law, and amenable to its penalties from the earliest times." The same rule is announced in *Littleton v. Fritz*, 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641; *Bank of Kentucky v. Stone*, 88 Fed. Rep. 383; *Central Trust Co. v. Citizens' Street R. Co.* 80 Fed. Rep. 218. Courts have frequently enjoined strikers from interfering with the traffic upon railroads, the moving of trains, and the destruction of property; and, while such acts are criminal offenses under the laws of the states in which they were committed, punishable by indictment, fine, and imprisonment, courts have never declined to restrain them upon the ground of their criminal character. Property not only includes the right to use, but the right of disposition, at one's pleasure, and upon such terms and conditions as the owner may see proper, whether it be labor or merchandise; and the business of a person conducted in accordance with law is as much a property right as property itself, and any interference therewith is an injury to the property. *Davis v. Zimmerman*, 91 Hun, 489, 36 N. Y. Supp. 303. The act in question prohibits these respondents from selling beer and malt liquors manufactured by them without its first having been inspected by the beer inspector; makes them guilty of a criminal offense punishable by indictment or information, and imposes upon them severe penalties and forfeitures, if they do so, one of which is the forfeiture of the right to manufacture beer for two years. The allegations of the petition for the injunction show that, if the provisions of the act are carried out by the inspector, it will greatly interfere with and injure the beer manufactured by them, to their serious injury, for which, because of its frequent occurrence, the law would afford them no adequate remedy.

But the petition stated grounds for equitable relief, upon the further ground that a multiplicity of suits would be avoided thereby. Besides the eight plaintiffs in the injunction suit, there are at least fifteen other brewers in this state, all of whom are alike affected by the act in question, and under such circumstances injunction will lie to prevent multiplicity of suits. Thus, it was held in *Damschroeder v. Thias*, 51 Mo. 100, that one of the offices of an injunction is to prevent a multiplicity of suits, where the whole question can be decided in a single proceeding. In *Michael v. St. Louis*, 112 Mo. 610, 20 S. W. 666, it was held that lot owners seeking to be relieved from local assessments may, to prevent multiplicity of

suits, unite in one equitable proceeding, where there is a community of interests in the questions to be decided. *Slyvester Coal Co. v. St. Louis*, 130 Mo. 323, 32 S. W. 649, is very much like the case at bar. In that case a weighing ordinance was claimed to be invalid and an unlawful interference with the business of the plaintiffs, and several of them having the same interest joined in a suit to enjoin its enforcement. The city contended that the plaintiffs had an adequate remedy at law, but it was held that the fact that in each of said suits the plaintiff might plead successfully the invalidity of the ordinance as defense thereto did not give them an adequate remedy, that they were entitled to be protected from the expense, vexations, and annoyance of such a multiplicity of suits in consequence of their continuance of legitimate business, except on compliance with the conditions of ordinances which, it is alleged, are utterly void. The court said: "But is the remedy at law adequate? It must be remembered that the injury complained of here is continuous. The ordinances are continuous, and plaintiffs' business is continuous, and, under the ordinances, for each wagon load of coal sold and delivered in violation of the restrictive provisions thereof the plaintiffs each become subject to an action in the municipal courts of the city for such violation. The fact that in each of such suits the plaintiffs might plead successfully the invalidity of the ordinances as a defense thereto does not give them an adequate remedy. They are entitled to be protected from the expense, vexation, and annoyance of such a multiplicity of suits in consequence of their continuance of a legitimate business except upon compliance with the condition of ordinances which it is alleged, are and may be utterly void. *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Davis v. Fasig*, 128 Ind. 271, 27 N. E. 726; *Rushville v. Rushville Natural Gas Co.* 132 Ind. 575, 15 L. R. A. 321, 28 N. E. 853; *Third Ave. R. Co. v. New York*, 54 N. Y. 159. 'The prevention of vexatious litigation and of a multiplicity of suits constitutes a favorite ground for the exercise of the jurisdiction of equity by way of injunction.' High, Inj. 3d ed. p. 12. This has been frequently recognized as a ground for the exercise of such jurisdiction in this state (*Swope v. Weller*, 119 Mo. 556, 25 S. W. 204; *Michael v. St. Louis*, 112 Mo. 610, 20 S. W. 666; *Carroll v. Campbell*, 108 Mo. 553, 17 S. W. 884); and is an independent ground of equity jurisdiction upon which such courts may interfere to prevent municipal authorities from transcending their powers. 2 Dill. Mun. Corp. 4th ed. §§ 906, 908, and cases cited above. While, under the former system of jurisprudence, in which relief in equity was administered by a different tribunal and by a different procedure from those that gave relief at law, courts of equity have sometimes refused to interfere before the right was established at law (*West v. New York*, 10 Paige, 539), there seems no good

reason, under the present system in code states, where both are blended, why such relief should not be granted in the first instance by injunction; and so it was ruled in the analogous cases of *Baltimore v. Radecke*, *Davis v. Fasig*, and *Rushville v. Rushville Natural Gas Co.*, above cited, which are on all fours with the case in hand. And so it would seem it must be ruled here, where we have, in addition, a special and liberal statutory provision in regard to injunction. Rev. Stat. 1889, § 5510." While this case and the cases cited therein were predicated upon the noncompliance with city ordinances which were claimed to be invalid, they were quasi-criminal in their character, and the same rule applies as for the violation of a criminal statute. It was upon this ground that a bank which was required to pay for its stockholders the taxes assessed upon the shares of the stock held by them, respectively, might bring a suit to restrain the collection of taxes illegally assessed upon such shares. *Whitney Nat. Bank v. Parker*, 41 Fed. Rep. 402. To the same effect is 1 Beach, Modern Eq. Jur. § 22. "As a general rule, wherever the rights of a party aggrieved cannot be protected or enforced in the ordinary course of proceedings at law, except by numerous suits, equity may properly interpose and offer relief by injunction. Upon this ground equity often grants an injunction to restrain wrongful acts which are of a continuing nature, or which are frequently repeated. The separate remedy at law for each violation of the plaintiff's right would not be an adequate remedy, and the ends of justice require in such cases that the whole wrong shall be arrested and concluded by a single proceeding. Such relief equity affords, and thereby fulfils its appropriate mission of supplying the deficiencies of legal remedies. Thus, where a company engaged in the business of buying and crushing seed cotton was in the habit of sending out sacks to farmers to be filled and re-shipped to it, and another company engaged in the same line of business persistently procured the sacks so distributed, and used them for their purposes, and, though repeated actions of replevin had been prosecuted against them, persisted in so doing, an injunction was granted to prevent a further repetition of the wrong." 2 Beach, Modern Eq. Jur. § 644; 1 Beach, Modern Eq. Jur. § 22. See also *Warren Mills v. New Orleans Seed Co.* 65 Miss. 391, 4 So. 298. In *Shaffer v. Stull*, 32 Neb. 94, 48 N. W. 882, it was held that injunction would lie to restrain the leaving down of a fence, when it has been repeatedly done, and its continuance is threatened. In *Carroll v. Campbell*, 108 Mo. 558, 17 S. W. 884, in speaking of the remedy by injunction, it is said: "It is well settled that for an interruption of this right an injunction will lie, particularly when, as in this case, the injury is of a continuous nature, and committed under a claim which indicates a continuance, or frequent and constant repetition of it. Courts of equity take

cognizance of these cases to prevent the vexation and harassment of continued disturbances, prevent a multiplicity of suits, and to preserve the right by restraining the commission and repetition of threatened injury." It is upon this principle that strikers have been enjoined from interfering with the business of railroads and persons, and destroying their property. While in all such cases the owner of the property has a remedy at law, it is inadequate. Besides, by proceeding by injunction, a multiplicity of suits may be avoided. The injunctive petition is full and specific upon these theories of the case, and stated all that was necessary to entitle the plaintiffs therein to the relief sought.

Dows v. Chicago, 11 Wall. 108, 20 L. ed. 65, which is the chief corner stone of the opinion in this case, was a suit by injunction begun in the circuit court of the United States to restrain the collection of a tax levied by the city of Chicago upon shares of stock in a national bank owned by the plaintiff, and upon appeal to the Supreme Court of the United States it was held that a suit in equity will not lie to restrain the collection of a tax upon the sole ground that the tax is illegal, but there must exist, in addition, some special circumstances bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury. In that case the suit was by a single individual who had an adequate remedy at law, and there was no pretense that the injunction would prevent a multiplicity of suits; while in the case at bar numerous persons whose interests will be similarly affected joined in the suit, in order thereby to avoid a multiplicity of suits, and with respect to that question brings the case clearly within the rule announced in that case. Besides, that case was an equitable proceeding by injunction. The court below sustained a demurrer to the bill upon the ground that it failed to state a cause of action, and its ruling was affirmed by the appellate court. But no one will claim that the writ of prohibition would have been available in that case to prevent the trial court from passing upon the question as to the sufficiency of the petition. Such is not the purpose of the writ. And if the court had jurisdiction to decide that the petition did not state a cause of action, it had the same jurisdiction to decide that it did state a cause of action.

The most important questions involved in this whole controversy are with respect to the validity of the act under consideration, which plaintiffs in the injunctive proceedings (respondents here) insist is in conflict with the state and Federal Constitutions upon various grounds which are specifically set forth in the petition for injunction; but these questions, while of the gravest and most important character, were passed over as not deserving consideration. The right of the respondents to injunctive relief depends

upon the validity of the act, and how this case could be disposed of without passing upon its constitutionality, unless its unconstitutionality be conceded, I am at a loss to know. It is quite true that, if these questions had been passed upon, and decided adversely to respondents, they could have taken the case by appeal or writ of error to the Supreme Court of the United States for review, and thereby protracted the litigation, but as they were not passed upon, that court could acquire no jurisdiction of the case, so no appeal will lie; but this, of course, was not the reason for not passing upon these questions. In my humble opinion, the act, whatever may be said in it to the contrary, is a revenue measure, and is invalid because it imposes a tax upon property for general state purposes in excess of the constitutional limitations. Mo. Const. art. 10, § 8. It is also violative of §§ 3, 4, 6, and 7, art. 10, of the Constitution of Missouri, which require uniformity and equality in taxation. But as the constitutional questions are not passed upon in the opinion, I am not disposed to enter into a discussion of them.

If, then, as I contend, the act is void because violative of the Constitution, injunction to restrain the collection of the tax or inspection fees is the proper remedy. In *Overall v. Ruenzi*, 67 Mo. 203, the court held that injunction was the proper remedy to prevent the collection of a tax levied in excess of the legal limit; saying: "In regard to the propriety of an injunction on the facts stated, various authorities cited on either side have been examined, but we deem it necessary only to state the conclusions we have reached, without any review of the cases. It would be difficult, if not impossible, to reconcile the authorities, either here or elsewhere. But it is quite apparent that of late years, whether by reason of our statute in regard to injunctions, first introduced into the Revised Code of 1865, or upon general grounds of expediency, this court has been disposed to regard with favor proceedings which are preventive in their character, rather than compel the injured party to seek redress after the damage is accomplished. We see no objection, therefore, to the mode adopted in this case to test the validity of the tax." This doctrine was reasserted and applied in *Valle v. Ziegler*, 84 Mo. 214, where it was held that injunction was the proper remedy to prevent the enforcement of the collection of taxes against personal property which was not subject to taxation. In *Arnold v. Hawkins*, 95 Mo. 569, 8 S. W. 713, the court followed *Overall v. Ruenzi*, 67 Mo. 203, in allowing injunction in behalf of taxpayers to prevent the collection of taxes levied in excess of the constitutional limit; the plaintiff having paid all the taxes except those which he claimed were illegal. See also *Dennison v. Kansas*, 95 Mo. 430, 8 S. W. 429. The principle was also applied in *Book v. Earl*, 87 Mo. 246, and in *St. Louis & S. F. R. Co. v. Apperson*, 97 Mo. 301, 10 S. 48 L. R. A.

W. 478, where the court said that injunction is the proper remedy to prevent the enforcement of the collection of taxes levied without authority; the court saying (page 319, 97 Mo., page 482, 10 S. W.): "Numerous decisions of this court attest that the remedy plaintiff asks is the proper one in cases of this sort,"—citing *Valle v. Ziegler*, 84 Mo. 214, and *Book v. Earl*, 87 Mo. 246; *Cooley, Taxn.* 2d ed., and cases cited there. In *Michael v. St. Louis*, 112 Mo. 610, 20 S. W. 660, while the court decided against the plaintiffs on the merits, it was held that all the owners seeking to be relieved from illegal assessment, to prevent multiplicity of suits, may unite in one proceeding, where there is a uniformity of interest in the question to be decided. And in *Damschroeder v. Thias*, 51 Mo. 100, the court said that one of the offices of an injunction is to prevent a multiplicity of suits, where the whole question can be decided by one and the same proceeding. In *Rubey v. Shain*, 54 Mo. 207, it is held that it is not only the right, but the duty, to resort to a court of equity for injunctive relief to prevent the collection of an illegal tax, for the taxpayer would have no right of action against the collector. And again, in *Ranney v. Bader*, 67 Mo. 476, it is held that, where the assessment of taxes is illegal, the remedy of the taxpayer is by proceeding to arrest the execution of the illegal assessment and the collection of the tax. In passing upon a similar question in *Dennison v. Kansas*, 95 Mo. 416, 8 S. W. 429, it is said: "In the cases of *Ranney v. Bader*, 67 Mo. 476, and *Newmeyer v. Missouri & M. R. Co.* 52 Mo. 81, 14 Am. Rep. 394, it is held that, to prevent the collection of an illegal tax, suit may be brought by any taxpayer for himself and all others similarly situated." It was held that injunction was the proper remedy in that case. So, in *Valle v. Ziegler*, 84 Mo. 214, it was held that injunction was the proper remedy to prevent the enforcement of the collection of taxes against personal property not subject to taxation. My conclusion is that the circuit court had jurisdiction to pass upon all the questions presented in the petition for injunction, and that the petition showed a prima facie case for relief; and that, if the court erred, an appeal or writ of error furnishes a complete and effective remedy for any error of that court; and, this being the case, the writ of prohibition will not lie, and was, in the first place, improvidently issued. *Martin v. Sloan*, 98 Mo. 252, 11 S. W. 558. This is but the announcement of a familiar principle of law, which is conceded by all and denied by none. But, even if the question of jurisdiction in the circuit court were doubtful, prohibition is not the proper remedy. 19 Am. & Eng. Enc. Law, p. 271, and authorities cited; *Hassinger v. Holt* (W. Va.) 34 S. E. 728; High, Extr. Legal Rem. § 780. For these reasons I think the writ should be denied.

NEW HAMPSHIRE SUPREME COURT.

Ross W. CATE
v.
Nathaniel E. MARTIN et al.

(.....N. H.....)

A mayor cannot veto the judicial action of the board of aldermen sitting as a court in a matter of which the statutes have made it the exclusive and final judge, as in the determination of the election of its members, under Pub. Stat. chap. 48, § 11, although by chap. 47, § 7, it is provided that "he shall have a negative upon the action of the aldermen in laying out highways, and in all other matters; and no vote can be passed or appointment made by the board of aldermen over his veto, unless by a vote of two thirds at least of all the aldermen elected."

(March 16, 1900.)

RESERVATION by the Merrimack County Court for the opinion of the Supreme Court of a petition for a mandamus to compel the recognition of petitioner as alderman of ward 2 of the city of Concord. *Granted.*

John W. Sanborn was declared elected as such alderman. Plaintiff contested the election. The aldermen granted a hearing and the majority adopted the following resolution: "Resolved, that Ross W. Cate, having received a plurality of the votes cast for alderman in ward 2 in said city, at an election held on the 8th day of last November, is entitled to a seat in this board, and John W. Sanborn, not having been elected at said election, is not entitled to a seat in this board. Resolved, that the clerk is instructed to strike out of his records the name of John W. Sanborn, as alderman from ward 2, and substitute in place thereof the name of Ross W. Cate, and further to notify said John W. Sanborn and said Ross W. Cate of this resolution at once." The resolution was vetoed. Eight aldermen voted to pass the resolution over the veto, which was less than two thirds of the number elected. Cate was not notified that he was declared elected, nor Sanborn that he was not elected. In vetoing the resolutions the mayor acted in good faith, believing that the ballot showed that Sanborn was elected.

Further facts appear in the opinion.

Messrs. Streeter, Walker, & Hollis, for plaintiff:

No declaration of the result of the vote by the mayor as presiding officer was necessary to its legal efficacy.

Chariton v. Holliday, 60 Iowa, 391, 14 N.

W. 775; *Tennant v. Crocker*, 85 Mich. 328, 48 N. W. 577; *State ex rel. Duane v. Fagan*, 42 Conn. 32; *Dingwall v. Detroit*, 82 Mich. 568, 46 N. W. 938.

The mayor could not lawfully vote upon the question of adopting the resolutions, and thereby create a tie.

The power to give a "casting vote" in the proceedings of a deliberative body is the power to facilitate, but not to block, that body's action; to vote when the assembly is equally divided, but not to create an equal division; to break, not make, a tie.

Cushing, Law & Pr. of Legislative Assemblies, § 306; *Brown v. Foster*, 88 Me. 49, 31 L. R. A. 116, 33 Atl. 662; *Gostin v. Brooks*, 89 Ga. 244, 15 S. E. 361.

The mayor has no power to veto a decision of the board of aldermen with reference to the election of one of its own members.

Erwin v. Jersey City, 60 N. J. L. 141, 37 Atl. 732; *State ex rel. Haight v. Love*, 39 N. J. L. 14.

The supposition that the veto power was intended to apply to a decision of the board of aldermen concerning the election of one of its members is, at the outset, nearly, if not quite, as improbable as the supposition that it was intended to apply to a vote to adjourn. The action of the board in such a case is judicial.

1 Kent, Com. 235; *Halloran v. Carter*, 35 N. Y. S. R. 884, 13 N. Y. Supp. 214; *Gregg v. Goodrich*, 67 N. H. 543, 42 Atl. 240.

"Each branch" of the city councils shall be, not merely the judge of the election and qualification of its own members, but the final judge.

Properly and primarily, the powers and duties of a mayor are executive and administrative.

Martindale v. Palmer, 52 Ind. 411; *Jacobs v. San Francisco City & County Supers.* 100 Cal. 121, 34 Pac. 630.

He is not a member of a city council, unless expressly made such by law.

Tiedeman. Mun. Corp. § 96; *Reynolds v. Baldwin*, 1 La. Ann. 162; *Mills v. Gleason*, 11 Wis. 470, 78 Am. Dec. 721; *Atty. Gen. v. Shepard*, 62 N. H. 383; *Brown v. Foster*, 88 Me. 49, 31 L. R. A. 116, 33 Atl. 662; *People ex rel. Gaskill v. Ransom*, 50 Barb. 514; *State ex rel. Laughlin v. Porter*, 113 Ind. 79, 14 N. E. 883; *Garside v. Cohoes*, 34 N. Y. S. R. 234, 12 N. Y. Supp. 192; *Hall v. Racine*, 81 Wis. 72, 50 N. W. 1094.

If the mayor were a member of the aldermanic branch of the city councils in every sense and for every purpose, the exercise of his veto power would not be an act of membership, but an exercise of an authority which he possesses "as an independent, coordinate branch of the city government."

State ex rel. Childs v. Darrou, 65 Minn. 419, 67 N. W. 1012.

The exclusive power to judge of the elec-

NOTE.—As to casting vote by mayor, see *Lawrence v. Ingersoll* (Tenn.) 6 L. R. A. 308, and note; *Magenau v. Fremont* (Neb.) 9 L. R. A. 786; *State ex rel. Rylands v. Pinkerman* (Conn.) 22 L. R. A. 653; *Wooster v. Mullins* (Conn.) 25 L. R. A. 694; *Brown v. Foster* (Me.) 31 L. R. A. 116; and *State ex rel. Young v. Yates* (Mont.) 37 L. R. A. 205.
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tion and qualifications of its members "has always been lodged in the legislative body by the uniform practice of England and America."

1 Story, Const. § 833; 1 Bl. Com. 163, 178; 1 Kent, Com. 235.

The present case is satisfied by finding that the mayor's veto is inapplicable to a decision by the aldermen of a contested election case.

The veto power of the mayor must be interpreted in the light of its origin.

State, Tims, Prosecutor, v. Newark, 25 N. J. L. 309; *People ex rel. Churchyard v. Buffalo*, 47 N. Y. S. R. 149, 20 N. Y. Supp. 51; *State ex rel. Sullivan v. Longdon*, 68 Conn. 519, 37 Atl. 383; *Achley's Case*, 4 Abb. Pr. 36; *North v. Cary*, 4 Thomp. & C. 357.

Messrs. Eastman & Hollis and Martin & Howe, for defendants:

It is to be assumed that the words and phrases are used in their technical meaning, if they have acquired one, and in their popular meaning if they have not, and the phrases and sentences are to be construed according to the rules of grammar.

Endlich, Interpretation of Statutes, p. 4.

The mayor's powers are clear and well defined. There is nothing in the context to warrant us in concluding that the literal interpretation is not the correct one.

The functions of the mayor are different in both scope and nature from those of either the President or governor; and the veto power is conferred upon the two classes of officials for different purposes.

28 Am. & Eng. Enc. Law, p. 446.

The veto power, which is vested directly by constitutional authority in the President and governor, is based on the theory of equilibrium between the several branches of government. The veto power which the legislature has conferred upon the mayor of Concord is based upon the theory of checking corrupt and ill-considered legislation.

Blodgett, Ch. J., delivered the opinion of the court:

The statutory scope of the veto power conferred upon the mayors of cities in this state is found in section 7, chap. 47, Pub. Stat., which provides that "he shall have a negative upon the action of the aldermen in laying out highways, and in all other matters; and no vote can be passed or appointment made by the board of aldermen over his veto, unless by a vote of two thirds at least of all the aldermen elected." While this sweeping language, standing alone and taken by itself, is apparently plain and explicit, its interpretation, nevertheless, does not depend upon any one rule alone; for statutes, like all other written instruments, are to be interpreted by the weight of competent evidence, a part of which may bear more or less strongly in a given direction, and another part in a different direction, thus making the result dependent upon the product of both combined. In other words, the primary object in construing statutes being to ascertain the intention of the legislature in their enactment, resort is to be had to their language, the context, the subject-matter, the effects

and consequences, or the spirit and reason of the law. In the light of these rules, and conceding, as the defendants claim, that a municipal council is largely *sui generis*, and its powers to be construed accordingly, we are of opinion that the defendants' contention that the veto power of a mayor extends to and embraces a decision of the board of aldermen as to the election of one of its members cannot be sustained. Further than this we are not required to go; for whatever the language of the statute giving the mayor a negative "upon the action of the aldermen in laying out highways, and in all other matters," may mean, and whether it would or would not be competent for the legislature to give to the executive of a city a veto upon the action of the legislative branch of the city government sitting as a court in the performance of a judicial duty, it is enough to satisfy the present contention if the decision of a contested election case by the aldermen is not embraced in the phrase "in all other matters," and, in support of the conclusion that it is not, we cannot but regard the evidence as decisive. The mayor of a city is not an alderman or councilman of the city, in any general or proper sense of those terms. He is designated in the statutes as the "principal officer" and the "chief executive" of the city. Pub. Stat. chap. 46, § 3: Id. chap. 47, § 5. And both properly and primarily his duties are executive and administrative. *Martindale v. Palmer*, 52 Ind. 411, 413; *Jacobs v. San Francisco City & County Supers.* 100 Cal. 121, 135. 34 Pac. 630. He is not a member of either branch of the city councils, unless expressly made such by law. *Tiedeman, Mun. Corp.* § 96. And when this is the case it is "to the extent of such powers as are specially committed to him, and no further, that he is a part of the city council." *Brown v. Foster*, 88 Me. 49, 31 L. R. A. 116, 33 Atl. 622; *People ex rel. Gaskill v. Ransom*, 56 Barb. 514, 516; *Mills v. Gleason*, 11 Wis. 470, 476. 78 Am. Dec. 721; *State ex rel. Laughlin v. Porter*, 113 Ind. 79, 14 N. E. 883. He is not one "of its own members in the sense in which an alderman is." *Garside v. Cohoes*. 34 N. Y. S. R. 234, 12 N. Y. Supp. 192, 195; *Winter v. Thistlewood*, 101 Ill. 450, 452. Nor has it been understood that he is to be counted in determining the presence of a quorum. *Atty. Gen. v. Shepard*, 62 N. H. 383; *Somer-set v. Smith*, 20 Ky. L. Rep. 1488, 49 S. W. 456.

Applying the principles of these authorities (and none have been found to the contrary) to the statutory provisions relating to mayor and aldermen cited in behalf of the defendants, the result is indubitably to establish the proposition that, while the mayor is a constituent part of the aldermanic board for some special purposes, he sits and acts in the board, not in the capacity of an alderman, but in the capacity of *ex officio* presiding officer, and exercises those powers only which have been specially committed to him as the chief executive of the city. However extensive such powers may be in the present case, and regardless of the authorities

to which reference has been made, the legislative understanding that the mayor should not be regarded as an alderman in contested election cases, at least, sufficiently appears from the statute enacting that the board of aldermen "shall be the final judge of the election and qualification of its members" (Pub. Stat. chap. 48, § 11), because the authority thus vested in the aldermen does not extend to the election of mayor, of which the city councils in joint convention are made the judges by chapter 47, § 3, and because under section 11, each alderman is not only made a judge of the election of his fellow members, but they are made the judges of his election also. And the same conclusion as to the legislative understanding of the mayor's membership is evidenced by the further provision of section 11, that each branch of the city government, in case of a vacancy therein, "shall call a new election," because special provision for the filling of a vacancy in the office of mayor was made elsewhere, and by another tribunal. Laws 1895, chap. 41. Such, also, would seem to have been the understanding of the defendant mayor himself, for he did not assume to act as an alderman in the election before the board, but solely as mayor. While these citations amply demonstrate that the aldermanic branch of the city councils, within the meaning of section 11, is the board of aldermen, exclusive of the mayor (and, if this be so, his veto power cannot apply, because the judgment of the board would not then be final), they also afford convincing proofs that the mayor's veto power was not intended to extend to a decision by the aldermen of a contested election case. Having made such a decision an imperative finality, it is incredible that the legislature would intentionally stultify itself, and emasculate the statute by making it subordinate to the arbitrary caprice of an executive officer, acting solely in an executive capacity, and subject to no supervising power. If, however, the contrary were true, and the provision giving the mayor "a negative on the action of the aldermen in laying out highways, and in all other matters," were susceptible of the broad construction put upon it by the defendants, it is not perceived upon what ground the provision could be sustained. In a contested election case, as in all other cases, it is the constitutional right of the contestants to have the issue between them settled by judicial action; and of this right they cannot be lawfully deprived by any legislative enactment. The veto power is not, and has never been understood to be, a judicial power. To all intents, and for all purposes, it is a franchise of the executive department alone, and may be exercised by its possessor at his pleasure, and without consent, trial, or notice. The adjudication of legal rights in this manner cannot be tolerated under our system of government, or under any other in which there has not been a total abolition of justice and fundamental legal principles. But there is no solid ground for the defendants' construction of the provision under consideration. It is no less true now than it was in the

time of Lord Coke that the laws consist, not in being read, but in being understood. [*Cumberland's Case*] 8 Coke, 167. "When the legislature enacts that each branch of a city government shall be the judge of the elections of its members, the inference is that they copied the language from the Constitution, understanding that it would mean in the statute what it means in the Constitution, and intending that municipal legislative bodies created, organized, and working on the model of the state legislature shall have the same powers, as judges of the elections of their members. It is also probable that, for reasons of public convenience in the transaction of the affairs of cities, the legislative intention was to establish a special tribunal for the determination of such cases, which would act expeditiously, and without the delays ordinarily incident to judicial procedure." *Atty. Gen. ex rel. Gregg v. Sands*, 68 N. H. 54, 57, 44 Atl. 83. See also *State, Times, Prosecutor, v. Newark*, 25 N. J. L. 399, 415. It has never been supposed that the veto power granted the governor of this state by the Constitution extended to the qualifications or elections of the members of either branch of the legislative department, concerning which the Constitution declares that each branch shall be the judge; and it would be an extraordinary prerogative, indeed, if the legislature has invested the mayors of cities with a more extensive veto power than our Constitution has conferred upon the governor, or the national Constitution upon the President. Nothing but the most decisive evidence would warrant such a conclusion, and this the defendants have failed to supply. In fact, their contention is substantially based upon the proposition that because the mayor is empowered by the statute to interpose his veto upon the judicial act of the aldermen in the laying out of highways, and in all other matters, he may therefore lawfully interpose it upon their judicial action in a contested election case. But this proposition is utterly untenable. Its reasoning is fallacious, and its conclusion unsound. Things which are similar in some respects are not the same. Whether it was competent for the legislature to empower the mayor with a negative upon the laying out of a highway by the aldermen need not now be determined. As has been previously stated, we are required to go at this time only far enough to meet the exigencies of the case before us; and, for this purpose, we think no other answer to the proposition is necessary than to call attention to the pregnant fact that the legislature has not anywhere enacted that the decision of the aldermen in the laying out of highways shall be final, but, on the contrary, it has expressly given to any person aggrieved by the decision of city or town authorities in laying out or altering highways the right of appeal therefrom to this court. Pub. Stat. chap. 68, § 2; Id. chap. 46, §§ 1, 2. These considerations so broadly distinguish the one case from the other as to bring to naught any analogy between them. Other answers to the proposition, however,

are not lacking. A sufficient foundation for the petition is furnished by the reported facts in respect of a demand upon the mayor to perform his duty.

Nothing more need be said of the case. Viewed in any permissible light derived from the decisions, the statutes, the nature and purpose of the veto power as heretofore understood, the consequences which would follow the defendants' construction, the analogy of the city system of government to the governmental system of the state and Nation, and the separation and independence

of the legislative, executive, and judicial departments enjoined in our bill of rights, the overwhelming weight of evidence leads to the conclusion that the mayor of Concord could not veto the judicial action of the board of aldermen, sitting as a court, in a matter of which the statutes have made it the exclusive and final judge.

Petition granted.

Pike, J., did not sit. The others concurred.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Andrew ALBRIGHT

v.

Joseph A. CORTRIGHT, *Plff. in Err.*

(.....N. J.....)

*The plaintiff claimed to own land covered by Swartswood pond, a body of nontidal water, and notified the defendant not to fish in it. The defendant, disregarding the notice, fished from a boat, on two different days, in water that covered land claimed by the plaintiff, who thereupon brought his action. The declaration alleged possession and title by deed in the plaintiff, and acts of trespass by the defendant in disregard of notice. The defendant filed pleas in both general and specific denial of the declaration, and a further special plea setting up in bar of the action two independent defenses: First, that the public had been accustomed for sixty years to fish in the pond, and that therefore the defendant, as one of the public, could do so of right; and, secondly, that the pond had been stocked with fish by the fish commissioners of the state of New Jersey for twenty-five years, and that therefore the defendant, as one of the public, could fish there of right. On the trial the plaintiff proved the case laid in his declaration and rested. The defendant offered to prove that the public had continuously fished in the pond for sixty years, which offer was overruled, and exception taken. The defendant also called a witness who testified to the stocking of the pond by public authority. This evidence was then stricken out, whereupon the defendant made a formal offer to prove the allegations of his plea in this particular, which offer was overruled, and exception taken. The trial judge thereupon directed the jury to find a verdict of 8 cents for the plaintiff, to which direction an exception was taken. Error was assigned on these exceptions.

As to the first special defense, it was held:

1. That, since the defendant had no license from the plaintiff, whatever right he could have had in plaintiff's close must have

been by way of easement, custom, or prescription.

2. That the right claimed was not an easement, which is a privilege without profit.

3. That the defendant could not claim such right by custom: (a) Because a common-law custom, as distinguished from a usage of trade, must be immemorial, which in New Jersey is impossible; (b) because a custom laid in the public is bad for universality; and (c) because a right to take profit from the land of another cannot be acquired by custom.

4. That the defendant, merely as one of the public, could not claim such right by prescription, because the public cannot prescribe.

As to the second special defense, it was held:

5. That the evidence that was stricken out and excluded, if it had been received, would have proved, in the view most favorable to the defendant, only that the state of New Jersey had placed on private property certain fish that the public might catch if members of the public could lawfully reach them.

6. That the defendant, as one of the public, could not lawfully reach these fish, against the prohibition of the plaintiff, while they remained in his close, unless either the common or the statute law conferred such right.

7. That the common law gave no such right, because there is no general rule authorizing a member of the community, merely as such, to invade private property in order to reach something that is devoted to the public.

8. That the acts concerning fish and game gave no such right, for they do not manifest a legislative intent to legalize what would otherwise be trespasses, in pursuit of private advantage, and, if they did manifest such intent, would be to that extent invalid.

9. Held, that the plaintiff was entitled to the direction that the jury give him a verdict for nominal damages.

(March 5, 1900.)

*Headnotes by ADAMS, J.

NOTE.—For prescriptive rights of fishery, see *Turner v. Hebron* (Conn.) 14 L. R. A. 386.

For governmental control over right of fishery, see *People v. Truckee Lumber Co.* (Cal.) 39 L. R. A. 581, and *note*; also *State v. Theriault* (Vt.) 43 L. R. A. 290. 48 L. R. A.

ERROR to the Circuit Court for Sussex County to review a judgment in favor of plaintiff in an action brought to recover damages for alleged unlawful fishing in plaintiff's pond. *Affirmed.*

The facts are stated in the opinion.

Mr. Martin Rosenkrans, for plaintiff in error:

The court will take judicial notice of the location, situation, and character of Swartswood lake, on the waters of which the alleged trespass was committed.

2 Wharton, Ev. (1877) § 399; *Peyroux v. Howard*, 7 Pet. 342, 8 L. ed. 707; *Metzger v. Post*, 44 N. J. L. 74, 43 Am. Rep. 341.

Swartswood lake is 1½ miles to 2 miles in width and over 3 miles in length.

The plaintiff does not and cannot have any title to the waters of Swartswood lake because its waters are navigable and it comes under the class of waters which in every state are peculiarly protected for the benefit of the public.

Arnold v. Mundy, 6 N. J. L. 1, 10 Am. Dec. 356.

To maintain trespass *quare clausum fregit* there must be an injury to the possession.

3 Bl. Com. 210; *Cortelyou v. Van Brundt*, 2 Johns. 357, 3 Am. Dec. 439.

As far as any right of property in fish can exist it is in the public, or is common to all. *Grutle v. State*, 29 Ind. 415, 2 Bl. Com. 392.

If fish belong to the public, of what benefit are they to the public unless the public have the right under the laws relating to fish to catch them without molestation.

Organ v. State, 56 Ark. 267, 19 S. W. 840.

Mr. Thomas M. Kays, for defendant in error:

The policy of the common law is to assign to everything capable of ownership a certain and determinate owner, and, for the preservation of peace and the security of society, to mark by certain indicia, not only the boundaries of such separate ownership, but the line of demarcation between rights which are held by the public in common and private rights.

Cobb v. Davenport, 32 N. J. L. 378.

Even the common right of fishing in the tidal waters of the state is subject to the supreme power of the state to convey such lands covered with water to individuals, and thus deprive the public of the common right of fishing.

McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248.

The title of the state is proprietary, an attribute of which is the unqualified right of disposition to public or private use, either absolutely, or for a qualified estate, as an estate for years, or by mere license, as in legislative discretion may be deemed most conducive to the public interest.

Wooley v. Campbell, 37 N. J. L. 164; *Gough v. Bell*, 21 N. J. L. 165, 22 N. J. L. 459; *Townsend v. Brown*, 24 N. J. L. 40; *Sterens v. Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269; *Trenton Water Power Co. v. Raff*, 36 N. J. L. 342; *Foulke v. Bond*, 41 N. J. L. 545; *Carlisle v. Cooper*, 21 N. J. Eq. 596; *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 639; *Nixon v. Walter*, 41 N. J. Eq. 112, 3 Atl. 385; *Newark Aqueduct Board v. Passaic*, 45 N. J. Eq. 398, 18 Atl. 106; *Pennsylvania R. Co. v. Thompson*, 45 18 L. R. A.

N. J. Eq. 871, 19 Atl. 622; *Brookhaven v. Strong*, 60 N. Y. 66; *Ackerman v. Shelp*, 8 N. J. L. 125.

The title to the bed of the Delaware river above tide water on the New Jersey side to the center thereof is in the riparian or shore owners.

Arnold v. Mundy, 6 N. J. L. 1, 10 Am. Dec. 356; *Rundle v. Delaware & R. Canal*, 1 Wall. Jr. 275, Fed. Cas. No. 12,139; *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 1, Affirmed in 27 N. J. Eq. 631; 2 Bl. Com. p. 18; *Hooker v. Cummings*, 20 Johns. 90, 11 Am. Dec. 249; *Adams v. Pease*, 2 Conn. 481; *People v. Platt*, 17 Johns. 195, 8 Am. Dec. 382.

Adams, J., delivered the opinion of the court:

The declaration is in tort, and seeks damages from the defendant for breaking and entering the close of the plaintiff (being a tract of land, covered with water, in Stillwater township, in Sussex county, known as "Swartswood pond"), and for fishing and catching fish therein, in disregard of a notice by the plaintiff not to trespass on his land, and especially not to fish in said pond. The gist of the defense is found in the following extract from the fifth plea, upon which issue has been joined: "That the said Swartswood pond has been stocked with fish by the fish commissioners of the state of New Jersey for twenty-five years, and that the fish therein belong to the public, and that the public for sixty years last past have entered the said close, and openly, adversely, continuously, uninterruptedly, and without restriction, used the said close and waters of said Swartswood pond for the purpose of fishing for fish therein, and catching and taking fish therefrom, and that the defendant, as one of the public, has a right by prescription in and to the said close and the said Swartswood pond, and had at the time mentioned in the plaintiff's declaration a prescriptive right of profit in the said lands covered with water, and said Swartswood pond (being the same described in the plaintiff's declaration), and to fish into the said waters of said Swartswood pond, and to take, catch, and carry fish therefrom, without any hindrance or molestation of the said plaintiff." At the trial the plaintiff proved both possession and title by deed in himself before and at the time of the acts complained of, and that the defendant had fished in said pond, though notified by the plaintiff not to do so. The defendant then offered to prove that the pond had been stocked by the state of New Jersey about twenty-five years before, and that the public had continuously fished there for sixty years, which offers were denied, and a verdict for 6 cents was directed and rendered for the plaintiff. The questions presented by the exceptions are whether one who fishes in nontidal water that covers land of another, though forbidden to do so by the owner of such land, can justify either by the long-continued usage of the public, or because the water has been stocked by the state of New Jersey. These defenses, though blended in the special plea, are logically distinct.

Leaving out of view certain relations that are plainly foreign to this case, it may be said that whatever right, provable by user, the defendant could have had in the plaintiff's land, must have been by way of easement, custom, or prescription. The right that the defendant asserted was not an easement, which is a privilege without profit. Nor could he, as one of the public, acquire this profitable right by custom. In the first place, a common-law custom, as distinguished from a usage of trade, must be immemorial; and this, in New Jersey, is impossible. *Ackerman v. Shelp*, 8 N. J. L. 125; *Allen v. Stevens*, 29 N. J. L. 513; *Ocean Beach Assn. v. Brinley*, 34 N. J. Eq. 438. In the next place, the right claimed is too comprehensive to be good by way of custom. "Custom is unwritten law, established by common consent and uniform practice from time immemorial, and it is local, having respect to the inhabitants of a particular place or district." 2 Greenl. Ev. § 248. This custom is laid in the whole public. A custom so general would be indistinguishable from the law itself, so that the question in such case really is, not whether the usage is customary, but whether it is lawful. *Fitch v. Rawling*, 2 H. Bl. 303. Finally, a profitable right in land of another cannot be gained by custom, but only by prescription. *Cobb v. Davenport*, 32 N. J. L. 369, 33 N. J. L. 223, 97 Am. Dec. 718. In view, no doubt, of these considerations, the special plea alleges "a prescriptive right" in the defendant, to which he is entitled "as one of the public." This proposition is unsound, because it conflicts with the rule that the public cannot prescribe. A right that a man claims merely as one of the public does not lie in grant, and therefore not in prescription, which presupposes a lost grant, and so can embrace only things that are grantable. A prescription, says Lord Coke, "always is alleged in the person." *Gateward's Case*, 6 Coke, 60b. "Prescription," says Sir William Blackstone, "is merely a personal usage, as that Sempronius and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege." 2 Bl. Com. p. 262. Mr. Greenleaf says: "Prescription is a personal right belonging to one or a few persons by particular designation, as, for example, the owner of a certain parcel of land." 2 Greenl. Ev. § 248. To use a technical phrase, the claimant in such a case must prescribe in a *que* estate; that is, under or in the right of some other person or persons, whose estate has come to him.

That a right to take profit from another's land cannot arise by custom was decided as early as *Gateward's Case*, 6 Coke, 60. Lord Kenyon, in *Grimstead v. Marlowe*, 4 T. R. 718, said that the law had been so settled ever since the time of *Gateward's Case*. This is still the law of England. In *Goodman v. Saltash*, L. R. 7 App. Cas. 648, Lord Cairns says: "I think it to be clear law that while you may by custom claim an easement to be enjoyed over the land of another, you cannot by custom claim a profit *à prendre* in alieno

solo. I think it also to be clear law that you cannot claim by prescription anything which could not have a lawful beginning. And I think it also clear that a fluctuating and uncertain body cannot claim a profit *à prendre* in alieno *solo*, and, indeed, cannot be the grantee either of a several fishery or of any other kind of real property." Two recent cases are *Blount v. Layard*, reported in a note to [1891] 2 Ch., at page 681, and *Smith v. Andrews* [1891] 2 Ch. 678. In the case first mentioned, Lord Justice Bowen, speaking of a part of the Thames that is above the reach of the tide, said: "Although the public have been in the habit as long as we can recollect, and as long as our fathers can recollect, of fishing in the Thames, the public have no right to fish there. I mean they have no right, as members of the public, to fish there. That is certain law. Of course, they may fish by the license of the lord or the owner of a particular part of the bed of the river, or they may fish by the indulgence or owing to the carelessness or good nature of the person who is entitled to the soil; but right to fish themselves, as the public, they have none." The following extract is from the opinion by North, J., in *Smith v. Andrews*: "The idea is sometimes entertained that the right to pass along a public navigable river carries with it the right to fish in it; but, so far as regards nontidal rivers, this is not so. No lawyer could take that view. Persons using a navigable highway no more acquire thereby a right to fish there than persons passing along a public highway on land acquire a right to shoot upon it. Some few passages may be found in the books in which judges are reported to have said that subjects have a right to fish in navigable rivers, just as in the sea; but on investigation it always will be found that they are referring to navigable rivers where the tide ebbs and flows, and nothing else. . . . But, even if the public had in fact fished this water with less interference or interruption than was actually the case, it would not supply any defense to the defendant in the present action. Any acquisition of right arising from long-continued use must be founded upon either custom, prescription, or lost grant. It is well settled that the public cannot have any right to fish founded upon custom, however long the practice has continued. Upon this point it is not necessary to refer to various well-known and often cited authorities. . . . Then can any such right be acquired by prescription? It is clear, settled law that it cannot. . . . Lastly, as to any presumption of a lost grant, the observations of Byles, J., in *Atty. Gen. v. Mathias*, 4 Kay & J. 579, are conclusive. There can be no presumption of a lost grant with respect to matter which cannot be the subject of prescription." To the same effect is *Constable v. Nicholson*, 32 L. J. C. P. N. S. 240, reported, also, with full notes, in 8 English Ruling Cases, 337. There are many American cases declaring the law to be as it is above stated; among which are *Waters v. Lilley*, 4 Pick. 145, 16 Am. Dec. 333; *Pearsall v. Post*, 20 Wend. 111.

124, 125; and *Perley v. Langley*, 7 N. H. 233. The English law allows to the public no greater privileges in fresh-water ponds and lakes than in fresh-water rivers. This is evident from the cases collected in Gould, Waters, §§ 79-81.

The leading case in this state is *Cobb v. Davenport*, decided by the supreme court on facts much like these now before us, and reported in 32 N. J. L. 369. The plaintiff claimed to own a natural, nontidal lake in Morris county, called "Green pond." The action was trespass for breaking his close and fishing in water that covered his land. The defendant pleaded the general issue, denying that the plaintiff had an exclusive right to fish in said pond; set up the statute of limitations, and license from the plaintiff; and also alleged a prescriptive right to fish, by virtue of certain grants to persons under whom the defendant claimed. A verdict was rendered for the defendant, which was set aside on rule to show cause. The supreme court held that the plaintiff had proved his title, and that the defenses by way of limitation, license, and prescription were not sustained. Among the legal conclusions to be drawn from this case are these: That the soil under a fresh-water pond in New Jersey is not in the state, but is in private ownership; that the exclusive right of fishing therein is *prima facie* in the owner of the soil, but may be acquired separate from the ownership of the soil; that the right of the public to fish in private waters cannot be claimed by custom, or established by proof of customary right; and that such right can be acquired only by grant or prescription, and must be prescribed for in a *que* estate. The following extract from the opinion will show both how strong was the proof of user in that case, and how closely the facts resemble those now in view: "The evidence in this case shows that the public in general, for a period of forty years and upwards, were accustomed to fish in the pond in question without hindrance or molestation, and that permission to do so was neither asked nor granted; that the fishery was never used by its owners, either before or since the plaintiff acquired title, as a source of pecuniary profit, but that everyone, without regard to residence or tenure of lands, was permitted to fish in all parts of the pond at will, and whenever his inclination prompted him to do so; and that this privilege was exercised under prevalent impression that the fishery, in the language of one of the witnesses, was a free fishery. And it is a noticeable fact in the case that, although the witnesses who fished in the pond testify that they did so under a conviction of their right, yet no one claimed a right personal to himself, or other than such as it was thought belonged to the public in general. This evidence tends merely to establish a customary right in all the inhabitants and frequenters in that locality to fish in these waters, if a right to fish could be established by proof of custom. But the right of fishing, being a profit *à prendre* in another's soil, as distinguished from an easement, cannot be claimed by custom, but must

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be prescribed for in a *que* estate. . . . The defendant cannot justify under a custom, nor will proof of a custom sustain a plea of prescriptive right, because the two rights, though they may coexist in the same land, are of a completely different nature." The defendant subsequently applied for leave to file an additional plea justifying the alleged trespass on the ground that the fishery had become public by dedication. Leave was granted, in order that the question might appear on the record, and the plea was then, after argument, struck out. The opinion is reported in 33 N. J. L. 223. The conclusions expressed by the court are that the right to fish and take fish in *alieno solo* is not an easement, but is a profit *à prendre*, and can be acquired only by grant or prescription, which must be pleaded; that such a right, so universal and unqualified as to subsist in the entire public, cannot be gained by custom or prescription; and that the doctrine of dedication to public uses does not embrace a claim of this character. The pleadings in the case now under consideration do not present the defense of dedication. The case of *Cobb v. Davenport* has been cited with approval by this court in *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 631, at page 639, and in *Grey v. Paterson* (decided at the present term) 42 Atl. 749, the exact point of the citation being, in each case, the tidal distinction between public and private waters. It is plain from an examination of the authorities above referred to, and of many others that might be mentioned if it were worth while to multiply citations, that the supreme court, in *Cobb v. Davenport*, declared and enforced the ancient and established law. There is nothing in our local conditions, which closely resemble those of England, or in the requirements of modern life, that calls for the adoption of a different rule. It may be true that there is here, as there seems to be in England, a common misapprehension on this subject, and that a good deal of fishing that is thought to be of right is only permissive. But it is not desirable to change an important rule of law merely because it is sometimes misunderstood. In country life a multitude of acts are habitually committed that are technically trespasses. Persons walk, catch fish, pick berries, and gather nuts in *alieno solo* without strict right. Good-natured owners tolerate these practices until they become annoying or injurious, and then put a stop to them. Little practical inconvenience results from this state of things, which the courts may well leave to regulate itself. Our conclusion on this branch of the case is that the trial judge did not err in excluding proof that the public had habitually fished in Swartswood pond.

The other ground of defense is that the state some twenty-five years ago stocked this pond with landlocked salmon, and that therefore the defendant, as one of the public, might fish in it. Inasmuch as evidence on this point was struck out, and the subsequent offer was not full, the facts relied on by the defendant do not appear as fully as they oth-

erwise might do. The waters of Swartswood pond, of course, escape and find their way to the ocean. It is not clear whether fish, also, may escape, or can enter from without, or even that salmon are now in the pond, or whether other kinds of fish are there. It is not distinctly shown that the defendant desired to catch salmon. He fished on two days, and seems to have caught nothing. It is fair to assume, in favor of the defendant, that there were salmon in the pond, either placed there originally by the state of New Jersey or the successors of such; that they were desirable; and that the defendant would have been glad to catch them, and was at least attempting to do so. The fish thus introduced into this body of water must have been at the dates of the alleged trespasses the property of the plaintiff, or of the state, or of the public; meaning by the latter phrase that the public were at liberty to catch them where they lawfully might. If these fish were the property of the plaintiff, the second defense fails. The plaintiff in error sometimes calls them the property of the state, and sometimes the property of the public. If they were the property of the state, this defense fails, and the plaintiff could no more take them than if they were still in the hatchery. The third alternative is that they were for the public, and this is probably what is meant when they are called the property of the state. The question then is whether, on this branch of the case, the defendant can justify his acts by force either of common or

statute law. He cannot do so by common law; for it is not true that a member of the community, merely as such, may enter the land of another in order to get something that is devoted to the public. For example, highways and parks are devoted to the public, but one may not therefore cross another man's farm in order to reach them. Nor can the defendant prevail by virtue of the acts concerning fish and game; for the legislature cannot confer upon the public a general license to commit trespasses, and, if it could do so, no such intent will be implied, and the statutes do not express it. The declared policy of the state of New Jersey is to promote and protect certain forms of animal life, in the interest of sport, and to increase the supply of food. To these ends nontidal waters have been stocked with fish, and woods and fields may be hereafter stocked with game. It may happen that gunners will then claim that they can cross lands against the protest of the owners, and will allege as their justification, in close analogy to this defense, that the birds which they seek were originally impressed by state authority with a special public character. No theory can be sound that would warrant such an invasion of private property in pursuit of private advantage. The trial judge did not err in overruling the second defense. The plaintiff was entitled to the direction that the jury find a verdict in his favor for nominal damages.

The judgment is affirmed.

OKLAHOMA SUPREME COURT.

J. J. WALLACE, *Piff. in Err.*,
v.
Town of NORMAN.

(.....Okla.....)

*A municipal corporation is bound by the acts of its officers only when within the charter or scope of their powers. Acts outside of powers of the corporation, or of the officers appointed to act for it, are void as respects the corporation, and such corporation is not liable therefor.

(February 7, 1900.)

ERROR to the District Court for Cleveland County to review a judgment in favor of defendant in an action brought to recover

*Headnote by IRWIN, J.

NOTE.—As to liability for property destroyed by mob, see note to *Glanfortone v. New Orleans* (C. C. E. D. La.) 24 L. R. A. 592.

For liability of city for act of mob causing death of human being, see that case and also *New Orleans v. Abagnatto* (C. C. App. 5th C.) 26 L. R. A. 320.

As to liability of a county for the lynching of a person by a mob, see *Brown v. Orangeburg County* (S. C.) 44 L. R. A. 734.
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damages for injuries to plaintiff by reason of an alleged conspiracy to drive all colored persons from the defendant town. *Affirmed.*

Statement by IRWIN, J.:

On November 2, 1898, J. J. Wallace, plaintiff in error, filed a petition in the district court of Cleveland county, in words and figures as follows: "Territory of Oklahoma. Cleveland County, in the District Court. J. J. Wallace, Plaintiff, v. The Town of Norman, Defendant. Case No. 2,266. Amended Petition. Comes now the plaintiff, with leave of court, and for his amended petition alleges: The plaintiff is, and at all times herein mentioned was, a citizen of the United States of America, and of the territory of Oklahoma, and a tinner and roofer by trade and occupation, having his residence in Oklahoma county, and a store and place of business in Oklahoma city, said territory. (1) The defendant is, and for many years last past was, a municipal corporation, and duly organized as a town, under the laws of Oklahoma territory. (2) Among the first inhabitants of the lands embraced within the limits of the said town were, and from that time until the present constantly have been a large number of lawless and seditious per-

sons, the number and the names of whom are unknown to the plaintiff, except as hereinafter stated, who, soon after the first settlement of said lands, on April 22, 1889, entered into a conspiracy, which has ever since openly and notoriously existed, and is now existing, for the purpose of preventing, by means of threats and physical violence, the laboring, living, or lodging, within the corporate limits of the defendant town, of law-abiding colored citizens of the United States. (4) In pursuance of said conspiracy, the said conspirators, within the past three years, the specific times being unknown to the plaintiff, and plaintiff being unable to more particularly give the details thereof, have openly and notoriously threatened, assaulted, beaten, and driven from said town certain law-abiding colored citizens of the United States, named Frank Rogan, Robert Green, David Branham, Robert Ely, Morey Lee, and others whose names are unknown to plaintiff, who have endeavored during said time to labor, live, and lodge in said town, and, by reason of said unlawful acts, at no time since the inception of said conspiracy, as aforesaid, has any colored person ever labored, lived, or lodged in said town, or been permitted to do so, although many such persons, including those above named, and others whose names are unknown to plaintiff, have gone to such town for such purposes. The said conspiracy still openly and notoriously exists, and by reason thereof no colored person whomsoever now labors, lives, or lodges in said town, although many such persons, including those above named, and many others whose names are to the plaintiff unknown, who are law-abiding citizens of the United States, are desirous of going to said town, and of laboring, living, and lodging therein. (5) The plaintiff, on or about July 10, 1898, went to the defendant town to perform certain work and labor in the line of his said trade, and took with him, as an assistant in his employ, a law-abiding colored citizen of the United States named George Rogan; and at said time, while engaged in said work in said town, and because of the presence and assistance of said colored person, and for no other reason, the plaintiff was unlawfully and maliciously set upon, threatened, assaulted, and beaten on and about the head, eyes, and body by said conspirators, to the number of twenty-five or thereabout, each and every one being then unknown to the plaintiff, and whose names the plaintiff has been unable since to ascertain, by the exercise of due diligence, except as hereinafter stated, but which are well known to the defendant town, and all of the officers and agents thereof, including its president, trustees, and marshal. (6) The plaintiff, by said unlawful and malicious acts, at the time, place, and manner aforesaid, was seriously and permanently injured in body and mind, in this, to wit: That he was knocked senseless; sustained a fracture of the skull; permanently lost the sight of his left eye: was under the care of a physician and nurse for sixty days, during which time he was unable to perform any labor;

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his nervous system was permanently shattered; he was permanently incapacitated for performing the labor necessary to a successful following of his said trade; and he was otherwise permanently injured, both mentally and physically,—to the great damage of plaintiff, as follows, to wit: That plaintiff has paid, and become liable to pay, because of said injuries, doctor's bills amounting to \$100; nursing and medicine, \$100; other bills incidental to his said sickness, about \$50; the income from personal labor at his said trade, aside from the store business, \$5 per day, since July 10, 1898; and he will be compelled to pay similar bills in future, because of said injuries, to an amount reasonably estimated at \$2,000. That plaintiff has lost, because of said injuries, the business of his store in Oklahoma City for sixty days, having been compelled to close up the same, because of his said injuries, for that length of time, \$500; the good will of his said business, reasonably estimated at \$1,000; the income from personal labor at his said trade in future, reasonably estimated at \$5,000. That the loss of the sight of his left eye, as aforesaid, has damaged plaintiff in the sum of \$5,000. That the skull fracture sustained by plaintiff, as aforesaid, has damaged plaintiff in the sum of \$2,500. That the injury to plaintiff's nervous system, as aforesaid, has damaged plaintiff in the sum of \$2,500. That the plaintiff has been otherwise damaged, and is entitled to claim punitive damages in the sum of \$5,000,—all to the damage of the plaintiff in the sum total of at least \$25,000. (7) The defendant town, and all of its officers and agents, including its president, trustees, and marshal, at all of the times herein mentioned, since the inception of said conspiracy as aforesaid, have had full notice and knowledge of the existence of said conspiracy, and of the names of said conspirators, and of the said unlawful objects and purposes thereof, and of the said unlawful acts of violence done to the plaintiff, and of the said unlawful acts of violence committed by said conspirators, pursuant to said conspiracy, within the three years last past, and it has at all times been the duty of said town, and its officers and agents, to protect the plaintiff and said other persons against such injuries and wrongs, and to suppress said conspiracy, and punish said conspirators, and to leave the plaintiff free to exercise his said trade in said town with such assistance as he may desire to employ, colored or otherwise; but notwithstanding said duty, and instead of performing the same, the defendant town, and all of its officers and agents, including its president, trustees, and marshal, have become, and at all of the times herein mentioned were, parties to said conspiracy, aiding and abetting the said wrongs and injuries by acquiescing therein, and refusing to suppress said conspiracy, although said conspiracy could have been suppressed and abated by the exercise of ordinary care on the part of said town, or its said officers and agents: and particularly did the said town, and all of its officers and agents, including

its president, trustees, and marshal, aid and abet the wrongs and injuries so as aforesaid inflicted upon the plaintiff, in this, to wit: That the fact of the existence of said conspiracy was notorious and a matter of common knowledge in said town, and the said president and trustees, with knowledge of the imminent danger of the plaintiff, at the time and place and in the manner aforesaid, acquiesced in the unlawful, malicious, and violent acts herein complained of, and refused and neglected to take any steps to prevent or suppress the same or protect the plaintiff, although with ample means and opportunity so to do, and the said town marshal, whose name, as plaintiff is informed and believes, is J. S. Davidson (otherwise called 'Long Jim'), with the consent and by the authority of the said town, and all the inhabitants thereof, tacitly given, and particularly with the consent and by the authority of the president and trustees of said town, tacitly and verbally given to said marshal, said officers acting in their official capacity, and the said Davidson acting in his official capacity, as town marshal, was present at the time and place aforesaid, when said injuries were inflicted upon the plaintiff, and openly and audibly encouraged the commission of said injuries by words and acts, and wholly neglected and refused to make any effort to prevent said injuries, or to arrest said conspirators, or to suppress said conspiracy, or to protect the plaintiff, although said injuries could have been prevented by said marshal, and said conspirators by him arrested, and the plaintiff protected by the exercise of ordinary care on his part or on the part of said president and trustees and said town; that since the commission of said injuries the said president and trustees have indicated, tacitly and verbally, their approval and ratification of, and acquiescence in, said acts of said marshal, having full knowledge thereof, acting in their official capacity for and on behalf of the defendant town, for its local and corporate benefit as hereinafter stated. (8) The conspiracy aforesaid, and wrongs done pursuant thereto, as aforesaid, are calculated to inure, have inured, and do inure to the benefit of the defendant town in its local and corporate capacity, in this, to wit: That, because of the existence of said conspiracy, numerous colored persons, including those above named, and others whose names are to the plaintiff unknown, and the plaintiff, with the colored person as assistant, have been as aforesaid, and are prevented from working and laboring in said town, in competition with each and every and all of its inhabitants who are capable of doing work and labor; that in said town numerous trades, occupations, and professions are carried on, and much day labor performed, each and every and all of which can well and capably be carried on by colored persons, particularly the said trade of the plaintiff; that the white inhabitants of said town who carry on and perform said trades, occupations, professions, and day labor, to 48 L. R. A.

the exclusion of colored persons, who are desirous of competing with them, are protected and benefited, to the injury and damage of said colored persons, and said white persons enjoy an unlawful monopoly, under the protection of the municipal authorities of said town as aforesaid, and said colored persons and the plaintiff are deprived of their liberty and property without due process of law, and are denied the equal protection of the law, because of the existence of the aforesaid conspiracy and common nuisance. Wherefore plaintiff prays judgment against the defendant for the sum of twenty-five thousand dollars (\$25,000) and costs of suit." On the 11th day of November, 1898, defendant filed a demurrer to said petition, on the ground that said petition did not state a cause of action. On the 14th day of September, 1899, on hearing, the court sustained said demurrer. Plaintiff thereupon elected to stand upon his petition, and declined to amend; whereupon the court dismissed the cause, at the cost of the plaintiff, to which ruling and judgment the plaintiff then and there excepted, and the cause is brought here for review.

Messrs. Francis J. Kearful, Jean H. Everest, and H. H. Howard for plaintiff in error.

Messrs. B. F. Wolf and S. H. Harris, for defendant in error:

Cities when exercising delegated governmental powers not for the peculiar benefit of the city are not liable for negligence or misconduct of their officers.

A conspiracy to oppress colored citizens is a violation of the act of Congress in what is denominated the civil rights bill.

The general nature of the unlawful conspiracy and its relation to the criminal laws of the country cannot be changed by denouncing it a nuisance, and it in fact possesses none of the qualities and elements of an actionable nuisance.

The officers of the city could not possibly be considered its agents in undertaking to exclude either negroes or tinnners from the corporate limits.

2 Dill. Mun. Corp. 4th ed. §§ 968-970.

Cities are not liable for the acts of mobs.

Robinson v. Greenville, 42 Ohio St. 625, 51 Am. Rep. 357; *Ball v. Woodbine*, 61 Iowa. 83, 47 Am. Rep. 805, 15 N. W. 846; *Schultz v. Milwaukee*, 49 Wis. 254, 35 Am. Rep. 779, 5 N. W. 342; *Little v. Madison*, 42 Wis. 643, 24 Am. Rep. 435; *Lafayette v. Timberlake*, 88 Ind. 330; *Western College of Homoeopathic Medicine v. Cleveland*, 12 Ohio St. 375; *Odell v. Schroeder*, 58 Ill. 353; *Forstyth v. Atlanta*, 45 Ga. 152, 12 Am. Rep. 576; *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760; *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368.

Irwin, J., delivered the opinion of the court:

The first assignment of error in this case

is, and in fact the only assignment of error is, that the court erred in sustaining the demurrer of the defendant to the petition of the plaintiff, and in dismissing plaintiff's cause of action. The allegations of the petition are that a conspiracy existed among the inhabitants of the town of Norman, and that the object of said conspiracy was to prevent, by means of threats and physical violence, the laboring, living, or lodging, within the corporate limits of said town, of colored citizens of the United States. The only allegation in said petition in any way connecting said defendant, to wit, the town of Norman, with said conspiracy, is in the seventh paragraph of said petition, wherein it is said: "The defendant town, and all of its officers and agents, including its president, trustees, and marshal, at all of the times herein mentioned, since the inception of said conspiracy as aforesaid, have had full knowledge and notice of the existence of said conspiracy, and of the names of said conspirators, and of the said unlawful objects and purposes thereof, and of the said unlawful acts committed by said conspirators pursuant to said conspiracy within the three years last past," etc. We are at a loss to understand how a municipal corporation, such as the town of Norman, in its official capacity and as a body corporate, could be a party to a conspiracy. We can understand how the officers who, for the time being, may be exercising, in their official capacity, the authority delegated to a town or city, might, in their individual capacity, be a party to a conspiracy; but a municipal corporation, which is limited by law to the purposes and object of its creation, to wit, the maintaining and exercising of the powers of local government, cannot, in its municipal capacity, be a party to a conspiracy. If the conspiracy existed as described in this petition, or taking the petition and construing it by the ordinary rules of construction, it simply means that there existed in the minds of the inhabitants of that locality certain prejudices against the colored people. This was a condition of the public mind over which the corporate authorities of Norman could exercise no rightful jurisdiction. The corporate authorities of a city or village may prescribe by ordinance as to the actions and conduct of the people, but no such village has a right to legislate, by ordinance, as to the thoughts, feelings, biases, or prejudices that shall exist in the minds of the inhabitants who compose that particular locality. It is contended in plaintiff's brief that one of the subjects over which authority is delegated to the city is to provide means "for keeping and preserving the peace and quietness of such town." This simply means that the town of Norman, in its official capacity, as a municipal corporation, shall have the right, and it shall be the duty of such town, to make and pass all necessary ordinances for the protection and welfare of the people in this particular. There is no allegation in the petition that the municipal authorities of Norman have been requested to pass ordi-

nances upon this subject, and refused. There is nothing in the petition which tends to show that the ordinances already passed by the town of Norman on this subject are not such as are proper, lawful, legal, and sufficient. Now, when a city has passed the necessary ordinances on any subject delegated to its charge, such ordinances become laws enforceable by any person, and it becomes the duty of all persons to assist in their enforcement. In fact, ordinances of every city and village, like the laws of every state and territory, are enforceable on the application of any person, when such application is made to the proper tribunal or officer. While it is true that in this petition the purpose of the conspiracy was clearly set forth, and its existence is positively alleged, still there is nothing in the petition which alleges any overt act of conspiracy, no definite details of such an organization, and nothing that would show that such an organization had any tangible existence, by means of which it could be identified or suppressed by the city authorities of Norman.

Now, if the contention of the plaintiff is true that it was the duty of the town of Norman to suppress and abolish this alleged conspiracy, how could this have been accomplished legally by the city of Norman? It is a well-known fact that the only mode of redress of grievances against its inhabitants by a city, and the only manner of enforcing any right delegated to them as a city, is by the passing and enforcing of ordinances. Now, if this conspiracy existed in consequence of or on account of the failure of the city of Norman to pass or enforce ordinances on the subject, then this failure should have been clearly and definitely set out in the petition of the plaintiff; but there is no such allegation, and, not having so set out, we are constrained to presume that the city of Norman had passed necessary, proper, and sufficient ordinances on this subject. When they have legally legislated by ordinance on the subject, they have then put it in the power of every citizen who may live or be in said city to apply to the proper courts for the enforcement of said ordinances, and for the punishment of every violation thereof. We cannot believe that under the law a municipal corporation can be accountable for the unauthorized acts of its servants, or the criminal acts of its employees unless such acts are within the scope of the authority of such servants or employees. If acting beyond or outside the scope of their authority, then, in such acts, they are not the servants or employees of the city. In 2 Dill. Mun. Corp. 2d ed. p. 877, in speaking of the liability of municipal corporations for the acts of its officers, it is said: "To create such a liability, it is fundamentally necessary that the act done which is injurious to others must be within the scope of the corporate powers, as prescribed by charter or positive enactment; the extent of which powers all persons are bound, at their peril, to know; in other words, it must not be *ultra vires*, in the

sense that it is not within the power or authority of the corporation to act in reference to it, under any circumstances. If the act complained of lies wholly outside of the general or special powers of the corporation, as conferred in its charter or by statute, the corporation can in no event be liable, whether it directly commanded the performance of the act, or whether it be done by its officers without its express command." Again, the same distinguished author, at page 879 of the same volume, makes use of this language: "The principle that a municipal corporation is bound by the acts of its officers, only when within the charter or scope of their powers, and that acts outside of the powers of the corporation, or of the officers appointed to act for it, are void as respects the corporation, is vital, and the opposite doctrine has no support in reason, and very little, if any, in the judgments of the courts." In 2 Dill. Mun. Corp. 2d ed. p. 868, the doctrine is laid down: "Public or municipal corporations are under no common-law liability to pay for the property of individuals destroyed by mobs or riotous assemblages, but in such case the legislature may constitutionally give a remedy, and regulate the mode of assessing the damages." In the case of *Western College of Homeopathic Medicine v. Cleveland*, 12 Ohio St. 375, it was held that a provision *in ter alia* in the constituent act of the city, that it shall be the duty of the council to regulate the police of the city, preserve the peace, prevent riots, disturbances, and disorderly assemblages, had reference to the passage of ordinances to be enforced by officers appointed for the purpose, and did not make the city responsible for the riotous destruction of property, or the neglect of the officers of the city in not preventing such destruction.

We are clearly of the opinion that, in the absence of any legislative provision, making the city liable, they cannot be held liable for the acts of a mob, in the destruction of life or property. It is alleged in said petition that certain city officers, naming them, were present, aiding and abetting said riot and said mob, but it cannot be claimed, it seems to me, that when such officers were present, aiding or assisting or abetting such mob, they were then acting within the scope of their authority as officers of the defendant city, as a corporation, but that their acts at that time were in no way authorized by the city: but it seems to us that, before the city could be held liable in this case, it must be shown by the petition that there has been some overt act done by the city, or some omission on the part of the city of some duty enjoined on it by law. It seems to us that, taking the allegations of the petition as true, the only thing the city government could have done, by way of preventing the said mob from committing the acts com-

plained of, would have been to have passed ordinances on the subject, prohibiting the acts and prescribing the penalty therefor; and such petition does not allege that such ordinances were not passed by the city, and as the passage of such ordinances would have been the proper exercise of the authority delegated in the premises to the city, we think it proper to indulge in the presumption that the city authorities have done their duty in this particular, and that said ordinances were passed and in force. It is alleged in the petition that various persons have been, in consequence of this conspiracy, assaulted, beaten, and misused; but it seems to us these facts would not, of themselves, make the city liable. It certainly could not be contended that the city is liable for every injury that may result to a person in consequence of a violation of an ordinance because that ordinance has been repeatedly violated. This petition states nothing more than that the plaintiff has been injured and damaged by a mob, or the unlawful act of a number of malicious persons, within the corporate limits of the city of Norman, and that the names of the persons so committing such acts were known to the defendant. But we fail to see anywhere in the petition any allegation which would make the city of Norman liable as a municipal corporation. If unlawful acts have been done by individuals, whether such persons were holding municipal offices in said city of Norman or not, whereby the plaintiff has been damaged and has sustained injury, then such persons in their individual capacity are liable, and an action may be brought against them; but it seems to us there is nothing in this petition, when measured by the well-known and recognized principles of the law, that would make the city of Norman, as a city, liable. City authorities make rules to regulate the conduct of people within the limits of the city, but no city can, by law regulate or control the thoughts, feelings, or prejudices of the people. If the city can be held responsible for the likes and dislikes of its people, then, with equal propriety, could it be said they are responsible for the health, religion, or politics of the community. The secret thoughts, feelings, likes, and dislikes of the people are beyond legislative control. It is only the outward manifestations, as exemplified in conduct, that can be regulated and controlled by law. It might be beneficial to the human family if, by legislation, good health, and not disease, could be made contagious, but under the present system of jurisprudence this cannot be done. Hence we think the demurrer to said petition was properly sustained.

Finding no error in the record, the decision of the District Court is affirmed.

All of the Justices concur.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

BRUNSWICK TERMINAL COMPANY *et al.*, *Appts.*,
v.
NATIONAL BANK OF BALTIMORE.

(99 Fed. Rep. 635.)

1. The construction given by the highest court of a state to a statute of limitations of that state will be followed by the Federal courts.
2. A special statute of limitations applicable to liabilities arising under statutes, acts of incorporation, or by operation of the law, such as Ga. Code 1882, § 2916 (Code 1895, § 3766), is to be considered as forming a part of, and as read into, a subsequent act of incorporation as much as if it were formally incorporated

therein; and therefore it will govern in an action in another state to enforce the liability of a stockholder in such corporation.

(Brawley, District Judge, dissents.)

(February 6, 1900.)

A PPEAL by complainants from a decree of the Circuit Court of the United States for the District of Maryland in favor of defendant in a suit to enforce defendant's liability as stockholder in the Brunswick State Bank of Georgia. *Reversed.*

Before Goff, Circuit Judge, and Brawley and Waddill, District Judges.

The facts are stated in the opinion.

NOTE.—When statute of limitations will govern action in another state or country.

I. General rule.

II. Exceptions.

III. Where there is no statutory provision in forum as to effect of bar of other state.

a. Contracts.

1. In general.

2. Cases in which the doctrine that the law of the forum governs, questioned or denied.

3. When right of action extinguished, as well as the remedy affected.

b. Judgments.

1. In general.

2. Where right of action extinguished as well as the remedy affected.

c. Decedents' estates.

d. Adverse possession.

e. Usury.

f. Liability of stockholders.

g. Personal injuries.

h. Death.

i. Miscellaneous cases.

IV. Where statutes of forum provide as to effect of bar of other state.

I. General rule.

The general rule is that the law of the forum, rather than the law of the place where the cause of action accrued, will govern. This rule is maintained to such an extent that many of the courts state that it is almost axiomatic.

II. Exceptions.

Some decisions make a distinction between those cases where the cause of action is fully barred in the state where the cause of action arose and those where the bar was not complete before defendant's removal from the state. See, on this point, *infra*, III. a, 2. The mass of cases, however, as will be seen, do not make any such distinction.

Another exception is where the statute of the state where the cause of action accrued extinguishes the right of action, as well as affects the remedy. For cases on this point, see *infra*, III. a, 3, b, 2, g.

Another exception very closely connected with the preceding, is where the statute of another state, giving a right of action, requires

suit to be brought thereon within a specified time. *Hudson v. Bishop*, 32 Fed. Rep. 519, which was an action against the surety on a guardian's bond, is a case of this kind, and holds that the provision of Wis. Stat. chap. 170, § 3968, that no action shall be maintained against the surety unless suit is commenced within four years from the guardian's discharge, is a substantial right forming part of the surety's contract, and is a bar to a suit, wherever brought, after such period has elapsed. *Brewer, J.*, on a rehearing in 35 Fed. Rep. 820, takes substantially the same view.

For cases involving the time within which to bring suit to enforce the liability of a stockholder in a corporation of another state, see *infra*, III. f.

For cases involving the time within which to bring suit for negligently causing the death of another in another state, see *infra*, III. h.

For cases involving the time to bring an action for illegal interest paid in another state, see *infra*, III. e.

The principal case of *BRUNSWICK TERMINAL CO. V. NATIONAL BANK OF BALTIMORE* goes even further, and holds that a special statute applicable to statutory liabilities or liabilities arising under acts of incorporation should be considered as forming part of the act of incorporation, and that its provisions should govern in an action in another state to enforce the liability of a stockholder.

Another exception is where the possession of property is held in one state until a good title is acquired by adverse possession under the statute of limitations of such state. For cases on this point, see *infra*, III. d. This, also, is closely connected with the second exception given.

Among the exceptions may also be placed those cases where the state in which the suit is brought has provided by statute as to what the effect of the statute of limitations of another state will be. A large number of the states have now made provision in this regard. On this point, see *infra*, IV.

III. Where there is no statutory provision in forum as to effect of bar of other state.

a. Contracts.

1. In general.

The general rule is that the law of the forum, rather than the law of the state in which the cause of action arose or the parties

Messrs. Goodyear & Kay and Williams & Williams, for appellants:

A right of action not existing in common law, but entirely the creation of statute, is controlled, even as to the remedy for its enforcement, by the statute of the state creating it, although, of course, in the absence of any such controlling statute, such remedy will be controlled by the law of the forum.

The statutes of Georgia have conferred upon the appellants a right not known to common law, and have also declared that such right shall continue to exist for a period of twenty years from the time it accrued; the appellee therefore, when it became a stockholder in the Brunswick State Bank, subjected itself to such right of action subject only to such statutory limitation; and such is the law for all jurisdictions.

The Harrisburg, 119 U. S. 199, *sub nom.*

resided, will govern. *Medbury v. Hopkins*, 3 Conn. 472; *State ex rel. Trimble v. Swope*, 7 Ind. 91; *Putnam v. Dike*, 13 Gray, 535; *Bigelow v. Ames*, 18 Minn. 527, 411; *Brown v. Bicknell*, 1 Pinney, 226, 39 Am. Dec. 299.

So held in actions on promissory notes. *Star Wagon Co. v. Matthiessen*, 3 Dak. 233, 14 N. W. 107; *Hoggett v. Emerson*, 8 Kan. 262; *Bennett v. Devlin*, 17 B. Mon. 353; *Union Cotton Manufactory v. Lobdell*, 7 Mart. N. S. 108; *Bacon v. Dahlgreen*, 7 La. Ann. 599; *Erwin v. Lowry*, 2 La. Ann. 314, 46 Am. Dec. 545; *Thibodeau v. Levassuer*, 30 Me. 362; *Wright v. Mordaunt* (Miss.) 27 So. 640; *Carrigan v. Semple*, 72 Tex. 306, 12 S. W. 178; *Johnson v. Anderson*, 76 Va. 766; *Farmers' & T. Nat. Bank v. Lovell*, 8 Ky. L. Rep. 261, 1 S. W. 426; *Stirling v. Winter*, 80 Mo. 141; *Carpentier v. Minturn*, 6 Lans. 56; *Jones v. Hays*, 4 McLean, 521, Fed. Cas. No. 7,467; *Walsh v. Mayer*, 111 U. S. 31, 28 L. ed. 338, 4 Sup. Ct. Rep. 260.

And on a bill of exchange. *Atwater v. Townsend*, 4 Conn. 47, 10 Am. Dec. 97.

And on a bond. *Crawford v. Childress*, 1 Ala. 482; *Graves v. Graves*, 2 Bibb, 207, 4 Am. Dec. 697; *King v. Lane*, 7 Mo. 241, 37 Am. Dec. 187.

And for goods sold and delivered. *Sisson v. Niles*, 64 Vt. 449, 24 Atl. 992; *Toulondou v. Lachenmeyer*, 37 How. Pr. 145, 6 Abb. Pr. N. S. 215, 1 Sweeny, 45; *Levy v. Boas*, 2 Ball. L. 217, 23 Am. Dec. 134.

In the absence of statute the bar of the state where contract was executed is not a bar in the state in which suit is brought. *Sloan v. Waugh*, 18 Iowa, 224; *Swickard v. Bailey*, 8 Kan. 507.

And in *Gautier v. Franklin*, 1 Tex. 732, it is held that an action on promissory notes executed in another state will be governed by the law of the forum in the absence of statutory provision in regard thereto.

And in *Clark v. Lake Shore & M. S. R. Co.* 94 N. Y. 217, it is admitted by both parties that, in the absence of a statutory provision relating thereto, the statute of limitations of the state where the cause of action arose would constitute no defense.

In *Brigham v. Bigelow*, 12 Met. 268, the statement is made, though not necessary to a decision of the case, that the statute of limitations of each state is to govern in an action brought therein.

In *Bacon v. Rives*, 106 U. S. 99, 27 L. ed. 69, 1 Sup. Ct. Rep. 3, the question is raised whether the *lex fori* shall govern in an action on a contract made and to be performed in another state, but the point is not decided, as it 48 L. R. A.

The Harrisburg v. Rickards, 30 L. ed. 358, 7 Sup. Ct. Rep. 140.

As a rule the statute of limitation is held to go only to the remedy, and therefore the law of the forum is applied, but the recognized exception to this is in the case of statutory rights, as to which the creating state has seen fit by statutes relating thereto to fix the period of limitations.

Flash v. Conn, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757; *Leighton v. Young*, 10 U. S. App. 298, 52 Fed. Rep. 449, 3 C. C. A. 176, 18 L. R. A. 266; *Andrews v. Bacon*, 33 Fed. Rep. 777.

Messrs. D. K. Este Fisher, Allan McLane, William A. Fisher, and James L. McLane for appellee.

is held that the cause of action was not barred by limitation as prescribed in either state.

In *Way v. Colyer*, 54 Minn. 14, 55 N. W. 744, it was held that the statute of limitations of the state in which the notes in suit were made, and in which the maker resided, was not available, as it was not pleaded or proved, no other intimation being given as to whether defendant could have relied thereon if it had been properly pleaded and proved.

In *Ridge v. Cowley*, 6 Lea. 166, the court states that the general rule is that the law of the state in which the suit is instituted regulates the prescription without regard to the place where the cause of action originated, although no claim appears to have been made that the statute of limitations of the state in which the note in suit was executed would govern.

In *Pike v. Greene*, 1 Yerg. 465, the court states that the bar to the note in suit formed by the law of Kentucky where it was executed could not be pleaded in the courts of Tennessee, and it does not appear that there was any contention by defendant that he was entitled to the benefit of the Kentucky statute.

In *Valz v. First Nat. Bank*, 96 Ky. 543, 29 S. W. 329, it is held that the statute of limitations of Kentucky, in an action on account for an overdraft in Alabama, would control, as the Alabama statute of limitations was not sufficiently pleaded, the implication from the opinion seeming to be that if the Alabama statute had been properly pleaded the right to recover would have been governed thereby.

In *Hanger v. Abbott*, 6 Wall. 532, 18 L. ed. 939, in which the question at issue was whether or not the time during which the courts of the southern states were closed during the Rebellion should be considered in determining whether the statute of limitations had run, the statement was made that proceedings in courts of justice, including the statutes of limitations, are usually determined by the *lex fori* instead of the *lex loci contractus*.

In *Paine v. Drew*, 44 N. H. 306, an action on a bill of exchange and an account annexed, it was stated that no claim was made that the statute of limitations of the state where the cause of action arose had any force or could be pleaded in bar of an action in the New Hampshire courts; that such statutes had no force outside the territorial limits of the state enacting them, and ordinarily do not in any way affect the contract sued on, but affect and limit the remedy only, and belong purely to the *lex fori*.

In *Campbell v. Stein*, 6 Dow, P. C. 116, it is

Waddill, District Judge, delivered the opinion of the court:

This is an appeal from the decree of the circuit court of the United States for the district of Maryland dismissing the bill in equity filed in that court by the appellants against the appellee. 88 Fed. 607. The bill was filed by the appellants, creditors of the Brunswick State Bank of Georgia, on their own behalf and on behalf of such other creditors as might intervene against the appellee, the National Bank of Baltimore, alleged to be liable as a stockholder in the Brunswick State Bank. The Brunswick State Bank was incorporated by an act of the Georgia legislature of October 24, 1881, and discontinued business, being insolvent, on the 25th of May, 1893. By its charter (Laws 1889, § 9, p. 522) it is provided: "That said corporation shall be responsible

to its creditors to the extent of its property and assets, and the stockholders, in addition thereto, shall be individually liable, equally and ratably, and not one for the other, as sureties to the creditors of such corporation, for all contracts and debts of the said corporation, to the extent of the amount of their stock therein, at the par value thereof, respectively, at the time the debt was created, in addition to the amount invested in such shares."

Ga. Code 1882, § 1496, further provides: "When a stockholder in any bank or other corporation is individually liable under its charter, and shall transfer his stock, he shall be exempt from such a liability unless he receives a written notice from a creditor, within six months after such transfer, of his intention to hold him liable: provided, he shall give notice for once a month, for six

held that in an action in Scotland by a solicitor in London for costs of suit incurred in England the statute of limitations of Scotland, where the debtor resided, would govern.

In *Fergusson v. Fyffe*, 8 Clark & F. 121, which is an action in Scotland on an account in a bank in Calcutta, it is held that the question as to the time within which suit must be brought is governed by the law of Scotland.

In *Townsend v. Jemison*, 9 How. 407, 13 L. ed. 194, it was held that, although the right of action on a contract is barred in the state in which it is made, such bar does not defeat a recovery in an action in another state, as in all cases governed by the *lex fori*. Instead of the *lex loci contractus*, must govern as to the statute of limitations, which is held to affect the remedy only.

An action in Minnesota on a note executed in Massachusetts between residents of that state is barred where the defendant has lived within the state of Minnesota more than six years, which is the period fixed by its statute for bringing an action on a note, as the time of bringing suit pertains to the remedy, and is in all cases governed by the *lex fori*. *Fletcher v. Spaulding*, 9 Minn. 64, Gil. 54.

The bar of the statute of limitations in New York on a note executed therein, all the parties to which are citizens of that state, is not available in an action in Massachusetts, as the *lex fori* prevails as to the remedy. *Byrne v. Crowninshield*, 17 Mass. 55.

The statute of limitations of the state of New York is not available in an action in Massachusetts by residents of the former state against residents of the latter on a note executed in New York. *Pearsall v. Dwight*, 2 Mass. 84, 3 Am. Dec. 35.

The statute of limitation is no bar to an action in Maine on a note executed in another state, where the defendant has never resided in Maine. *Brown v. Nourse*, 55 Me. 230, 92 Am. Dec. 583.

The law of the forum governs as to prescription in an action in Louisiana against a succession, on a note executed by a resident of that state, whose property is in the state, and whose succession was opened therein, although the note was dated and payable in another state. *Young v. Crossgrove*, 4 La. Ann. 233.

In *Ware v. Curry*, 67 Ala. 274, it is said that if the statute of the state in which suit is brought does not operate as a bar to an action on contract, the statute of the state in which the contract was made, under which the action is barred, is not available.

In *Decouche v. Savetier*, 3 Johns. Ch. 190, 18 L. R. A.

8 Am. Dec. 478, it is held that the statute of limitations will govern as to the rights of the surviving wife in the personal estate of her husband who died in New York, under a marriage contract executed in France, where the parties then resided.

In *New York L. Ins. Co. v. Altkin*, 125 N. Y. 674, 26 N. E. 732, it is held that the New York statute of limitations will govern an action commenced in New York on a covenant by the grantee of real estate in New Jersey assuming payment of a mortgage thereon.

An action to enforce, in the District of Columbia, an agreement by the purchaser of land to pay an existing mortgage thereon, although such land is situated in the state of New York where the agreement is to be performed, is governed as to limitations by the laws of the District of Columbia. *Willard v. Wood*, 164 U. S. 502, 41 L. ed. 531, 17 Sup. Ct. Rep. 176.

In *Carter v. Adamson*, 21 Ark. 287, it was held that in an action in Maryland on an Arkansas contract the Maryland statute of limitations would control, and that the judgment rendered in the Maryland court could not be attacked on the ground that the cause of action was barred by the Arkansas statute.

In *Graves v. Weeks*, 19 Vt. 178, it is held that the fact that the account sued on accrued in New York, and was barred by the statute of limitations of that state, was not available as a bar in an action in Vermont.

The statute of limitations of a state in which a note is executed by a citizen thereof is not available in an action in another state to which he subsequently removes. *Way v. Sperry*, 6 Cush. 238, 52 Am. Dec. 779.

In *Power v. Hathaway*, 43 Barb. 214, which was an action by legatees to recover the amount of legacies collected for them by defendant from the executors in Michigan where all the parties resided, it was held that the statute of limitations of New York would govern, although the claim would be utterly barred by the Michigan statute of limitations if suit were brought in that state.

In *Hoag v. Dossan*, 1 Pittsb. 390, it is held that the *lex fori* governs in an action on a contract executed in another state, although by the law of the latter state the right of action was barred before either party left the state.

The bar of the statute of limitations of the state in which a note is made and payable, arising while the parties resided therein, is not a bar to an action in Maine. *Thompson v. Reed*, 75 Me. 404.

The statute of limitations of a country in

months, of such transfer, immediately thereafter, in two newspapers in and nearest the places where said institution shall keep its principal office."

The appellee was at one time a stockholder of the Brunswick State Bank of Georgia, and, upon transfer of its stock, failed to comply with the statutory provisions last set forth, and appellants claim that it has incurred the stockholders' liability provided for in the charter hereinbefore recited, and is liable to them in this suit.

In the lower court the appellee appeared, and filed its answer, setting up, among other defenses, that of the statute of limitations, and insisted that the case was governed by the Maryland statute of limitations, applicable to actions of assumpsit or actions of debt on simple contracts (Md. Code [Pub. Gen. Laws] art. 57, § 1), which requires the

suit in such cases to be commenced within three years from the time the right of action accrues. The appellants, complainants in the lower court, demurred to the plea of the statute of limitations thus set up, and elected to stand upon the demurrer, and the case turned upon that question solely, the court overruling the demurrer to said plea, and dismissing the bill.

The single question to be determined in this case is whether the statute of limitations of the state of Maryland or of the state of Georgia, applies to the claim sued on. The merits of the case were not touched upon by the decision of the lower court, and it is not the purpose of this court to express any opinion thereon. It is a general rule, too well settled to admit of serious controversy at this late day, that the remedies, as distinguished from the rights of the parties,

which a note is executed between parties residing therein, and who remain there until the bar of the statute is complete, is not available in an action on a note brought in Massachusetts after the payee's removal to that state. *Bulger v. Roche*, 11 Pick. 36, 22 Am. Dec. 359.

That an action on contract is barred by limitation in the state in which it is made, and in which the person sought to be held resided until the bar was complete, is not available in an action in another state to which he subsequently removes. *Jones v. Jones*, 18 Ala. 248.

In *Urton v. Hunter*, 2 W. Va. 83, it is held that the bar of the statute of Maryland, where the note in suit was given by a resident of that state to a citizen of Virginia, could not be set up in bar in an action in West Virginia, where the defendant left the state of Maryland before the bar of that state was complete.

In *Adams v. Kelly*, 2 Wash. Terr. 263, 5 Pac. 601, it is held that defendant, sued on a note executed in California while all the parties resided there, could not set up the California statute of limitations, where he left that state before the bar of the statute was complete, and did not thereafter return. § 351 of the California Code of Civil Procedure providing that if after the cause of action accrues the debtor leaves the state, the time of his absence is no part of the time limited for commencing the action.

The statute of limitations of the forum is available to a resident of the state, although the plaintiffs are nonresidents, and the note in suit was executed in another state. *Bruce v. Greene*, 4 G. Greene, 43.

In *Barbour v. Erwin*, 14 Lea, 716, the general rule is held that if a foreigner brings an action for a debt in a state by whose laws it is barred he is bound by the law of the forum, and cannot recover, although the debt would not be barred in the state of his residence.

In *Beardsley v. Southmayd*, 15 N. J. L. 171, it is stated that no attempt was made to set up the statute of limitations of the state in which the cause of action accrued; and then it is further said that the plaintiff has voluntarily come into the New Jersey court and invoked its aid, and has thereby adopted the *lex fori* as the rule by which his case is to be governed, and that the defendants claimed the protection of that law, which must control the court.

In *Nash v. Tupper*, 1 Cal. 402, 2 Am. Dec. 197, it is held, Livingston, J., dissenting, that the law of the forum would govern in an action on a note executed in Connecticut, rather than the longer statute of limitations of the latter 48 L. R. A.

state, the court citing, on p. 412, an action between Page and Cable on a promissory note executed in Connecticut in which the court also held that plaintiff, having elected to prosecute his suit in New York, must pursue his remedy agreeably to its laws, and that its courts could not dispense with an adherence to the requisites of time in commencing and prosecuting a suit because the cause of action arose in another state.

An action in Louisiana on a note payable in Mississippi, executed by a resident of Arkansas, is governed as to prescription by the laws of Louisiana, and no recovery can be had if the action is barred in that state. *Brown v. Stone*, 4 La. Ann. 235.

In *Howard v. Coon*, 93 Mich. 442, 53 N. W. 531, it was held that no recovery could be had in Michigan on a note executed in California, where an action on the note was barred by the Michigan statute, the question as to whether or not the statute of limitations of California should govern not being considered in the opinion.

An action on a bond executed between parties residing in New Jersey cannot be maintained in Michigan, to which state the obligor subsequently removed, after it is barred by the limitation of that state, even though the obligee did not know of his removal thereto, as the Michigan statute contains no provision relieving a foreign plaintiff from the force of the statute because of his ignorance that the defendant had removed to that state. *Home L. Ins. Co. v. Elwell*, 111 Mich. 689, 70 N. W. 334.

In *Pinney v. Cummings*, 26 Ohio St. 46, it was held that actions on causes of action accruing outside of the state, and not limited by the law of the place where they accrued, or limited thereby to longer periods than those specified in the Ohio statute, are governed as to limitation by the Ohio statute.

In *British Linen Co. v. Drummond*, 10 Barn. & C. 903, 9 L. J. K. B. 213, it is held that where an action on a bond executed in Scotland, where the parties resided, is brought in England, the plaintiff must be governed by the statute of limitations of England, and cannot recover if the action is barred there, although the cause of action was not barred in Scotland.

An action in Scotland on a bill of exchange drawn, accepted, and payable in France, the acceptor returning to Scotland before the maturity of the bill and there remaining until his death, is governed by the statute of limitations of Scotland, and when barred there no recovery can be had, although a judgment against

are determined by the law of the forum, and that the statutes of limitations are part of the remedy, and not of the laws affecting rights. *M'Emoye v. Cohen*, 13 Pet. 312, 327, 10 L. ed. 177, 184; *Michigan Insurance Bank v. Eldred*, 130 U. S. 693, 696, 32 L. ed. 1080, 1081, 9 Sup. Ct. Rep. 690; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 339, 40 L. ed. 986, 991, 16 Sup. Ct. Rep. 810; *Willard v. Wood*, 104 U. S. 502, 520, 41 L. ed. 531, 538, 17 Sup. Ct. Rep. 176; *Townsend v. Jemison*, 9 How. 407, 13 L. ed. 194; *Union P. R. Co. v. Wyler*, 158 U. S. 285, 289, 39 L. ed. 983, 987, 15 Sup. Ct. Rep. 877. There are, however, exceptions to this rule; one being where a statutory liability is sought to be enforced, and the statute prescribes the period of limitation. In this case the general rule, adopting the statutes of limitations of the forum, is departed

from, and the limitation prescribed by the act fixing the liability is applicable. Indeed, this principle was recognized by the learned judge in the court below in his opinion, but he proceeded upon the theory that there was no statute of the state of Georgia fixing the limitation in actions to enforce stockholders' liability. This, it seems, was a mistake, and that there existed such a statute. Ga. Code 1882, § 2916 (Code 1895, § 3766); is as follows: "All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within twenty years after the right of action accrues."

This statute, in our opinion, governs in this case, and not the Maryland statute. It is exceedingly broad in its terms, and is expressly made applicable to suits for the

the acceptor had previously been obtained in France. *Don v. Lippmann*, 5 Clark & F. 1, 5 English Ruling Cases, 930.

An action in England to recover a debt contracted in India is governed by the statute of limitations of England, and the bar of the Indian statute of limitations is unavailable. *Finch v. Finch*, 45 L. J. Ch. N. S. 816, 35 L. T. N. S. 235.

In *Ruggles v. Keeler*, 3 Johns. 263, 3 Am. Dec. 452, it is held, in an action on a note executed in Connecticut between citizens thereof, that the bar of the Connecticut statute to a demand in favor of the defendant against the plaintiff was not available, whether interposed against the demand of the plaintiff or the set-off of the defendant.

An action in Kansas to foreclose a mortgage on land in that state to secure notes executed by a resident of Iowa, and payable in that state, is governed by the statute of limitations of the latter state, where the mortgagor had not been in Kansas the length of time required by its statutes to constitute a bar. *Crooker v. Pearson*, 41 Kan. 410, 21 Pac. 270.

The Louisiana statute of limitations applicable to non-negotiable instruments will be applied in an action in Louisiana on a note executed in another state, where it is not negotiable in Louisiana, although it is negotiable in the other state. *Lacoste v. Benton*, 3 La. Ann. 220.

An action cannot be maintained in New York on an attested promissory note made in Massachusetts, where it would be barred by the statute of the former state, although the Massachusetts statutes provide that the statute of limitations shall not extend to any attested note. *Nicolls v. Rodgers*, 2 Paine, 437, Fed. Cas. No. 10,260.

In *Watson v. Brewster*, 1 Pa. St. 381, which was an action on promissory notes with scrawl seals, executed and made payable in New York, it was held that the statute of Pennsylvania, by which such notes were regarded as specialties on which the statute of limitations does not run, would govern instead of the laws of New York by which such notes are regarded as promissory notes and as such bound by the statute of limitations.

In an action in Virginia on a note executed in Kentucky, the statute of limitation of the former state will govern, and the statute applicable to instruments which are not specialties will apply if the note is not a specialty under the Virginia laws, although it is held to be under the Kentucky statute. *Bank of* 48 L. R. A.

United States v. Donnally, 8 Pet. 361, 8 L. ed. 974.

An action in England on a bond executed in India is governed as to limitations by the English law fixing a longer period for limitation on bonds than on instruments which are not specialties, although by the laws of limitation of India, which make no difference between specialty debts, and simple contracts, the statute of limitations would have run. *Alliance Bank v. Carey*, 29 Week. Rep. 306, 44 J. P. 735, 40 L. J. C. P. N. S. 781, L. R. 5 C. P. Div. 420.

The statute of Georgia providing that a partial payment on a note to stop the running of the statute of limitations must be entered on the note by the debtor or subscribed by him, or by someone for him, governs in an action in that state on a note executed elsewhere. *Obear v. First Nat. Bank*, 97 Ga. 587, 33 L. R. A. 384, 25 S. E. 335.

In *Tilliard v. Hall*, 11 Tex. Civ. App. 381, 32 S. W. 803, which was an action in Texas to recover a balance due on a mortgage on real estate in England, it is held that the Texas statute of limitations, under which a partial payment will not stop the running of the statute, would govern; the court stating that the English laws as to foreclosure of mortgages do not affect the right to sue on the maturity of the demand, but only the right to foreclose the mortgage security.

A party must rely on the statute of limitations of one state or the other, and cannot join the time in the two states together. *Petchell v. Hopkins*, 19 Iowa, 531.

The provision of Vt. Rev. Laws, § 970, as to absence of defendant from, and want of property within, the state, applies to the absence from, and want of property within, Vermont, and not within the state in which the cause of action accrued. *Slisson v. Niles*, 64 Vt. 449, 24 Atl. 992.

2. Cases in which the doctrine that the law of the forum governs, questioned or denied.

In *Le Roy v. Crowninshield*, 2 Mason, 151, Fed. Cas. No. 8,269, it was held that the bar of the state of New York to an action on a contract entered into within that state was not available in an action thereon in Massachusetts. Story, J., who delivered the opinion, stating that the law on that subject had been settled by authorities which the court was bound to respect, but that if the question were new the inclination of his own mind would lead him to hold that where all remedies were barred or discharged by the *lex loci contractus*,

enforcement of rights accruing to individuals under statutes and acts of incorporation. This statute has been construed by the supreme court of the state of Georgia, and by it held applicable to causes of action arising under acts of incorporation in that state. *Georgia Masonic Ins. Co. v. Davis*, 63 Ga. 471. This case turned upon the question of whether the liability arising under the act of the Georgia legislature incorporating the Georgia Masonic Mutual Life Insurance Company was subject to the period of limitation prescribed by the law of that state applicable to simple contracts, or by the act now under consideration, and the court decided that the liability was a statutory one, lasting for twenty years, and that this act applied. A further presentation of the general doctrine of a stockholder's statutory liability by the supreme court of the state

of Georgia will be found in *Banks v. Darden*, 18 Ga. 318, 341. This court will follow the construction given by the supreme court of the state of Georgia to a statute of limitations of that state. No rule is, perhaps, more thoroughly established, and we know of no reason for disregarding it in the present case. *Bauserman v. Blunt*, 147 U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466; *Balkam v. Woodstock Iron Co.* 154 U. S. 177, 188, 38 L. ed. 953, 957, 14 Sup. Ct. Rep. 1010.

In *Balkam v. Woodstock Iron Co.* 154 U. S. 187, 188, 38 L. ed. 957, 14 Sup. Ct. Rep. 1014, Mr. Justice White, speaking for the court, said: "No laws of the several states have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations

and have operated on the case, the bar might be pleaded by the debtor in a foreign tribunal to repel any suit brought to enforce the debt; that where all remedies were barred by the *lex loci contractus* there was a virtual extinction of the "right" in that place, which ought to be recognized in every other tribunal; but that, if the prescription of the *lex loci contractus* was longer than that of the *lex fori*, the latter might be pleaded in bar of a foreign contract if it applied to such contracts.

In *Townsend v. Jemison*, 9 How. 407, 13 L. ed. 194, the court considers the above decision, and states that Judge Story afterward receded from such position, and in his work on the Conflict of Laws expressed the view, from his own conviction as well as on authority, that the *lex fori* would govern in such case.

In *Towns v. Bardwell*, 1 Stew. & P. (Ala.) 36, it is said that if the statute of limitations had run against the note in suit before the defendant had left the state in which it was made, the court would be strongly inclined to hold that it would bar a recovery in Alabama.

And *Goodman v. Munks*, 8 Port. (Ala.) 54, holds that the maker of a note which had become barred by limitation in the state of its execution before the maker's removal therefrom may set up such bar in another state to which he removes, although, by the law of the latter state, limitation has not yet run. This case was, however, overruled in *Jones v. Jones*, 18 Ala. 248, as being in opposition to every well-considered case in England and America, and not sustainable on principle.

Gilpin v. Plummer, 2 Cranch. C. C. 54, Fed. Cas. No. 5451, an action in the United States circuit court of the District of Columbia on a bond executed in Maryland between parties residing in that state, holds that the bar of the Maryland statute of limitations, providing that no bond shall be good and pleadable after the debt or thing in action is above twelve years standing, was a good defense, where both parties had continued to reside in Maryland for more than twelve years after the bond was executed.

And *Rathbone v. Coe*, 6 Dak. 91, 50 N. W. 620, holds that the bar of limitations of the state in which the contract was made, is, when complete, available in another state to which the debtor subsequently removes.

In *Dudley v. Kimball*, 17 N. H. 498, the court states that it is well settled that "courts do not take notice of any foreign statute of limitation unless the party has absolutely lost all right of action in the foreign court by having omitted, during the period prescribed by that 48 L. R. A.

statute, to assert his right there, he having had full opportunity to do so." In this case no foreign statute had been pleaded, so that in reality no question arose as to the force of such a statute.

In *Carpenter v. Wells*, 21 Barb. 593, it is stated that no pretense was made that defendants could avail themselves of the statute of limitations of Massachusetts where the note in suit was made; but the court admits that a very serious objection to the doctrine that the *lex fori* does not apply to the time of the remedy is that antiquated demands may be revived and enforced when the party happens to be found in some state where the statute of limitations is not available; but the consideration of such objection is held to belong to the legislature, rather than to the courts.

And *Wilcox v. Williams*, 5 Nev. 206, holds that the law of the forum always governs the remedy, and that the statute of limitations applies only to a remedy, and not to a right or obligation, the court stating that it was doubted at one time whether such rule would apply when the statutory bar had fully run against the contract where made, but that the better opinion now is that such fact makes no difference and that the rule is unchanged except when such statute by its terms and conditions extinguishes and modifies the claim itself.

Gibbons v. Ewell, 1 Handy (Ohio) 561, is an apparent exception to the general rule that the law of the forum will govern as to limitations, the court treating the case throughout as though the statute of limitations of Maryland, in which state the note in suit was made and delivered, governed, but as there was a statute in Ohio that actions on contract executed by nonresidents, when barred in the state or country where made would be barred when sued in Ohio, it is very probable that the court had such statute in mind when writing the opinion.

3. Where right of action extinguished, as well as the remedy affected.

In *Le Roy v. Crownshield*, 2 Mason, 151, Fed. Cas. No. 8,269, Story, J., brings out the distinction between statutes of limitations which purport on their face to extinguish all right of action on contracts made in a country without reference to any particular court in which the action may be brought and statutes which merely prohibit a court from taking cognizance of an action unless within a limited period after the right has accrued, and says that he can per-

of actions, real and personal, as enacted by the legislature of a state, and as construed by its highest court."

And in support of this position the unbroken decisions of the supreme court, commencing as early as 4 Cranch, and running down to the time of its delivery, were cited by the learned justice. In *Flash v. Conn*, 109 U. S. 371, 381, 27 L. ed. 966, 970, 3 Sup. Ct. Rep. 263, on an appeal from the circuit court of the United States for the district of Florida, it was held that the decision of the New York court of appeals, holding a certain statutory stockholder's liability not to be a penalty, but in the nature of a contract, and therefore not barred by the three years' limitation, as in the case of a penalty, but by the six years' limitation prescribed as to contracts, was binding in all jurisdictions. The court (Mr. Justice Woods) says: "We

think this is a case where the construction of the state court is entitled to great, if not conclusive, weight with us. It is the settled construction of a law of the state, upon which the rights and liabilities of a large number of its citizens must depend. If the liability of a stockholder under § 10 arises upon contract, the six years' limitation applies to it; if the liability is in the nature of a penalty, the three years' limitation applies. It is clear that confusion and uncertainty would result should the state and Federal courts place different constructions on the section. Such a result ought, if possible, to be avoided. . . . If this were a case arising in the state of New York, we should, therefore, follow the construction put upon the statute by the courts of that state. The circumstance that the case comes here from the state of Florida should

ceive no reason why the right to use the defense that all right of action has been extinguished in the state in which the parties reside, given by its laws, should not go with the debtor into any other country.

In *Crocker v. Arey*, 3 R. I. 178, it is held that the statute of limitations of another state in which the note in suit was executed would not govern, as such statute did not extinguish the right, but merely affected the remedy.

In *Scharff v. Lisso*, 63 Miss. 213, it is held that the fact that the statute of limitations of the state in which the cause of action arose has run in defendant's favor is not available to him unless such statute of limitations bars the right as well as the remedy.

In *Perkins v. Guy*, 55 Miss. 153, 30 Am. Rep. 510, it is held that the *lex fori* will govern as to limitations in an action on contract executed in another state in which both of the parties resided until the cause of action was barred therein, unless the statute of such state absolutely extinguished the debt instead of merely affecting the remedy. The statement is made, however, that it might perhaps be worthy of the serious consideration of the legislature, whether it would not be wise to alter the general rule that the *lex fori* prevails where both parties resided in another state whose statute had barred the remedy.

In *Lincoln v. Battelle*, 6 Wend. 475, it is held that a law of a foreign country, requiring creditors to present their demands by a certain day or be precluded thereafter from asserting the same, even though its effect was to extinguish the debt, was a mere statute of limitations, and would not govern in an action in New York.

And in *Gans v. Frank*, 36 Barb. 320, it is held that the statute of limitations of Pennsylvania, in which state the goods were sold for which suit was brought, was not available as a bar, as the Pennsylvania statute only prohibits the bringing of an action after the time limited in such state, the court saying that if the provisions of the law rendered the contract void or terminated it in any way a different rule might be applicable.

Haws v. Cragie, 40 N. C. (4 Jones, L.) 394, holds that the presumption of payment, arising from the lapse of time, of a bond executed in another state, is that allowed by the *lex fori*, as it affects the remedy instead of the rights and merits of the action. The court stated in this case that there was a marked difference between the effect of a statute which merely bars a remedy and one which gives a right, and that it may be the duty of every state, on the 48 L. R. A.

principle of comity, to protect a right or title, no matter how acquired, under the laws of another state.

In *Taberner v. Brentnall*, 18 N. J. L. 262, an action on a note executed in England, which country the defendant left before an action thereon was barred by its laws, it is stated that the statute of limitations of England affects the remedy and does not interfere with the obligation of the contract, and that the *lex fori* will therefore govern the case.

An action in England for services as attorney and solicitor in India, where both parties resided at the time, may be maintained, although the statute of limitations has run in India where defendant continues to reside, the plaintiff having left that country before the bar was complete. *Williams v. Jones*, 13 East, 439. The court, however, stated that if there had been an extinguishment of the right itself, instead of a mere extinction of the remedy, the decision might have been different.

A judgment for defendant in the Isle of Man, in an action for services as attorney rendered in a suit in that island, on the ground that under the statute of limitations for three years of such island the cause of action was barred, does not bar a subsequent action in England to recover for the same services brought within the period limited by the laws of that country for maintaining such an action. In this case the court states that the law of the Isle of Man extinguished the right as well as the remedy, and had such been the issue determined by the Manx court the defense of the statute of limitations would have been a good one. *Harris v. Quina*, L. R. 4 Q. B. 653, 38 L. J. Q. B. N. S. 331.

Sawyer v. Macaulay, 18 S. C. 543, holds that the bar of the statute of the state in which the notes in suit were executed was not available in an action in South Carolina, the court saying that if the statute paid or destroyed the debt, then, when once barred in any state, it would be gone forever and in all places, but that it does not destroy the debt but only suspends the remedy.

Hays v. Cage, 2 Tex. 501, holds that, in the absence of a statutory provision in regard thereto, the statute of limitations of the forum will govern, unless in those cases where the laws of limitation of the foreign country not only extinguish the right of action but the claim of title itself *ipso facto*, and declare it a nullity after the lapse of the prescribed period.

In *Carson v. Hunter*, 46 Mo. 467, 2 Am. Rep. 529, an action on a note executed in Arkansas, it was held that the *lex fori* would govern as

not leave the statute open to a different construction. It would be an anomaly for this court to put one interpretation on the statute in a case arising in New York, and a different interpretation in a case arising in Florida. Our conclusion, therefore, is that this action was not brought to enforce a liability in the nature of a penalty."

The rule recognizing the statute of limitations of the state passing the act under which the liability sought to be enforced arises, in cases of statutory liability, where there is a period of limitation prescribed, has been frequently followed by the Federal and state courts. *Flash v. Conn.*, 109 U. S. 371, 381, 27 L. ed. 966, 970, 3 Sup. Ct. Rep. 263; *The Harrisburg*, 119 U. S. 199, 214, *sub nom. The Harrisburg v. Rickards*, 30 L. ed. 358, 362, 7 Sup. Ct. Rep. 140; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 756, 30

L. ed. 829, 7 Sup. Ct. Rep. 757; *Boyd v. Clark*, 8 Fed. Rep. 49; *Andrews v. Bacon*, 38 Fed. Rep. 777; *Muños v. Southern P. Co.*, 2 U. S. App. 222, 51 Fed. Rep. 188, 2 C. C. A. 163; *Theroux v. Northern P. R. Co.*, 27 U. S. App. 508, 64 Fed. Rep. 84, 12 C. C. A. 52; *Eastwood v. Kennedy*, 44 Md. 563; *Pittsburg, C. & St. L. R. Co. v. Hine*, 25 Ohio St. 629; *O'Shields v. Georgia P. R. Co.*, 83 Ga. 621, 6 L. R. A. 152, 10 S. E. 268. The reason upon which this line of decisions is based is that in the enforcement of a liability not existing at common law, and arising by virtue of a statute, the right, as well as the mere remedy, is involved, and that to the statute in question alone, as construed by the courts of the state of its passage, can resort be had, either in the matter of the ascertainment of rights arising thereunder, or remedies provided thereby. The statute it-

to limitations unless the statute of the state where the note was made expressly discharged the debt instead of going to the remedy merely, and that the fact that the term fixed by the Arkansas statute had expired before the defendant left that state would not prevent the application of a longer statute of Missouri where the Arkansas statute affected the remedy only.

Sterling v. Hunt, 10 Mo. App. 596, holds that the Louisiana prescription does not extinguish the debt, and that suit on a note executed in Louisiana may be brought against the maker in Missouri at any time within the limitation fixed by the statute of the latter state.

In *McMerty v. Morrison*, 62 Mo. 140, it is held that the Louisiana statute prescribing an action on a note in five years was not available in Missouri, in which state the period of limitation was ten years, the court holding that the Louisiana statutes, providing that obligations are extinguished by prescription, that prescription is a manner of acquiring property or discharging debts by effect of time, and that the prescription which operates a release from debts discharges the debtor by the mere silence of the creditors during the time fixed by law from all actions which may be brought against him, do not, as interpreted by the Louisiana courts, operate as a complete extinguishment of the debt, but are to be regarded as mere statutes of limitation.

And *Lyman v. Campbell*, 34 Mo. App. 213, holds that an answer setting up the Kentucky statute of limitations as a bar to a suit in Missouri on a note executed in Kentucky where the maker resided, was insufficient to make the bar of the statute available, where it alleged that by the laws of Kentucky the maker was fully discharged from liability by the running of the period of five years under the statute of limitations of that state, the court holding that an allegation that the Kentucky statute operated to extinguish the debt itself, and not merely to bar the remedy, was necessary.

The statute of limitations of Wisconsin, by which, as interpreted by its courts, the debt is extinguished, is a bar to an action in another state on a note executed in Wisconsin, and the collection of a judgment rendered in such other state will be enjoined in Wisconsin on the ground that the debt or claim had been cut off and destroyed before the judgment was rendered, and that the courts of the other state must have so held if the question had been there presented. *Brown v. Parker*, 28 Wis. 21.

The French statute providing that all actions on notes prescribe themselves by five years from the day of protest if there has been

no judgment, or if the debt has not been acknowledged by any separate act, but that the pretended debtors shall be held, if required, to affirm on oath that they no longer owe the money, extinguishes the remedy only, and not the right or contract, and the bar of the French statutes to notes executed in France between subjects thereof is not available in an action in England. *Huber v. Steiner*, 2 Scott, 304, 2 Blig. N. C. 202, 1 Hodges. 206.

The act of the Provincial Parliament of Lower Canada, passed in 1793, providing that all notes on which no suit is brought within five years after their maturity shall be taken and considered to be "paid or discharged if the debtor will make oath if required that such note is paid or discharged, is a mere statute of limitations affecting the remedy, and is not available in a suit in Vermont. *Cartier v. Page*, 8 Vt. 146.

In *Seagrove Eldg. & L. Asso. v. Stockton*, 148 Pa. 146, 23 Atl. 1063, an action on a bond secured by a mortgage of real estate in New Jersey, it is held that the New Jersey act of March 23, 1881, providing that in all cases where a bond and mortgage are given for the same debt, all proceedings to collect the debt shall be first to foreclose the mortgage, and in case of deficiency all suits on the bond shall be commenced within six months from the sale of the mortgaged premises, was an incident of the contract affecting, not merely the remedy, but the rights of the parties to the contract, and that no action could be maintained on the bond in Pennsylvania after the lapse of more than six months from the foreclosure sale.

Hudson v. Bishop, 32 Fed. Rep. 519, holds. *Squires J.*, delivering the opinion, that a provision in Wis. Rev. Stat. chap. 170, § 3368, giving a right of action on a guardian's bond, that no action shall be maintained against the surety unless suit is commenced within four years from the guardian's discharge, prevents an action against the surety in another state after the lapse of such time, as such condition is not a mere matter of form, but a substantial right forming part of the surety's contract. This decision was sustained on rehearing before *Brewer, J.*, in 35 Fed. Rep. 820, on substantially the same grounds.

b. Judgments.

1. In general.

The general rule in an action on a judgment of another state is that the law of the forum, rather than that of the place where the judg-

self prescribes just what right it gives, and it can likewise provide the remedy for its enforcement, and the time within which it shall be operative. *The Harrisburg*, 119 U. S. 199, 214, *sub nom. The Harrisburg v. Rickards*, 30 L. ed. 358, 362, 7 Sup. Ct. Rep. 140, was an admiralty proceeding in the United States district court for the state of Pennsylvania, in which the liability sought to be enforced was one arising under the statutes of the state of Massachusetts, occasioned by the wrongful death of the libellant; and the Supreme Court, speaking through Mr. Chief Justice Waite, said: "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as cre-

ated, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania or the indictment in Massachusetts could be maintained if brought or found after the expiration of the year; and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

The Harrisburg was a case seeking to en-

ment was rendered, will govern. *Fanton v. Middlebrook*, 50 Conn. 44; *Rice v. Moore*, 48 Kan. 590, 16 L. R. A. 198, 30 Pac. 10; *McArthur v. Goddin*, 12 Bush. 274; *Taylor v. Joor*, 7 La Ann. 272; *Lucas's Succession*, 11 La Ann. 296; *Walworth v. Routh*, 14 La Ann. 201; *Miller v. Brenham*, 68 N. Y. 83, *Affirming* 7 Hun, 330; *Jones v. Hook*, 2 Rand. (Va.) 303, 14 Am. Dec. 783; *Waddill v. Cabell*, 21 D. C. 597; *Egberts v. Dibble*, 3 McLean, 86, Fed. Cas. No. 4,307.

In *Summerside Bank v. Ramsey*, 55 N. J. L. 383, 26 Atl. 837, it is held that the *lex fori* will govern in an action on a judgment rendered in Canada.

The limitation of an action on a justice's judgment rendered in another state is determined by the statute of limitations of the state in which the action is brought. *Mowry v. Cheesman*, 6 Gray, 515.

Miller v. Smith, 16 Wend. 425, which is an action on a domestic judgment rendered about thirty years before, states that it has been solemnly adjudged in several states and repeatedly decided in New York, that foreign statutes of limitation are in no case available in the state where suit is brought, the statutes of such state being applicable to all actions prosecuted in its courts.

Loveland v. Davidson, 3 Clark (Pa.) 377, holds in an action on a judgment before a justice of the peace of the state of New York that the bar of the latter state is not available, as the *lex fori* must govern.

The statute of limitations of the forum is available to a resident of the state, although the plaintiffs are nonresidents, and the judgment sued on was rendered in another state. *Bruce v. Luck*, 4 G. Greene, 143.

In *Randolph v. King*, 2 Bond, 104, Fed. Cas. No. 11,660, an action in Ohio on a New York judgment, it was not controverted but that the statute of limitations of the forum applied, and it was held that the Ohio statute of limitations as to specialties would apply if such a judgment was held to be a specialty by the statutes and decisions of the highest courts of that state.

An action on a judgment of another state is within the Illinois limitation act of July 1, 1872, § 15, fixing the period of limitation of all civil actions not otherwise provided for, barred by the lapse of five years, even though a longer period is fixed by the laws of the other state. *Ambler v. Whipple*, 139 Ill. 311, 28 N. E. 841.

An action cannot be maintained in Kansas on a Missouri judgment more than five years after its rendition if the defendant was present

in Kansas during all that time. *Bauserman v. Charlott*, 46 Kan. 480, 26 Pac. 1051.

The law of another state, limiting the time within which payment of a judgment may be compelled, cannot be set up in Kentucky by a resident of such other state who removed therefrom Kentucky before the judgment was obtained. *Cobb v. Thompson*, 1 A. K. Marsh, 507.

Evans v. Cleary, 125 Pa. 204, 17 Atl. 440, an action on a judgment of a justice of the peace of the state of Illinois, holds that no statute of Illinois has been brought to its attention putting such a judgment on the same footing with ordinary simple contract debts as to the statute of limitations, and in the absence of proof on the subject the law of Illinois will be presumed to be the same as that of Pennsylvania. There is nothing in the case to indicate whether the point was raised that the Illinois statute of limitations must govern, but it seems to have been assumed that the statute of that state would govern for the purpose of determining whether such judgment would be treated for the purpose of limitation as a simple contract debt.

An Ohio judgment cannot be revived in Iowa, if barred by the statutes of that state, although it is not barred by the laws of Ohio. *Meek v. Meek*, 43 Iowa, 204.

St. Louis Type Foundry Co. v. Jackson, 128 Mo. 119, 30 S. W. 521, holds that an action cannot be maintained in Missouri on a judgment obtained in Kansas more than five years after its rendition, where it had not been kept alive by the issuance of execution, under 2 Kan. Gen. Stat. 1889, chap. 80, § 445, providing that if execution is not sued out within five years from the date of any judgment, it shall become dormant and cease to operate as a lien on the judgment debtor's estate, as such statute is held to extinguish the right instead of merely affecting the remedy.

A state has full power to fix the time within which a suit on a foreign judgment must be brought within the state. *Bacon v. Howard*, 20 How. 22, 15 L. ed. 811.

A state may pass a law declaring that all judgments rendered in any other state prior to its passage shall be barred unless suit is brought thereon within two years, and in such case an action in that state on such a judgment more than two years after the act is passed will be barred, although the suit is commenced on the very day that the judgment debtor becomes a citizen of such state, as the constitutional provision that full faith and credit shall be given in each state to the judicial proceedings of

force a liability arising under the statute for wrongful death, and most of the cases last above cited are of the same character, though not all of them; notably *Flash v. Conn.*, *Fourth Nat. Bank v. Francklyn*, and *Andrieux v. Bacon*,—the latter case being almost a counterpart of the present one. But we perceive no good reason why the same general doctrine applicable to cases of liability arising under a statute should not apply to cases like the one now under consideration, where it is sought to impose upon stockholders in a corporation a personal liability. Such a liability is unknown to the common law, and exists only by virtue of the statute, and the limitation of the right imposed by the statute controls in the matter of its enforcement. In *Pollard v. Bailey*, 20 Wall. 526, 527, 22 L. ed. 378, Mr. Chief Justice Waite, in discussing the doctrine of the

individual liability of the stockholders in a corporation for the payment of its debts, thus states it: "The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purposes of its creation, and provide for the manner of its enforcement. . . . The liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by statute, without a remedy, may be enforced by an appropriate common-law action. But, where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed."

And in the more recent case of *Fourth Nat. Bank v. Francklyn*, 120 U. S. 756, 30 L.

every other state and the legislation of Congress thereof do not prevent a state from passing acts of limitations to bar suits on judgments rendered in another state. *Bank of Alabama v. Dalton*, 9 How. 522, 13 L. ed. 242.

McElmoyle v. Cohen, 13 Pet. 312, 10 L. ed. 177, holds that the statute of limitations, in an action on a judgment rendered in another state, affects the remedy only, and that the law of the forum will accordingly govern, as the constitutional provision that full faith and credit shall be given in each state to the judicial proceedings of every other state was intended only to give them conclusiveness on the merits, and not fix a time within which suit must be brought thereon.

Robinson v. Peyton, 4 Tex. 276, holds that the statute of limitations of the forum will govern in an action on a judgment, and that a statute requiring an action on a foreign judgment to be brought within a shorter period than an action on a domestic judgment is not repugnant to the provisions of the Federal Constitution or the act of Congress that full faith and credit shall be given in each state to the judicial proceedings of every other state.

Estes v. Kyle, Meigs, 34, holds that the law of the forum governs in an action on a foreign judgment, the court stating that such holding does not violate the provision of the Federal Constitution, art. 4, that full faith and credit shall be given to the judicial proceedings of every other state, and the act of Congress providing that judicial proceedings shall have such faith and credit given them in every court within the United States as they have in the courts of the state from which such records shall be taken.

Christmas v. Russell, 5 Wall. 290, 18 L. ed. 473, holds that the Mississippi statute providing that no action shall be maintained on any judgment or decree of any court without the state against any person who, at the commencement of the action in which the judgment is rendered was or shall be a resident of Mississippi in any case where the cause of such action would have been barred by limitation therein if such suit had been brought there, is void as an unlawful attempt to give operation to the Mississippi statute of limitations in all other states by denying the efficacy of any judgment recovered in another state against a citizen of Mississippi on a cause of action barred by its statutes, and as violating the provision of the Federal Constitution that full faith and credit shall be given to the judicial proceedings of every other state.

Waterman v. A. & W. Sprague Mfg. Co. 55 48 L. R. A.

Conn. 354, 12 Atl. 240, which was an action to foreclose a judgment lien against a foreign corporation which had never resided within the state, holds that the bar of the statute of limitations in the state where it was incorporated, and where the cause of action arose, and the parties resided, could not be set up in the action in Connecticut.

2. Where right of action extinguished as well as the remedy affected.

The law of the forum governs as to prescription in an action to enforce in Louisiana a judgment of Mississippi. *Ducker's Succession*, 10 La. Ann. 758, Voorhies and Buchanan, JJ., dissented on the ground that under the Mississippi statute no action of debt shall be instituted on a judgment after the expiration of seven years from its date, and that accordingly when an action on a Mississippi judgment is barred in that state it should not be enforced in Louisiana.

Baker v. Stonebraker, 36 Mo. 338, holds that an action on a Maryland judgment cannot be maintained in Missouri after the lapse of twelve years from its rendition, although the judgment defendant removed from the state soon after judgment was recovered under the Maryland statute of limitations, providing that no judgment of above twelve years' standing shall be "good and pleadable or admitted in evidence" except in favor of persons under specified disabilities or "beyond the sea" under certain disabilities which did not exist in this case, the court holding that such statute operated upon the judgment and declared the debt conclusively barred, paid, and extinguished after the lapse of twelve years, and there being no provision that the absence of the defendant would prevent the running of the statute.

A statute providing that every judgment of any court shall be "presumed to be paid and satisfied" at the expiration of a specified time, whether considered as a statute of limitations or not, relates to the remedy, and will not govern in an action brought in another state. *Hendricks v. Comstock*, 12 Ind. 238, 74 Am. Dec. 205.

c. Decedents' estates.

McDonald v. Underhill, 10 Bush. 584, holds that the laws of the forum will govern as to limitations in determining the right to recover the amount of a note from the estate of a decedent.

Fitzsimmons v. Johnson, 90 Tenn. 436, 17 S. W. 100, an action by legatees against exec-

ed. 829, 7 Sup. Ct. Rep. 757, Mr. Justice Gray, in referring to the principles as above settled, said:

"Pursuant to these principles, this court has repeatedly held, not only that suits either at law or in equity, in the circuit court, by creditors of a corporation, to enforce the liability of stockholders under a state statute, are governed by the statute of limitations of the state (*Terry v. Tubman*, 92 U. S. 156, 23 L. ed. 537; *Carroll v. Green*, 92 U. S. 509, 23 L. ed. 738; *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365), but also that the question whether the remedy in the Federal courts should be by action at law or by suit in equity depends upon the nature of the remedy given by the statutes of the state (*Mills v. Scott*, 99 U. S. 25, 25 L. ed. 294; *Terry v. Little*, 101 U. S. 216, 25 L. ed. 864; *Patterson v. Lynde*, 106 U. S. 519, 27 L. ed.

265, 1 Sup. Ct. Rep. 432; *Flash v. Conn*, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263). See also *Blair v. Gray*, 104 U. S. 769, 26 L. ed. 922; *Chase v. Curtis*, 113 U. S. 452, 460, 28 L. ed. 138, 5 Sup. Ct. Rep. 554."

Counsel for appellee insists that the Georgia act of limitation, above quoted, does not apply, and should not control, in this case, because it is not a part of the act of incorporation of the Brunswick Bank of Georgia, under which the liability sought to be enforced arises, and that, inasmuch as this act contains no specific clause of limitation, the general acts of limitation of the state of Maryland, and not those of Georgia, apply. We cannot accede to this proposition in this case. While there is force in the contention, and in some cases it would be doubtless correct, it is not, in our opinion, true here. The statute of limitations of the state of

Tennessee of a will executed by a citizen of Ohio, to recover their legacies, holds that the *lex fori* governs as to the time within which the action must be brought, including the effect of the statute on a married woman, and the right to recover from the executors of a deceased executor.

In *Woodbridge v. Austin*, 2 Tyler (Vt.) 364, 4 Am. Dec. 740, an action in which defendant pleaded as a set-off to a note executed in Canada and indorsed to him, but which the plaintiffs claimed was barred by failure to make proof of the claim on settlement of the maker's estate, the court stated its opinion that when a demand is barred by the existing laws of a foreign country where the contract was made, it cannot be revived by transferring it to an inhabitant of Vermont.

That a cause of action against the estate of a deceased citizen of one state is barred in that state does not give a right to interpose such bar in an action in another state against property therein, so as to authorize the courts of the former state to enjoin the action. *Thorndike v. Thorndike*, 142 Ill. 450, 21 L. R. A. 71, 32 N. E. 510.

But *Hoskins v. Sheddon*, 70 Ga. 528, holds that the statute of limitations of Tennessee, fixing the time within which suit must be brought against personal representatives of a decedent, extinguished the right, and would govern in an action in Georgia to collect a note given in Tennessee out of the assets of the deceased administrator of the maker, who was appointed and resided in Tennessee.

d. Adverse possession.

Personal property.

Brown v. Brown, 5 Ala. 508, 13 Ala. 208, 48 Am. Dec. 52, holds, following *Goodman v. Munks*, 8 Port. (Ala.) 84, that adverse possession of personal property in one state until the right of recovery was barred in that state would prevent a recovery in another state having a longer period of prescription, into which the possessor might remove.

Doyle v. Boulter, 7 Ala. 246, as digested in *Brickell's (Ala.) Digest*, vol. 2, Limitation of Actions, § 5, holds that if personal property is held adversely in one state for the period prescribed by the laws of that state, beyond which an action for its recovery cannot be maintained, and the possessor removes with such property to another state, effect will be given to his possession under the statute of the former state.

One who remains in possession of a slave 48 L. R. A.

mortgaged to him until the statute of limitations bars a recovery in the state of his residence may set up such bar in an action to recover from him in another state to which he afterwards removes. *Freeman v. Baldwin*, 13 Ala. 246.

The purchaser in good faith of a slave taken by fraud, force, or felony from another state, who retains possession of him in his own state until the statute of limitations has run against the right to take him away, acquires a title which may be relied on by the purchaser in a state having a longer period of limitation, to which the original owner removes him after covertly obtaining possession of him. *Howell v. Hair*, 15 Ala. 104.

The South Carolina statute of limitations and prescription applies in a suit in Louisiana, to recover a slave, held in possession in South Carolina until a valid title by prescription and possession under its laws is obtained, although the original owner never lived in South Carolina, where he voluntarily allowed the slave to go into that state. *Broh v. Jenkins*, 9 Mart. (La.) 526, 13 Am. Dec. 320.

The title to slaves acquired by adverse possession by the laws of the state in which the possession is held will not be disturbed on their removal into Louisiana. *Frierson v. Irwin*, 5 La. Ann. 530.

The possession of a slave in Virginia until a good title is acquired under the statute of limitations of that state is available in a suit to recover the slave, brought in Tennessee, to which state the slave was afterwards removed. *Shelby v. Guy*, 11 Wheat. 361, 6 L. ed. 495.

Waters v. Barton, 1 Coldw. 450, holds that adverse possession of a slave for the statutory period in Texas, by the statute of limitations of which as construed by the Texas courts the title vested in the possessor, was a bar to the recovery of the slave in Tennessee, even though the original owner did not at any time reside in Texas.

Hamilton v. Cooper, Walk. (Miss.) 542, 12 Am. Dec. 588, holds that, although the courts of that state must confine themselves to the limitations provided by its statutes, and not regard those of any other state, yet, where the title to slaves has been acquired in another state by possession for the length of time required by its statute of limitations, the title thus acquired may be relied on as a bar to recovery in an action in Mississippi.

Fears v. Sykes, 35 Miss. 633, holds that, although, as a general rule, the statute of limitations of another state cannot be relied on as a defense, yet, where title to a slave has been ac-

Georgia sought to be applied was not, in its broader sense, the general statute of limitation of the state, as distinguished from a statute contained in the particular enactment; but it was the special statute of limitations of that state, applicable to statutory liabilities, or liabilities arising under acts of incorporation, or by operation of law, in existence at the time and for years previous to the passage of the act of incorporation of the Brunswick Bank, and therefore must be considered as forming a part of, as read into, the act incorporating the bank, as much so as if it had been formally incorporated there-

in, and the stockholders and all persons dealing with this bank are presumed to know of its existence, and are bound by its terms.

For these reasons *the decree of the Circuit Court dismissing the bill of the complainant is reversed, and the cause remanded, with instructions to said court to reinstate the same, and proceed therein to a final decree.*

Brawley, District Judge, dissents.

Petition for certiorari to remove case to Supreme Court of United States denied.

quired under the laws of another state by reason of possession for such length of time as renders unimpeachable in that state the title of the one in possession such title may be relied on in an action in Mississippi to recover possession of the slave.

In *Moseby v. Williams*, 5 How. (Miss.) 520, the rule was recognized, seemingly without question, that five years' adverse possession of a slave in Tennessee would give title which could be relied on in Mississippi by a creditor of the person in possession as against the original owner, but it was held that in the case in suit title had not passed because the possession had not been adverse.

The purchaser in good faith in one state, of slaves removed from another state, who retains possession in the state of his purchase until the statute of limitations of that state bars a recovery, may set up such bar in another state as against one having a lien by execution in such other state from which the slaves were removed to the former state, even though the execution creditor has executions regularly issued from term to term until the slaves are returned into such other state. *Newcombe v. Leavitt*, 22 Ala. 631.

The purchaser of a slave from one who has had possession of him until the statute of limitations of the state in which he resides is a bar may set up such bar in the courts of a state to which he removes with the slave, provided the limitation act of the former state bars the title or claim as well as the right of action, and the situation of the parties is such that the statute has fully and actively operated on the case. *Wynn v. Lee*, 5 Ga. 217.

In *Cargile v. Harrison*, 9 B. Mon. 518, it was said that the court would not be understood as deciding that if the possession of slaves be held in another state, until the adverse holding grows into a good title under its laws, thereby divesting the claimant of all rights, a mere change of possession to another state where a longer time is required to constitute a bar, will revive the claimant's right, and reinvest him with title. The question was not decided, however, as the statute of neither state could be relied on as a bar.

In *Crane v. Allen*, 11 La. Ann. 493, the court, while assuming that property in slaves acquired by possession under the Mississippi statute would be protected in Louisiana, although the period of limitation was much longer, stated that the point was at least doubtful, and held that the possession in this case had not been adverse as required by the Mississippi statute.

And in *Mansell v. Israel*, 3 Bibb, 510, an action in Kentucky by a resident of Maryland to recover slaves from one who obtained possession in Maryland and removed to Kentucky, no question was made but that the Kentucky statute of limitations would govern, the decision being that it was not available to the defendant 48 L. R. A.

because of the provision therein preventing the limitation from running against a person without "the country," which is held to mean the state.

And *Stanley v. Earl*, 5 Litt. (Ky.) 281, 15 Am. Dec. 66, holds that the statute of limitations of Kentucky, vesting title to personal property by five years' adverse possession, and containing no saving of the right to maintain an action because the thing possessed or person possessing is without the state, governs in an action in Kentucky to recover slaves held in adverse possession by a person without the state. In this case the court states without qualification that the statute of limitations of the forum will govern.

And in *Coleson v. Blanton*, 3 Hayw. (Tenn.) 152, which is an action in trover for a slave, the court says that though the plaintiff be barred by the act of limitations in one state he may recover in another where the time is longer and has not yet elapsed, and that, as the time in which an action is barred by the act of another state respects the remedy, and not the right, it cannot be resorted to in the courts of the state where the action is brought, as it would be if a lapse of time vested in the possessor the property in the thing sued for.

And *Blackburn v. Morton*, 18 Ark. 384, holds, in an action to recover a slave, that the statute of limitations of Arkansas where the action is brought will govern, and that its provision, making five years' peaceable possession give title to the possessor, will apply, although the possession was without the state, and that the parties, by subsequently coming within the state, and one of them applying for redress to its courts, thereby submitted to all its laws to the same extent as if they had continuously been citizens of the state.

And *Richards v. Towles*, 3 Hill, L. 346, holds that the possession of a slave in Georgia for the time prescribed by the statutes of that state for maintaining an action to recover possession was not available in South Carolina as against an execution in the latter state to which the slave was subject before his removal to, and possession in, Georgia.

And *Gassaway v. Hopkins*, 1 Head, 583, holds that the law of the forum will govern as to the time for bringing an action to recover a slave allotted as dower to a widow in Kentucky, by the law of which state she had a life estate in the slave, and who was sold and removed by the purchaser into Tennessee, but that the court would look to the laws of Kentucky as construed by its courts to determine when the statute of limitations began to run.

And *Alexander v. Burnet*, 5 Rich. L. 149, holds that possession of a slave in Alabama was not available in an action in South Carolina, because the defendant did not show that such possession would give title to the slave under the Alabama statute, no evidence as to such statute being given on the trial. *O'Neal*,

J., dissented on the ground that the Alabama statute of limitations to which he had access gave title to the slave.

And *Goodwin v. Morris*, 9 Or. 322, held that the statute of limitations of the forum would govern, and that in consequence one purchasing a horse in Oregon from one who had held possession in that state for the period prescribed by the Oregon statute, within which an action to recover its possession must be commenced, was justified in surrendering possession without suit, on the original owner claiming it on its removal to Washington territory, and could thereupon recover damages in Oregon for breach of warranty of title, the court holding that under the Oregon statute no title could be acquired by adverse possession for the prescribed period.

The period of prescription of one state which has partly run cannot be united with the period in another state in which suit is brought, unless the statute of the former state goes directly to the extinguishment of the debt, claim, or right, instead of merely professing to bar the remedy. *Perry v. Lewis*, 6 Fla. 553. This was an action in trover to recover value of a slave.

Real property.

Possession of real property in Jamaica, whose possessory law converts a possession for seven years under a deed real or other conveyance into a positive absolute title against all the world, gives title which may be set up in bar in an action in England, although the one against whom possession is held has never been in Jamaica, the statute of limitations of that island containing no exception in her favor on that ground. *Beckford v. Wade*, 17 Ves. Jr. 87.

Pitt v. Dacre, L. R. 3 Ch. Div. 295, holds that the statute of limitations of England, where the suit was brought, would not apply to the right of an annuitant to recover the annuity charged on real estate in Jamaica, where there is no statute of limitations applicable.

Kc Peat, L. R. 7 Eq. 302, holds that, in an action in England to set aside a family settlement of real property situated in India and a division of the rents therefrom on the ground of a mistake as to the proportionate amounts the parties were entitled to, the statute of limitations of India would govern, and that, the bar of that country having operated, the action could not be maintained in England.

But *Stillman v. White Rock Mfg. Co.* 3 Woodb. & M. 538, Fed. Cas. No. 13,440, an action in Rhode Island by citizens of Connecticut to enjoin a Rhode Island corporation from diverting water in Connecticut, holds that the law of the forum will govern as to the length of time required to obtain title by adverse possession.

And the law of the forum governs as to the time when an infant attains her majority for the purpose of determining whether the cause of action is barred by limitation. *Burgett v. Williford*, 56 Ark. 187, 19 S. W. 750. This was an action to recover possession of land.

And in *Hawkins v. Barney*, 5 Pet. 457, 8 L. ed. 190, the claim was made that under the treaty between Virginia and Kentucky the latter state had agreed that the limitation act of the former should be perpetual and unrepensible in Kentucky, and the claim was made that the statute of Virginia should apply in an action in Kentucky to recover land, but the court held that the laws limiting the time of bringing suit constituted a part of the *lex fori*, and that Kentucky, which passed a statute of limitations of its own, had not bound itself by 48 L. R. A.

such treaty to forever retain the laws of Virginia on that subject.

The right to redeem land from a mortgage or absolute deed given as security depends upon the law of the state where the land is situated, and where the law of such state provides that there can be no redemption in such state after the right to recover the debt is barred, there can be no redemption therein after the right to recover the debt is barred in the state in which the parties reside and the contract was made, although by the laws of that state an action to redeem could be maintained. *Allen v. Allen*, 95 Cal. 184, 16 L. R. A. 646, 30 Pac. 213.

e. Usury.

The right to recover in Maryland for illegal interest paid in the District of Columbia under a contract entered into therein is governed as to the time for bringing the action by the act of Congress applicable to such District giving the right to recover and prescribing the time for bringing the action. *Eastwood v. Kennedy*, 44 Md. 563.

The provision of the Louisiana statute, allowing forfeited interest to be applied in reduction of the principal by requiring an action to recover the same to be commenced within a year, will govern in an action in Mississippi, and prevent the application of the illegal interest on the principal after the lapse of that time, as the proviso that suits shall be commenced within a year is a condition qualifying a right of action, and not a mere limitation on the remedy. *Walsh v. Mayer*, 111 U. S. 31, 28 L. ed. 338, 4 Sup. Ct. Rep. 260.

f. Liability of stockholders.

An action in New York to enforce the liability of a stockholder in a Kansas corporation is governed by the *lex fori* as to limitations, as the liability is contractual and transitory. *Schiffer v. Columbia College*, 87 Fed. Rep. 160.

In *Hutchings v. Lamson*, 96 Fed. Rep. 720, 37 C. C. A. 564, it is held that an action in Illinois to enforce the liability of stockholders of a Kansas corporation cannot be maintained after the time when the action has been barred by the Illinois statute.

And an action in the Federal court to enforce in Massachusetts the liability of a stockholder in a New Jersey corporation is governed by the New Jersey statute of limitations. *Andrews v. Bacon*, 38 Fed. Rep. 777. This case was criticised in *Brunswick Terminal Co. v. National Bank*, 88 Fed. Rep. 607, *Dexter v. Edmonds*, 89 Fed. Rep. 467.

And in *Glenn v. Liggett*, 135 U. S. 533, 34 L. ed. 264, 10 Sup. Ct. Rep. 867, an action to enforce in Missouri the liability of stockholders in a Virginia corporation, it is held that the laws of Virginia fixing the liability of stockholders, rather than the laws of Missouri, will govern in determining when the statute of limitations begins to run.

In *Crofoot v. Thatcher*, 19 Utah, 212, 57 Pac. 171, which is an action by the receiver of a Nebraska corporation on a note given for subscription for stock, it is conceded that the statute of limitations fell within the remedy, and that the law of the forum governed in so far as the remedy was concerned as applied to an existing and enforceable cause of action; but it was held that the law of Nebraska controlled as to the time when the statute of limitations began to run.

And in *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810, an action in Iowa to recover an assess-

ment against a stockholder in an Illinois corporation ordered paid by the courts of that state, it was held that the provision of the Iowa statute that the cause of action accrued when the contract of subscription was entered into, rather than the provision of the Illinois statutes that the cause of action accrued at the time the order for an assessment was made, would govern in determining whether the statute of limitations had run.

The time within which an action may be maintained in another state to enforce the statutory liability of a stockholder of a Kansas corporation is determined by the law of the forum, where the only statute of limitation of Kansas is a general one limiting actions on contracts not in writing. *Dexter v. Edmands*, 89 Fed. Rep. 467.

In *Broadway Nat. Bank v. Baker* (Mass.) 57 N. E. 603, which is an action to enforce the statutory liability of stockholders of a Kansas corporation against persons residing in Massachusetts, it is held that under the Kansas statutes of limitations, which provide that if a person is out of the state when the cause of action against him accrues the period limited for the commencement of the action does not begin to run until he comes within the state, which had been construed by the Kansas courts to apply to nonresidents, the cause of action was not barred, as the statute on which the right to hold the stockholder liable rested did not contain any requirement that the right be enforced within a specified time. This case seems to admit that the statute of limitations of the state which created the liability, rather than that of the forum, would govern.

An action to enforce the liability of a stockholder in a New York corporation imposed by N. Y. Stat. 1848, chap. 40, § 24, providing that no stockholder shall be liable unless suit for collection of the debt is brought against the corporation within a year after the debt becomes due, cannot be maintained in Massachusetts, where suit was not commenced against the corporation within the time so fixed. *Halsey v. McLean*, 12 Allen, 438, 90 Am. Dec. 157.

And the principal case of *BRUNSWICK TERMINAL CO. v. NATIONAL BANK OF BALTIMORE* holds that an action in Maryland to enforce the statutory liability of a stockholder in a Georgia corporation is governed by Ga. Code 1882, § 2916, providing that all suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of the law, shall be brought within twenty years after the right of action accrues. In this case the court holds that the fact that such statute is not a part of the act of incorporation does not change the rule that statutes creating a liability, which require suit to be brought thereon within a specified time, will govern in an action in another state, as it is a special statute applicable to statutory liabilities, or liabilities arising under acts of incorporation, and must therefore be considered as forming a part of the act of incorporation.

g. Personal injuries.

In *Hurley v. Missouri* P. R. Co. 57 Mo. App. 675, the general rule that the *lex fori* must govern is held.

In *Union P. R. Co. v. Wyler*, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877, an action in Missouri for personal injuries received in Kansas, the question was raised whether the shorter statute of limitation in Kansas was not applicable, the claim being made that the circumstances of the case took it out of the general rule that the *lex fori* governs as to limitations, but no decision on the point was

made, as it was held that the cause of action was barred by the Missouri statute as well.

The *lex fori* governs in an action for personal injuries founded on the common law. *Johnston v. Canadian P. R. Co.* 50 Fed. Rep. 886.

The statute of limitations of the forum governs in an action for personal injuries inflicted in another state, where the right of action existed at common law instead of by the statute of the state in which the injury occurred. *Krogg v. Atlanta & W. P. R. Co.* 77 Ga. 202.

An action for personal injuries, for which a right exists at common law, received in one state by a citizen of another, who soon after returns to the latter state, where he commences a suit before the right of action is barred by its laws, can be maintained, although it would be barred by the laws of the state in which the injury was received, as the *lex fori* applies to such a case as fully as to one on contract. *Nonce v. Richmond & D. R. Co.* 33 Fed. Rep. 429.

In *Morgan v. Camden & A. R. Co.* 18 W. N. C. 128, it is held that the New Jersey statute of limitations, requiring all actions for personal injuries to be commenced within two years after the cause of action accrues and not afterwards, is not a bar to an action in Pennsylvania for personal injuries received in New Jersey, although more than two years have elapsed, as the general rule that the law of the forum will govern as to limitations applies to actions on torts as well as in other cases.

The statute of limitations of the forum governs in an action for personal injuries inflicted in another state, where the statute of such other state which confers the right does not limit the duration of such right to a prescribed time. *O'Shields v. Georgia P. R. Co.* 83 Ga. 621, 6 L. R. A. 152, 10 S. E. 268.

An action in Vermont by a resident of that state for personal injuries received in Canada is not barred by the one year's statute of limitations therein, even if such statute is one of extinguishment instead of merely barring the remedy, when, before the expiration of the year, the plaintiff returned to and remained in Vermont. *Canadian P. R. Co. v. Johnston*, 61 Fed. Rep. 738, 9 C. C. A. 587, 26 U. S. App. 85, 25 L. R. A. 470.

The provision of the New Jersey statute that all actions accruing for injury to persons from neglect of any railroad company shall be commenced within two years after the cause of action accrues is an ordinary statute of limitations, and does not undertake to deal with or extinguish the right of the party injured; and the lapse of more than two years after a cause of action for injuries in that state arises does not bar an action to recover therefor in Pennsylvania within the time fixed by its laws. *Dickerson v. Central R. Co.* 7 Pa. Dist. R. 104.

A right of action at common law for personal injuries received in Kansas by a resident of Missouri, who immediately returns and remains in the latter state, is not affected by the Kansas statute of limitations requiring such an action to be brought within two years, notwithstanding the further provision that when the right of action is barred it is not available for any purpose, and such provision extinguishes the liability, as the person injured was not subject to the operation of such statute after his removal from the state. *Finnell v. Southern Kansas R. Co.* 33 Fed. Rep. 427.

In *Williams v. St. Louis & S. F. R. Co.* 123 Mo. 573, 27 S. W. 387, and *Morgan v. Metropolitan Street R. Co.* 51 Mo. App. 523, it is held that an action may be brought in Missouri at any time within the statute of limitations of that state for personal injuries received in

Kansas, although the action therefor is barred in that state, as the provision of Kan. Comp. Laws 1879, § 3546, that when a right of action is barred by the provisions of any statute it shall be unavailable either as a cause of action or ground of defense, and § 3539, providing that civil actions for injury to the rights of another, not arising out of a contract, can only be brought within two years after the injury occurs and not afterwards, are only ordinary statutes of limitations which affect the remedy only, and do not extinguish the right. It is further held in *Williams v. St. Louis & S. F. R. Co.*, that, even if such statutes were construed as extinguishing the right, the action might still be maintained, as it did not appear that either of the parties were residents of Kansas for two years after the cause of action accrued.

b. Death.

Where the statute of a state in which one is negligently killed gives a right of action for killing another which did not exist at common law, and limits the time for recovery to one year, an action to enforce such liability cannot be maintained in another state after the lapse of a year. *Selma R. & D. R. Co. v. Lacey*, 49 Ga. 106.

And in *Dalley v. New York, O. & W. R. Co.* 26 Misc. 539, 57 N. Y. Supp. 485, it is held that the provision of the Pennsylvania statute, giving a right of action for negligently causing the death of another, that suit therefor must be brought within one year after the death and not thereafter, will bar an action in New York after the lapse of such time, as the period of one year so limited for bringing the action relates to and qualifies the right itself, instead of affecting the remedy.

And where a statute of the province of Ontario gives a right of action for negligently causing the death of another, and provides that the action must be commenced within a specified time, an action cannot be maintained in the United States for a death in Ontario, after such period has elapsed. *Boyd v. Clark*, 8 Fed. Rep. 849.

And an action cannot be maintained in admiralty for death of a human being in waters navigable from the sea, under a statute of the state in which the injury was inflicted, or of the state where the vessel belonged, after the time fixed by such statute for bringing the action therefor. *The Harrisburg*, 119 U. S. 199, *sub nom.* *The Harrisburg v. Richards*, 30 L. ed. 358, 7 Sup. Ct. Rep. 140.

And an action for negligently causing the death of plaintiff's husband in Missouri, by the laws of which the widow has a right of action for six months, after which the right vests in the minor children, cannot be maintained in Kansas after the lapse of six months. *Hannibal v. Hannibal & St. J. R. Co.* 39 Kan. 56, 15 Pac. 57.

And an action for death by wrongful act in a state whose statutes create a right of action and allow three years within which to bring the suit may be maintained in another state after the lapse of time allowed in that state for maintaining similar actions, as the time given by the former statute operates as a limitation of the liability, and not merely of the remedy. *Theroux v. Northern P. R. Co.* 27 U. S. App. 508, 64 Fed. Rep. 84, 12 C. C. A. 52.

But the statute of limitations of the forum governs, in an action for wrongful death, the right to maintain which is given by the laws of the territory in which the injury occurs, where no other limitation than the general one is given by the laws of such territory. *Munos v. Southern P. Co.* 2 U. S. App. 222, 51 Fed. Rep. 188, 2 C. C. A. 163.
48 L. R. A.

1. Miscellaneous cases.

The statute of limitations of the state in which an action for wrongful attachment is brought, rather than of the state in which the attachment is issued or the plaintiff resides, will govern. *Dougherty v. Cummings*, 9 Ohio C. C. 718.

In *Hale v. Lawrence*, 21 N. J. L. 714, 57 Am. Dec. 190, an action for destruction of goods by defendant while mayor of New York city, the question at issue was whether a foreign creditor was entitled to the provision of the New Jersey statute, that the time which the defendant was not a resident of the state should not be computed as part of the time limited for bringing an action, where the cause of action arose without the state, and the defendant was at that time a nonresident. The court held that the fact that both plaintiff and defendant resided in the same state, but not that in which the suit was brought, could make no difference unless the court was to regard the statute of limitations of such state, which it could not do.

The statute of limitations is the law of the forum, and operates on all who submit themselves to its jurisdiction. *McCluny v. Silliman*, 3 Pet. 270, 7 L. ed. 676. This was an action against the register of the United States Land Office for refusal to enter in the books of his office an application for certain land in his district.

In an action for conversion, by an agent, of money intrusted to him for the particular purpose of loaning the same on real estate, the general rule that the law of the forum will govern was maintained. *Peebles v. Green*, 6 Lea, 475.

In an action in the supreme court of India for conversion of personal property, it is held that the English statute of limitations has been adopted in India, and that it is applicable in an action between Hindoos, although the Hindoo statute of limitations might be different, the court stating that it is almost an axiom of jurisprudence that the law of prescription or limitation is a law relating to procedure, having reference only to the *lex fori*, and that courts respectively proceed according to the prescription of the country in which they exercise their jurisdiction. *Ruckmaboye v. Mottichund*, 8 Moore, P. C. C. 4, 5; Moore, Indian App. 234.

A stipulation that a telegraph company will not be liable on claims unless presented within sixty days will not, although enforceable in the state from which the message was sent, be enforced in Texas under Tex. Rev. Stat. 1895, art. 3379, providing that a limitation of the right to sue, however fixed, to ninety days, shall be void, as the *lex fori* will govern as to matters of limitation. *Western U. Teleg. Co. v. Lovely* (Tex. Civ. App.) 52 S. W. 563.

IV. Where statutes of forum provide as to effect of bar of other state.

Alabama.

The defense that a contract sued on is barred in Alabama, if barred by the laws of another state in which the contract was made and where the defendant resided, given by Ala. Code 1876, § 3237, is not available if the contract was not made in such other state. *Minniece v. Jeter*, 65 Ala. 222.

Nor where the contract was made in Alabama, although the party resided in such other state. *Wright v. Strauss*, 73 Ala. 227.

California.

An action may be maintained by residents of California on a judgment obtained in another

er state, although an action thereon would be barred in that state under Cal. Code Civ. Proc. § 361, which, while providing that the bar of another state may be set up in California, makes an exception in favor of residents of that state. *Stewart v. Spaulding*, 72 Cal. 264, 13 Pac. 661.

Colorado.

A state may pass an act that an action on a contract made in another state shall be barred unless the action is commenced within a specified time, and such statute will control as to the time for commencing action. *Hawse v. Burgmire*, 4 Colo. 313.

Illinois.
A cause of action which is barred by the laws of the state in which the party sought to be held resides, even though the court does not approve the laws of such other state, will be held to be barred in Illinois, under the Illinois limitation act 1872, § 20, providing that where a cause of action has arisen in another state by the laws of which an action cannot be maintained thereon from lapse of time, an action cannot be maintained in Illinois. *Great Western Teleg. Co. v. Stubbs*, 53 Ill. App. 210.

In *Hyman v. McVeagh*, 10 Legal News, 157, cited in *Story v. Thompson*, 36 Ill. App. 370, which was an action on a note executed between parties residing in another state and continuing to do so until the bar of limitations therein was established, the court stated, in construing § 20, that the words "when a cause of action has arisen" should be "construed as meaning when jurisdiction exists in the courts of a state to adjudicate between the parties upon a particular cause of action, if properly invoked, or, in other words, when the plaintiff has the right to sue the defendant in the courts of the state upon the particular cause of action without regard to the place where the cause of action had its origin."

And such section is held in *Hyman v. Bayne*, 83 Ill. 256, to apply to any action brought after its passage, where neither party resided in Illinois until after the bar was established in the other state.

On the authority of the two preceding cases it was held in *Humphrey v. Cole*, 14 Ill. App. 56, that, where one executes a note in Illinois, and afterwards removes to another state, a cause of action on the note will be barred in Illinois under § 20, of the statute where he might have been sued in such other state, and has resided there such a length of time that an action on the note is barred therein.

The preceding case of *Humphrey v. Cole* was overruled in *Story v. Thompson*, 36 Ill. App. 370, on the ground that under § 18 of the Illinois limitation act of 1872, providing that if, after the cause of action accrues the debtor departs from, and resides out of the state, the time of his absence is no part of the time limited for commencing an action, the fact that an action would be barred in the state in which the debtor resided when the debt became due does not operate as a bar in Illinois if the creditor resides within that state, although under § 20 the bar would operate if neither party resided in Illinois until the bar in the other state was established.

And *Wooley v. Yarnell*, 40 Ill. App. 112, holds that under §§ 18 and 20, where one executes a note in Illinois, and then removes from the state before an action will be barred, he cannot set up the lapse of the statutory time in the state to which he removes, as § 20 applies only to causes of action which "arise" in the other state.

The earlier action of the same name in 39 Ill. App. 595, admitted that under *Hyman v. 48 L. R. A.*

Bayne, 83 Ill. 256, *supra*, and *Hyman v. McVeagh*, 10 Legal News, 157, *supra*, it would seem that an action on the note would be barred under § 20; but the point in that case was whether an action could be maintained to foreclose a mortgage securing the note.

But *Osgood v. Artt*, 11 Biss. 160, 10 Fed. Rep. 365, holds that an action on a note executed in Illinois by a resident thereof who removes after its maturity to another state, where he remains until the cause of action is fully barred therein, cannot, under § 18, be maintained in Illinois, as the provision of § 18, that the period of absence from the state after the cause of action accrues is no part of the time limited, does not apply when the full period of limitation has elapsed in the other state.

In *Collins v. Manville*, 170 Ill. 614, 48 N. E. 914, affirming 69 Ill. App. 594, it is held that under § 20 an action might be maintained in Illinois on a note executed in New York by a citizen of that state, if the action was commenced within the meaning of the Illinois statute, before the cause of action was barred in New York, although from delay in serving the summons the action was not commenced according to the laws of New York until after the bar was established.

Although an action on a note secured by mortgage on land in Illinois executed by a resident of that state may, under § 20, be barred in Illinois by the lapse of the period fixed by the statute of another state to which the mortgagor removed, an action may be maintained in Illinois for the foreclosure of the mortgage, as no right to maintain a foreclosure suit existed in such other state. *Wooley v. Yarnell*, 39 Ill. App. 595.

In *Parks v. Cadwallader*, 53 Ill. App. 236, it is held that an action to foreclose a mortgage in Illinois could not be maintained by one who subsequently removed from the state under § 20, on the ground that when construed with § 18 the provision of § 20 did not apply, as the cause of action did not "arise" in the other state.

In *Bemis v. Stanley*, 93 Ill. 230, it is held that under the Illinois limitation act of July 1, 1872, § 15, an action on a judgment of another state must be commenced within five years, unless it would be barred in a shorter time by the statute of such other state, in which case, under § 20, no action can be maintained in Illinois, even though five years have not elapsed.

Under the Illinois statute a claim against a decedent who was domiciled in another state is barred in Illinois if barred in such other state. *Wernse v. Hall*, 101 Ill. 423.

Indiana.

A cause of action which is fully barred by the laws of the place where the party resided, is barred in Indiana whether he resides in the latter state when the action is brought or is still a nonresident, under the Indiana statute of limitations, 2 *Gavin & B* 161, § 216, providing that "when a cause of action has been fully barred by the laws of the place where the defendant resided [or has resided], such bar shall be the same defense here as though it had arisen within this state." *Van Dorn v. Bodley*, 38 Ind. 402. This case was followed in *Harris v. Harris*, 38 Ind. 423.

And an action on a note executed in Indiana by a resident of that state who subsequently removed to another place, by the laws of which the action was barred, was held in *Wright v. Johnson*, 42 Ind. 28, to be barred in Indiana by the same statute.

It is stated in *Mechanics' Bldg. Assn v. Whitacre*, 92 Ind. 547, that the section was afterward amended by adding a proviso that

it should apply only to causes of action arising without the state. *Wright v. Johnson*, 42 Ind. 29.

An action cannot be maintained in Indiana on an administrator's bond executed in Maryland under the Maryland statute of limitations, limiting suits on such bonds to twelve years after their approval, although the party sought to be bound left the state of Maryland before the twelve years had elapsed, as the Maryland statute does not make any provision suspending the operation of the statutes as to non-residents and absentees, and the Indiana statute of 1852 provides that where the cause of action is fully barred by the laws of the place where the defendant "resided," such bar shall be the same defense here as though it had arisen within the state. *Maryland ex rel. Partridge v. Todd*, 1 Biss. 69, Fed. Cas. No. 9,220. Iowa.

A cause of action fully barred in the state where it arose, and in which defendant resided before the latter left the state, is barred in Iowa, although defendant had previously resided therein, under Iowa Rev. Stat. § 2746, providing that when a cause of action has been fully barred by the laws of any country where the defendant has previously resided, such bar shall be the same defense here. *Lloyd v. Perry*, 32 Iowa, 144.

One relying on such section must show that the cause of action is fully barred in such other state, and cannot unite the incomplete period in the former state with that elapsing in the latter. *Sloan v. Waugh*, 18 Iowa, 224.

One leaving another state before the lapse of time required by its laws to establish a bar cannot rely on such provision. *Petchell v. Hopkins*, 19 Iowa, 531; *Sloan v. Waugh*, 18 Iowa, 224.

That a cause of action on notes secured by mortgage is barred by the laws of a state in which the makers resided, does not bar a foreclosure action in Iowa where the land is situated, unless the right to foreclose is also barred in such other state, under such provision. *Gillett v. Hill*, 32 Iowa, 220.

Such provision cannot be relied on if the cause of action arose in Iowa, unless the bar was established before the passage of the Amendment of 1870, chap. 187, making such section inapplicable where the cause of action arose within the state. *Goodnow v. Stryker*, 62 Iowa, 221, 14 N. W. 345, 17 N. W. 506.

This case was followed in *Bradley v. Cole*, 67 Iowa, 650, 25 N. W. 849, which was an action between nonresidents to recover taxes paid, in which the court held that the bar of the statute of defendant's residence was not available in Iowa as the cause of action arose therein.

A cause of action arising in Iowa, fully barred by the laws of another state in which defendant resided, was barred in Iowa, under Iowa Rev. § 2746, and such bar was not removed by the subsequent Amendment of 1870, chap. 187, making such section inapplicable where the cause of the action arose in the state. *Thompson v. Read*, 41 Iowa, 48.

A cause of action arising in Iowa for services rendered, which is barred by the statutes of the state where the defendant has all the time resided, is barred in Iowa, under Iowa Rev. § 2746, providing that when a cause of action has been fully barred by the laws of any country where the defendant has previously resided such bar shall be available in Iowa. *Davis v. Harper*, 48 Iowa, 513.

The court in rendering this decision apparently did not consider the Amendment of 1870, 48 L. R. A.

p. 167, although the cause of action would have in fact been barred in such other state before the amendment was passed.

Kansas.

In *Swickard v. Bailey*, 3 Kan. 507, the statement is made that an action cannot be maintained in Kansas on a claim barred by the laws of another state wherein it arose, but that this was so because the 20th section of the Code so provided.

The limitations prescribed by the Kansas statutes of limitations may, under Kan. Code Civ. Proc. § 22, be reduced in some cases by the limitation laws of the state in which the cause of action arose, but there is no provision for enlarging their limitation. *Hoggett v. Emerson*, 8 Kan. 262.

Kentucky.

In *Templeton v. Sharp*, 10 Ky. L. Rep. 490, 9 S. W. 507, which is an action on a note executed in California between residents of that state, it was held that because the defendant had removed to Kentucky before the maturity of the note the California statute of limitations was not available under Ky. Gen. Stat. chap. 74, art. 4, § 19, providing that where a cause of action at law arose in another state between residents thereof, or between them and residents of another state, and by the laws of the state where the cause of action accrued an action cannot be maintained thereon from lapse of time, no action can be maintained in Kentucky.

Such section does not apply to a cause of action arising in another state between a resident of it and Kentucky sought to be enforced in Kentucky. *Labatt v. Smith*, 83 Ky. 509.

This case overrules *Allen v. Hill*, 78 Ky. 119, an action against a resident of Kentucky, to the extent that it assumes rather than decides that under such section the Texas statute would be applicable.

First Nat. Bank v. Thomas (Ky.) 3 S. W. 12, holds that where the foreclosure of a mortgage is sought in Kentucky, and the party sought to be held liable pleads the statute of limitations of Kentucky, the party seeking the foreclosure, who claims that the cause of action accrued in another state, where both parties resided, and that the statute of limitations of that state does not prevent relief, has the burden of showing such facts. No reference is made in the decision to § 19, but it is evident that the court had such statute in mind when rendering the decision.

In *Northwestern Mut. L. Ins. Co. v. Lowry*, 14 Ky. L. Rep. 600, 20 S. W. 607, the court, after quoting § 19, holds that if the action on a life insurance policy in suit issued by a Wisconsin corporation to a resident of Alabama was not barred by the Alabama statute of limitations, there was no statute barring it in Kentucky, even though there existed a statutory bar in Wisconsin.

And in *John Shillito Co. v. Richardson*, 19 Ky. L. Rep. 1020, 42 S. W. 847, it is held that under such section the Kentucky statute of limitation was no bar to an action accruing in Ohio between residents thereof, where the defendant soon after the cause of action accrued removed to New York state, so that under the laws of Ohio the claim was not barred.

In the preceding cases the court seems to have extended the provision of this section so as to make the statute of limitations of the state in which the cause of action arose applicable as well to those cases where the bar of such state had not run, as to those in which it had.

The provision of Ky. Gen. Stat. chap. 71, art. 4, § 18, that no action can be maintained

in Kentucky on a judgment barred by the laws of the state where it was rendered, does not prevent the statute of Kentucky from being a defense in an action therein, where the bar was not complete in the state where the judgment was rendered. *McArthur v. Goddin*, 12 Bush, 274.

Louisiana.

Under the Louisiana statute of March 15, 1885, p. 224, providing that whenever any judgment has been rendered between persons who reside out of the state to be paid out of the state, and the judgment "is barred" by the statute of limitations of the place where the judgment was rendered, it shall be considered as barred by prescription in Louisiana, upon the debtor, who is thus discharged, subsequently coming into the state, it is held that a partial bar of a judgment by the laws of another state, in which it was rendered, was not available in Louisiana, and that the remedy of *scire facias*, still available in such other state, was sufficient to prevent the debtor from setting up the bar in Louisiana. *Morton v. Valentine*, 15 La. Ann. 150.

And the foreign statute governs in such case only where the judgment was rendered between persons residing out of the state, to be paid out of the state, and the judgment is barred in the state where rendered before the debtor removed therefrom to Louisiana. *Walworth v. Routh*, 14 La. Ann. 201.

In *Mandeville v. Huston*, 15 La. Ann. 281, it is held that under the act of May 27, 1846, p. 161, providing that no bank or other corporation of any other state, nor any creditor under assignment or otherwise, shall, in seeking to enforce the collection of debts due by the citizens of Louisiana, exercise any right which such bank or creditor could not exercise by virtue of the laws of the state in which the bank is situated, no recovery could be had in Louisiana by the trustees of a Mississippi bank on a judgment obtained by the bank in Mississippi, where no recovery thereon could be had in Mississippi because of the statute of limitations of that state.

Maine.

An action on a note executed in Massachusetts in which the holder resided, the maker residing in Maine, is not barred by limitation in Maine under the amendment to the limitation act passed in 1885, chap. 876, providing that no action shall be brought by any person whose cause of action has been barred by the laws of any other state "while all the parties have resided therein." This is true, although under the limitation laws of Massachusetts the action would be barred. *Frye v. Parker*, 84 Me. 251, 24 Atl. 844.

Such act does not apply to a note held by a citizen of Maine at the time of its passage, so as to allow the maker to set up the bar arising in another country. *MacNichol v. Spence*, 83 Me. 87, 21 Atl. 748.

Massachusetts.

An action on a note executed in Maine, in which state the parties resided, and in which the payee has continued to reside, the maker removing to New York before an action is barred in Maine, may be maintained in Massachusetts, although an action thereon would be barred in New York, under Mass. Pub. Stat. chap. 197, § 11, providing that no action shall be brought by any person whose cause of action has been barred by the laws of any state, territory, or country "while he has resided there." *McCann v. Randall*, 147 Mass. 81, 17 N. E. 75.

Minnesota.

In *Hoyt v. McNeill*, 13 Minn. 390, 64 362, it is held that, although the defendant may, 48 L. R. A.

under Minn. Gen. Stat. chap. 66, §§ 3, 15, 16, take advantage under some circumstances, where the cause of action arose in another state, of the statute of limitations of either state, the defense of the statute of limitations of the state in which the cause of action arose was not available on a demurrer to the complaint, where such complaint did not show that there was any statute of such state limiting the time within which an action could be brought thereon on the cause of action sued on. *Mississippi*.

The provision of Miss. Code, § 2754, that when a cause of action has accrued in some other state, by the laws of which an action thereon cannot be maintained from lapse of time, an action thereon cannot be maintained in Mississippi, is not available in an action in Mississippi for animals killed in Alabama by a railroad company, operating its line in both states, as such section has in view the case of a nonresident protected by the bar of limitation of the state in which he resides who afterwards moves into Mississippi. *Louisville & N. R. Co. v. Pool*, 72 Miss. 487, 16 So. 753.

Montana.

Where a judgment is rendered in Canada, and the judgment debtor thereafter removes to Nevada, where he remains until the judgment is barred by the statute of limitations of that state, such bar is not available in an action on the judgment in Montana, under Mont. Code Civ. Proc. § 55, p. 50, providing that when a cause of action has arisen in any other state or territory, or in any foreign country, and by the "laws thereof" an action cannot be maintained against a person because of the lapse of time, no action thereon shall be commenced against him in Montana. *Chevrier v. Robert*, 6 Mont. 319, 12 Pac. 702.

Nebraska.

The bar of the statute of limitations of the state of Kansas, to which the maker of a note in Indiana removed after its execution, is available to him in an action thereon in Nebraska, under Neb. Civ. Code, § 18, providing that all causes of action which are barred by the laws of any state or territory shall be deemed barred under the laws of Nebraska. *Hower v. Aultman*, 27 Neb. 251, 42 N. W. 1039.

An action on a note executed in Nebraska by a resident thereof is barred in that state, where he subsequently removed to another state, remaining there for the full period of limitations of such other state, under Neb. Code Proc. § 21, providing that when a cause of action has been fully barred by the laws of any state where the defendant has previously resided, such bar shall be a defense in Nebraska. *Webster v. Davies*, 44 Neb. 301, 62 N. W. 484.

Nevada.

In an action in Nevada on a note executed in California but payable in Nevada the statute of limitations of the latter state governs, as Nev. Gen. Stat. § 3602, providing that when the cause of action has arisen in any other state or territory, by the laws of which no action can be maintained thereon from lapse of time, no action can be maintained in Nevada, does not apply. *Drake v. Found Treasure M. & Co.* 53 Fed. Rep. 474.

New York.

Under the express provision of N. Y. Code Civ. Proc. § 390, an action by a nonresident, on a cause of action accruing against a nonresident, is governed as to limitation by the laws of the state of defendant's residence. So held in *Fearing v. Glenn*, 38 U. S. App. 424, 73 Fed. Rep. 116, 19 C. C. A. 388, an action to re-

cover assessments in New York from a stockholder in Rhode Island.

In *Clark v. Lake Shore & M. S. R. Co.* 94 N. Y. 217, it is held that the provision of N. Y. Code Civ. Proc. § 390, making the bar of the statute of limitations of the state where defendant resided and the cause of action arose available to him in certain cases when sued in New York, does not apply, as the suit was brought before the Code of Civil Procedure took effect, and § 414 provides that the chapter in which § 390 occurs should not apply in certain cases, one of which is a case in which a person is entitled when the act takes effect to commence an action, where he commences it within two years after the Code takes effect, in which case the "provisions of law" applicable thereto immediately before the act took effect were to continue to be so applicable, notwithstanding the "repeal" thereof, the court holding that a doctrine established by judicial decision was a "provision of law" within the latter section.

Beer v. Simpson, 65 Hun, 17, 19 N. Y. Supp. 578, holds that the statute of limitations of Colorado was not available as a defense in an action in New York on a Colorado judgment, where the defendant is a resident of New York, and it does not appear when he became such, nor that plaintiff is a resident, as § 390 did not apply so as to remove the case out of the general rule that the *lex fori* governs. Ohio.

In *Worth v. Wilson*, Wright (Ohio) 162, it is held that the Ohio act of 1830, 28 O. L. 34, containing the first legal provision allowing defendants in Ohio to plead the statute of limitations of another state, did not authorize the pleading of the statute of limitations of another state in a suit brought before its passage, and that the statute of the other state was therefore not available to the defendant.

In *Gordon v. Preston*, Wright (Ohio) 341, in which the defendant, relying on the above provision pleaded the statute of limitations of New Hampshire where the note in suit was executed, the court held that such plea was not good because it did not sufficiently set out the New Hampshire statute of limitations relied on.

In *State use of Shipley v. Shipley*, 7 Ohio, pt. 1, p. 246, the court states that in the absence of a statute the *lex fori* would govern in an action on a bond executed in Maryland between parties residing there, but that the bar of the Maryland statute was available to defendant in Ohio, under the Ohio statute providing that all actions founded on contract, made between persons residing without the state at the time such contract was made, and which are, or hereafter may be, barred by the laws of the state where made, shall be and continue barred when brought in any court of Ohio.

In *Horton v. Horner*, 14 Ohio, 437, 16 Ohio, 145, the headnote states that a contract made in New York state for the payment of money in that state, the maker residing there at the time of its execution, is controlled by the laws and affected by the statute of limitations of that state, but in the opinion the reason therefor is shown to be that the Ohio statute provides that all actions founded on a contract made between parties resident without the state at the time such contract was made, and which are barred by the laws of such state, shall be barred when brought in Ohio.

Clark v. Eddy, 22 Ohio L. J. 63, holds, in an action on a covenant of warranty and against encumbrances on the land sold, that Ohio Rev. Stat. § 4990, providing that if by the laws of the state or country where the cause of action

arose the action is barred, it is also barred in Ohio, would enable the defendant to interpose the bar of the Illinois statute of limitations, although both parties resided in Ohio when the covenant was entered into, and continued so to reside.

While *Gibbons v. Ewell*, 1 Handy (Ohio) 561, which throughout the case seems to assume that the statute of limitations of Maryland where the note in suit was executed would govern, does not refer to the Ohio statute relative to the effect of the bar of limitations of another state, it is very probable that the court had such statute in mind when writing the opinion.

Pennsylvania.

The provision of the Pennsylvania act of June 26, 1895, P. L. 375, that when a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to an action thereon in Pennsylvania, is not retroactive so as to make the bar of the statute of the state where the injury sued for accrued available in an action commenced before its passage. *Dickerson v. Central R. Co.* 7 Pa. Dist. R. 104.

Nor does it apply to a cause of action on contract existing at the time of its passage, although the action was not commenced until afterwards. *Shinn v. Healy*, 23 Pa. Co. Ct. 123.

Tennessee.

An action in Tennessee on a note executed and payable in Missouri where the parties resided is governed as to limitation by the Missouri statute under Tenn. Code, § 3480, providing that where the statute of limitations of another state has created a bar to an action on a cause accruing therein while the party to be charged was a resident in such state, the bar is equally effectual in Tennessee, and in the absence of evidence as to the Missouri statute of limitations it will be presumed to be the same as that of Tennessee. *Bagwell v. McTighe*, 85 Tenn. 616, 4 S. W. 46.

But in *Kempe v. Bader*, 86 Tenn. 189, 6 S. W. 126, it is held that an action might be maintained in Tennessee on notes executed in Missouri in which state both parties then resided, where the defendant removed from the state before the cause of action was barred by the Missouri statute, as the above provision applied only where the cause of action was fully barred before the defendant's removal.

Texas.

In *Gautier v. Franklin*, 1 Tex. 732, it is held that the Texas statute of limitations of 1841, § 18, providing that no action shall be brought against any emigrant of the republic to recover a claim barred by the law of limitation of the state from which he emigrated, does not apply so as to make the bar of such other state available, unless the right of action was fully barred in such other state before emigration.

And a similar ruling was made in *Smith v. Crosby*, 2 Tex. 414.

A provision in the statute of limitation in the state where a cause of action on a note accrued, that where the statute has commenced to run it will continue to run notwithstanding intervention of any impediment which would have prevented the operation of the statute if it had existed when the cause of action accrued, has no extraterritorial force so as to make the bar of such state, which was incomplete at the time of defendant's removal, available in Texas under § 13. *Hays v. Cage*, 2 Tex. 501.

In *Thompson v. Berry*, 26 Tex. 263, which was an action to recover slaves claimed by defendant on the prescription growing out of

twenty years' possession in Louisiana, an instruction that the demand in question was not barred by the law of limitation of Louisiana was held to be proper under § 13.

The law of the state in which the note in suit was executed as construed by its courts will govern in an action in Texas in determining whether the claim has been taken out of the bar of the statute of limitations by a subsequent promise under such provision. *Bryan v. Bouton*, 10 Tex. 62.

Wyoming.

Notwithstanding the provision of the Wyoming statute that a cause of action on a judgment barred by the statute of the state in which it arose is also barred in Wyoming, the statute of such other state is not available where it appears that defendant has been absent from such other state for such a period of time that under its laws the bar of the statute is not complete, even though his absence was due to employment in the military service. *Bonnifield v. Price*, 1 Wyo. 223. J. H. H.

MICHIGAN SUPREME COURT.

Andrew BELL, *Plff. in Err.*,
v.
Village of WAYNE.

(.....Mich.....)

The lack of barriers on the side of approaches to a bridge will not make a municipality liable for injuries caused by a team going off the bank, when the roadway was wide enough for two teams to pass without difficulty, and the proximate cause of the accident was the fact that the horse became frightened and so unmanageable that the driver could not keep him within the limits of the road.

(*Montgomery and Moore, JJ., dissent.*)

(March 27, 1900.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligently permitting a highway to remain unsafe. *Affirmed.*

The facts are stated in the opinions.

Messrs. Selling & Hatch, for plaintiff in error:

The question of the duty upon the defendant to have barriers along the side of the road was for the jury, and should have been submitted to them under proper instructions.

Malloy v. Walker Twp. 77 Mich. 448, 6 L. R. A. 695, 43 N. W. 1012; *Gage v. Pontiac, O. & N. R. Co.* 105 Mich. 340, 63 N. W. 318; *Shaw v. Saline Twp.* 113 Mich. 342, 71 N. W. 642.

3 How. Stat. 1365, 1366, provides that when any public highway which passes along the bank of any watercourse shall be reduced to less than 50 feet it shall be the duty of the highway commissioner to restore it to that width.

It was a question for the jury to say whether this was such a watercourse as to bring this case within the statute.

Earl v. De Hart, 12 N. J. Eq. 280, 72 Am. Dec. 395; *Carver v. Detroit & S. Pl. Road*

NOTE.—As to liability of municipal corporation for failure to provide railings or barriers at dangerous places along a public highway, see *Malloy v. Walker Twp.* (Mich.) 6 L. R. A. 695, and *note*.
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Co. 61 Mich. 584, 28 N. W. 721, *Affirming* 69 Mich. 616, 25 N. W. 183.

When an accident happens from a negligent defect in a highway the fact that the horse was at the time uncontrollable or running away furnishes no defense to an action for the injury.

Ring v. Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; *Ehrgott v. New York*, 96 N. Y. 283, 43 Am. Rep. 622; *Ivory v. Deerpark*, 116 N. Y. 486, 22 N. E. 1080; *Kennedy v. New York*, 73 N. Y. 305, 29 Am. Rep. 160; *Allen v. Hancock*, 16 Vt. 230; *Hunt v. Pownal*, 9 Vt. 411; *Winship v. Enfield*, 42 N. H. 197; *Stark v. Lancaster*, 57 N. H. 92; *Clark v. Barrington*, 41 N. H. 48; *Bartlett v. Hooksett*, 43 N. H. 18; *Baldwin v. Greenwood's Turnpike Co.* 40 Conn. 238, 16 Am. Rep. 33; *Hull v. Kansas*, 54 Mo. 601, 14 Am. Rep. 487; *Bassett v. St. Joseph*, 53 Mo. 295, 14 Am. Rep. 446; *Pittsburgh City v. Grier*, 22 Pa. 54, 60 Am. Dec. 65; *Hey v. Philadelphia*, 81 Pa. 44, 22 Am. Rep. 733; *Kitchen v. Union Twp.* 171 Pa. 145, 33 Atl. 76; *Burrell Twp. v. Unruh*, 117 Pa. 353, 11 Atl. 619; *Yodanis v. Amwell Twp.* 172 Pa. 447, 33 Atl. 1017; *Kennedy v. Cecil County Comrs.* 69 Md. 65, 14 Atl. 524; *Baltimore & H. Turnpike Co. v. Bateman*, 68 Md. 399, 13 Atl. 54; *Joliet v. Shufeldt*, 144 Ill. 410, 18 L. R. A. 750, 32 N. E. 969; *Carterville v. Cook*, 129 Ill. 152, 4 L. R. A. 721, 22 N. E. 14; *Laron v. Page*, 48 Ill. 500; *Tallahassee v. Fortune*, 3 Fla. 26, 52 Am. Dec. 358; *Atlanta v. Wilson*, 50 Ga. 544, 27 Am. Rep. 396; *Martin v. Algona*, 40 Iowa, 393; *Byerly v. Anamosa*, 79 Iowa, 208, 44 N. W. 359; *Powder v. Strawberry Hill*, 74 Iowa, 646, 38 N. W. 521; *Miller v. Boone County*, 95 Iowa, 5, 63 N. W. 352; *Gould v. Schermer*, 101 Iowa, 582, 70 N. W. 697; *Cracfordsville v. Smith*, 79 Ind. 309, 41 Am. Rep. 612; *Boone County Comrs. v. Mutchler*, 137 Ind. 140, 36 N. E. 534; *Parke County Comrs. v. Sappenfield*, 6 Ind. App. 577, 33 N. E. 1012.

The weight of authority is certainly with the New York rule, and it seems the fairer. It has been approved, and the cases holding its doctrine have been cited with approval, in—

Ross v. Ionia Twp. 104 Mich. 320, 62 N. W. 401; *Gage v. Pontiac, O. & N. R. Co.* 105 Mich. 335, 63 N. W. 318; *Simons v. Cass Twp.* 105 Mich. 588, 63 N. W. 500; *Shaw v. Saline Twp.* 113 Mich. 342, 71 N. W. 642.

Even under the strictest of the decisions this case should have gone to the jury.

Ross v. Ionia Twp. 104 Mich. 324, 62 N. W. 401; *Languorothy v. Green Twp.* 95 Mich. 93, 54 N. W. 697.

It was for the jury to say, upon the testimony, whether plaintiff's horse was running away, or so far uncontrollable as to make the negligence of defendant a remote cause of plaintiff's injury.

St. Clair Mineral Springs Co. v. St. Clair, 96 Mich. 467, 56 N. W. 18; *Bleil v. Detroit Street R. Co.* 98 Mich. 228, 57 N. W. 117; *Ross v. Ionia Twp.* 104 Mich. 324, 62 N. W. 401; *Huge v. Pontiac, O. & N. R. Co.* 103 Mich. 337, 63 N. W. 318; *Lambek v. Grand Rapids & I. R. Co.* 106 Mich. 512, 64 N. W. 479; *White v. Riley Twp.* 113 Mich. 295, 71 N. W. 502; *Shaw v. Saline Twp.* 113 Mich. 342, 71 N. W. 642; *Babson v. Rockport*, 101 Mass. 93; *Britton v. Cummington*, 107 Mass. 347; *Wright v. Templeton*, 132 Mass. 49; *Hinckley v. Somerset*, 145 Mass. 326, 14 N. E. 166; *Harris v. Great Barrington*, 169 Mass. 271, 47 N. E. 881; *Aldrich v. Gorham*, 77 Me. 287; *Spaulding v. Winslow*, 74 Me. 534; *Houfe v. Fulton*, 29 Wis. 296, 9 Am. Rep. 568; *Olson v. Chippewa Falls*, 71 Wis. 558, 37 N. W. 575; *Yoders v. Amwell Twp.* 172 Pa. 453, 33 Atl. 107.

From the point where the ends of the bridge proper touch the road there is nothing artificial to distinguish the place of the accident from any other part of the same highway.

Traversy v. Gloucester, 15 Ont. Rep. 217; *Newcomb v. Montgomery County*, 79 Iowa, 490, 44 N. W. 715; *Tolland v. Wellington*, 26 Conn. 578; *Morland v. Mitchell County*, 40 Iowa, 304; *Nims v. Boone County*, 66 Iowa, 272, 23 N. W. 663; *Tinkham v. Stockbridge*, 64 Vt. 480, 24 Atl. 761.

Messrs. Cutchson & Stellwagen, for defendant in error:

It ought not to be left for a jury to say when barriers should or should not be provided along highways.

This court has allowed the jury to determine whether a barrier was necessary or not in cases where, if a horse was frightened, he was frightened:

1. By the condition of the highway itself. *Simons v. Casco Twp.* 105 Mich. 588, 63 N. W. 500.

2. Where something naturally calculated to frighten horses existed in or near the highway for a long time.

Ross v. Ionia Twp. 104 Mich. 320, 62 N. W. 401.

3. Also, in cases where the accident occurred without fright, through the condition of the highway itself, without any intervening cause.

Malloy v. Walker Twp. 77 Mich. 448, 6 L. R. A. 695, 43 N. W. 1012.

If the case at bar is to be ruled by *Shaw v. Saline Twp.* 113 Mich. 342, 71 N. W. 642, then the township of Nankin, not the village of Wayne, is charged with the duty of keeping the approach to the bridge in repair.

The statutes in Massachusetts and Maine 48 L. R. A.

expressly make the municipality liable for the want of railings.

Maine Stat. 1883, § 80, p. 256.

Under the decisions in this state neither the so-called Massachusetts rule, nor the New York rule, applies to the case at bar.

Agnie v. Corunna, 55 Mich. 428, 54 Am. Rep. 338, 21 N. W. 873; *Beall v. Athens Twp.* 81 Mich. 536, 45 N. W. 1014; *St. Clair Mineral Springs Co. v. St. Clair*, 96 Mich. 463, 56 N. W. 18; *Kingsley v. Bloomingdale Twp.* 109 Mich. 340, 67 N. W. 333.

Where there is proximate cause for which the municipality is not liable, there can be no recovery.

White v. Riley Twp. 113 Mich. 295, 71 N. W. 502; *Moulton v. Sanford*, 51 Me. 127; *Perkins v. Payette*, 68 Me. 152; *Hubbell v. Yonkers*, 104 N. Y. 434, 58 Am. Rep. 522, 10 N. E. 858; *Patchen v. Walton*, 17 App. Div. 158, 45 N. Y. Supp. 145; *Glacier v. Hebron*, 131 N. Y. 447, 30 N. E. 239, 82 Hun, 311, 31 N. Y. Supp. 236; *Lane v. Hancock*, 142 N. Y. 510, 37 N. E. 473; *Smith v. Kanawha County Ct.* 33 W. Va. 713, 8 L. R. A. 82, 11 S. E. 1; *Worrilow v. Upper Chichester Twp.* 149 Pa. 40, 24 Atl. 85; *Kieffer v. Hummelstown*, 151 Pa. 304, 17 L. R. A. 217, 24 Atl. 1060; *Herr v. Lebanon*, 149 Pa. 222, 10 L. R. A. 106, 24 Atl. 207.

Grant, Ch. J., delivered the opinion of the court:

The distinction, now contended for in cases of this character, was not lost sight of by the writer of the opinion in *Doak v. Saginaw Twp.* 119 Mich. 680, 78 N. W. 883. The differences between that case and this are these: In this case the banks were higher and steeper, at least on one side. In the *Doak Case* the frightened horse backed into the ditch. In the present case the backing horse was struck by the plaintiff, started forward, crossed the road, and went down the embankment. The roadbed in this case was wider than that. Here the roadbed was 17 feet wide, and in good condition. In both cases the horses were frightened, and not by anything for which the township was at fault. In the *Doak Case* it was uncertain what frightened the horse and caused him to back. In the present case it was two boys in a tree. The plaintiff lost control of his horse, so that he was unable to keep him within the traveled way, 17 feet wide. He testified that there would have been no trouble if the horse had not seen the boys in the tree. Whether this is a case where barriers should have been erected I do not deem it necessary to determine. In Massachusetts the statute expressly makes townships liable for the failure to erect barriers. What the decisions would be if their statute were like ours is at least doubtful. In *Hinckley v. Somerset*, 145 Mass. 326, 14 N. E. 166, the stone wall which formed the barrier was 2 feet high. On the outside of the wall was water 10 feet deep, the surface of which was about 8 feet below the top of the wall. The horse became frightened at some oyster boats, ran into or upon the wall, and got astride of it with his hind

legs. That case is in direct conflict with *Beall v. Athens Twp.* 81 Mich. 536, 45 N. W. 1014. It is impossible to reconcile them. In *Harris v. Great Barrington*, 169 Mass. 271, 47 N. E. 881, it was held that the roadbed, 17 feet wide, was not defective by reason of narrowness, but that there was evidence that the highway was defective for want of a sufficient railing. If, as my Brother Montgomery says, the rule has not been made entirely clear by the decisions, it undoubtedly results from the difficulty in determining when the driver has, and when he has not, lost control of his frightened horse. In the *Doak Case* the horse had become so unmanageable that the driver could not prevent his backing: Doak's counsel said in their brief: "The driver did his utmost to prevent the backing." In the present case the frightened horse was backing, was struck by the driver, and had become so unmanageable that he could not keep him within the limits of the traveled road, wide enough for two teams to pass with perfect safety. Plaintiff did his utmost to keep the horse in the road, but failed to do so. We held in *St. Clair Mineral Springs Co. v. St. Clair*, 96 Mich. 463, 56 N. W. 18, that where a horse stopped, backed over the apron of a bridge against an insufficient railing, fell into the water, and was drowned, the township was not liable. In that case there was no fright. The horse started up the bank, and backed because of too great a load. Under the contention of the plaintiff in this case, if the horse, instead of backing from an overload, had backed from fright, and the jury could find that the driver had lost only temporary control, the township would have been liable. In neither case was the township responsible for the proximate cause of the accident. What difference, in principle, between the two cases? Is it logical to say that, where the horse backs from other cause than fright, the township is not liable, but where he backs from fright it is liable, provided the jury are able to find that the driver had not lost complete control of him? There certainly is no difference in the liability between backing and shying or running down an embankment or into a ditch. In *Beall v. Athens Twp.* the horse became frightened at a log upon the side of the highway. The driver struck his horse, which jumped forward, and upset the buggy. In this case the horse became frightened, was struck, could not be kept within the highway, and went down the embankment. Where is the difference in principle or in the facts between that case and the present? Both horses went over the side of the road because their drivers were unable to keep them within the traveled way. In *Lambeck v. Grand Rapids & I. K. Co.* 106 Mich. 512, 64 N. W. 479, plaintiff's horse had run for a block, and ran into the end of a car standing in the highway. Plaintiff was unable to keep him from running the carriage against it. It was held that the horse was beyond control. In *Agnew v. Corunna*, 55 Mich. 428, 54 Am. Rep. 338, 21 N. W. 873, it was claimed that the horse was frightened at a large stone

standing in the highway between the roadbed and the gutter, turned up a side street, and upset the buggy. It was there said: "If the stone had anything to do with the action of the horse and damage to the buggy, it was by frightening the animal, and not by hurting or impeding him." If the horse in that case had shied or run into the gutter, or, running down the side of the roadbed, had caused the buggy to sway and upset, would not the rule of law have been the same? In *Bleil v. Detroit Street R. Co.* 98 Mich. 229, 57 N. W. 117, the horse was hitched, broke away, and ran into iron rails piled upon the street. If the driver had been in the buggy when the window fell, and the horse had started and run upon the rails, causing the same injury, would this court have said that the rails, and not the falling of the window, were the proximate cause of the injury, if the jury were enabled to find that the horse was not beyond control? What is the principle or rule upon which these decisions are based? It is that the primary cause of the accident is the fright of the horse, not the defect in the highway. Why should a jury be left to speculate upon the question whether the driver could have controlled his horse but for the defect in the highway? In *Langworthy v. Green Twp.* 95 Mich. 93, 54 N. W. 697, the wagon struck a log, which was from 4 to 18 inches above the roadbed, and near the center thereof. The horse had not left the traveled road, but had, for some reason which did not appear, shied a little to one side. It did not appear that the horse was running, or was going at an unsafe speed for a properly constructed roadbed. By referring to the same case in 88 Mich. 207, 50 N. W. 130, it will be seen that the plaintiff was driving at a slow trot when the log was struck.

We are not concerned with the rule in other courts, if this court has established a rule and followed it. In the cases above cited I think we have established and recognized the rule to be that a township is not liable, under our statute, for the failure to maintain barriers, where the horse leaves a traveled highway, which is in good condition and wide enough to drive upon with safety, through any cause for which the township is not responsible. When a horse has become so frightened that, under proper management, he cannot be kept within a good roadbed 17 feet wide, he is beyond control, under our decisions, and the fright, not the absence of barriers, is the cause of the accident. Upon no other rule can these decisions, in my opinion, be sustained.

I think the learned circuit judge was correct in directing a verdict for the defendant. Its reversal would, in my judgment, result in overruling the cases above cited, and approved in *Doak v. Saginaw Twp.*

The judgment should be affirmed.

Long, J., concurred.

Hooker, J., concurring:

The doctrine that a township is not liable for an injury, where, though negligent, such

negligence is not the proximate cause of the injury, has been asserted and reiterated many times by this court. Like other rules, it is invoked in many cases where its application is of doubtful propriety, and doubtless in some to which it should not be applied. It is not unnatural that minds should differ in close cases, and there is always danger that a misapplication shall make it more difficult to adhere to the rule, and easy to extend it. There is but one proper way to deal with such questions, and that is to adhere to the underlying principle, and not put too great emphasis upon similar, but not necessarily analogous, decisions. If this is done in this case, I am of the opinion that its proper solution need not be difficult. It has been several times held that where a horse, while running away, strikes an obstruction, the resulting injury is due to the running away, and not to the obstruction, because the former, and not the latter, is the proximate or moving cause of the injury. The law requires highways to be kept in condition for the ordinary uses, and it expects the driver to be in control of his horse, and does not assume to compensate those who are injured through a failure to maintain such control. The decisions do not refuse relief upon the ground that the horse was running away, but upon the ground that the uncontrolled impulse of the horse was the moving, *i. e.*, proximate, cause. Where the loss of control is due to the negligence of the town, it has been held that the township is liable, but where it is due to other causes the contrary has been usually held. We are cited to cases which hold that the mere shying of a horse is not sufficient to exonerate a township, the reason being given that shying is to be expected of a horse, and that control cannot be said to be lost if the horse is so far under the control of the driver as to be immediately stopped or brought back to the traveled way. It makes little difference whether we say that the horse was under control of the driver when he shied, or that the want of control was but momentary, and to be expected at times with any horse, from his common and known habit, and therefore an exception to the rule. In neither is ground for breaking down the rule. The case can, at most, be treated as an exception, and, though a precedent governing cases where a horse shies suddenly a little out of the beaten track, it does not follow that the exception should cover all cases, where the want of control is of short duration, or where caused from some vice or habit which cannot be said to be found in horses in general. A horse which, through fright at an object on one side of the road, leaves the traveled way, and, notwithstanding the utmost efforts of the driver, cannot be made to return to it, and ultimately crosses the highway ditch, or goes to the verge of an embankment, which slides down with him, has done something more than to merely shy. To "shy" is defined as "to start suddenly aside as if a little frightened." So, if the horse should rear, and fall against the carriage, throwing all down an embankment, or

if he should refuse to obey the driver to go forward, and back up instead, overturning the buggy against a tree in the highway, or going down an embankment, the horse is beyond control, as much as though running away, and, to my mind, much more than when merely or momentarily starting and shying. If these instances are enlargements of the adjudicated instances of shying, they are not within the exception, and, if one after another they are included within the exception, the rule will soon give way under the evolution of the exception. It is as much the duty of the citizen to drive reasonably tractable horses as it is of the community to maintain reasonably safe highways, and as much the duty of courts to hold the former to the consequences of a failure of the performance of his duty as the latter, and it is, to say the least, fairly debatable whether the doctrine of proximate cause is not a reasonable and just one. It is not yet the law that the highways must be so level and smooth that a horse cannot capsize a carriage, and provided with barriers so strong that a team cannot break them down, to the injury of the driver. Barriers may be required in some cases, as where the highway and its surroundings are of such a character as of themselves to create the danger of fright, but we may take judicial notice that barriers are usually limited to such places, and are not common along our highway ditches or causeways. The *Case of Doak* was correctly decided, in my opinion. The present case is substantially on all fours with *Beull v. Athens Twp.* The other cases are not cited, because referred to in the opinions of my brethren. I think the judgment should be affirmed.

Montgomery, J., dissenting:

This is an action for personal injuries claimed by the plaintiff to have been caused by the negligence of the defendant. The injuries were sustained by the plaintiff, May 17, 1892, upon a highway within the corporation limits of defendant. The highway in question crosses the River Rouge a few rods north of the place where plaintiff was injured, and the approach to the bridge crossing the river is elevated at the point where the accident happened 8 feet 10 inches on the west side, the descent being absolutely perpendicular, and 8 feet 6 inches on the east side, the descent being a slope above the surrounding country. The approach to the bridge is the same width as the bridge where they join, but a few yards north of the bridge, and at the point where the plaintiff was injured, it is but 17 feet in width. There was no barrier on either side of the approach, to prevent travelers from going off the road down the embankment on either side. There was a plum tree a little west of the roadbed, at a point where the approach to the bridge ended, and a few rods south of the place of the accident, towards the main part of the village. Upon the morning in question, Andrew Bell, the plaintiff, was driving along the said road towards the main part of the village, on his

way to the home of his sister-in-law, Susan Bell, who lived on the other side of the village. He was driving his horse, which he described as gentle, and not given to shying, attached to his buckboard. He had crossed the bridge, and was upon the southern approach to the same, at a point nearly abreast of the piling, when the horse caught sight of some boys in the plum tree picking blossoms, and thereupon started to back. The buckboard wheels were cramped, so that, if the horse continued to back, Bell would have been thrown out backwards, down the abrupt descent upon the west side, there being no barrier to arrest the progress of the vehicle. To save himself from this danger, he struck the horse one blow with the whip, and in obedience to the blow the horse started forward at a slow pace (about half as fast as a man can walk). The loosely-packed earth on the east side of the approach gave way, the horse slipped down the east side of the approach, and plaintiff was thrown out, and sustained the injuries complained of. The evidence shows that the horse was not running away; that, at the most, he took but three or four steps back, and that plaintiff did not lose control of the horse; and that the horse had his own way but momentarily, at the most.

The foregoing is the statement of facts, taken in the main from plaintiff's brief, and we find that there is testimony tending to support the statement in every particular. As the circuit judge directed a verdict for the defendant, the inquiry is whether, assuming this state of facts, the plaintiff was entitled, under any theory, to take the judgment of the jury as to the question of defendant's liability. The learned circuit judge, while stating that he was unable to reconcile all that this court has said in various cases, regarded it as *stare decisis* that the presence of those boys in the plum tree and the consequent fright of the horse was the proximate cause of the injury to plaintiff, and directed a verdict for defendant. We think it must be conceded that this court has not made the rule in this class of cases entirely clear. It is equally true that other courts, in dealing with the broad question of proximate cause, as well as in dealing with the more restricted one as to what is to be deemed an intervening cause, such as relieves a municipality from responsibility from defective highways, have encountered difficulties at every turn, and have not always dealt with the question logically. See this illustrated in cases commented on by Judge Cooley (Cooley, Torts, pp. 76, 77, and also at pages 622 *et seq.*). At page 70, Judge Cooley states one of the rules relating to the subject as follows: "If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury though the intervention of other causes, which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent. But, if the original wrong only becomes injurious in

consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause." In a very able discussion of the causal connection, by Mr. Wharton, at section 104 of his work on Negligence, he reaches the conclusion that where a township is negligent in failing to keep its highway in repair, and an injury results from a frightened horse striking against a defect in the way from which, if he had not been frightened he could have been safely guided by his driver, the municipality is not liable to an action, for reasons fully stated by him. He adds, however: "This mode of reasoning is inapplicable if the evidence is that the horse, being driven with due care, simply shies to an extent common and probable among horses, and that when shying he deflects a few feet from the beaten track, and then strikes against a defect and is hurt. In this case, as the shying is part of the natural and probable habits of horses, and does not, when only producing a slight change of course, make the horse unfit for use in a public road, the road-making authorities are liable for the consequences." See also Wharton, Neg. § 983. There are many cases which, as pointed out in *Langworthy v. Green Twp.* 95 Mich. 93, 54 N. W. 697, hold to a still stricter rule of liability, and maintain that the fact that the horse is frightened, and at the time uncontrollable, does not relieve the municipality of liability. We think the better rule is that quoted from the text of Wharton on Negligence, and this rule we find abundantly supported in those jurisdictions in which the stricter rule, above adverted to, does not prevail. The case of *Wright v. Templeton*, 132 Mass. 49, is very similar in its facts to the present. The plaintiff's horse was frightened by the lantern of some boys fishing. The horse backed up, cramped the wagon, and carried it against the railing, which gave way. Defendants preferred a request that, if the horse backed a distance of 20 or 30 feet, the plaintiff could not recover. The court held that this request was properly refused. It was held, in effect, in *Hinckley v. Somerset*, 145 Mass. 326, 14 N. E. 166, that the township might be liable if the driver did not lose control of the horse, or lost control for a moment only, and either regained control, or would have regained it but for a defect in the way. See also *Harris v. Great Barrington*, 169 Mass. 271, 47 N. E. 881. The case of *Olson v. Chippewa Falls*, 71 Wis. 558, 37 N. W. 573, is quite similar in its facts to the present. It was said: "The team instantly and suddenly became frightened by some suddenly appearing object, . . . and as instantly and suddenly backs the wagon over the embankment. . . . Such a movement of any team would not be at all uncommon under such circumstances, and so the city might have anticipated when it left the steep bank of the creek so unguarded in such a place." The distinction contended for in the present case was again noted by this court in *Gage v. Pontiac, O. & N. R. Co.* 105 Mich.

335, 63 N. W. 318, and recognized in *Simmons v. Casco Twp.* 105 Mich. 588, 63 N. W. 500, but was clearly lost sight of in *Doak v. Saginaw Twp.* 119 Mich. 680, 78 N. W. 883. In the last case a motion for a rehearing should be granted. We think the plaintiff was entitled to go to the jury.

It is contended in this court that the highway at this point was a part of the bridge. It does not appear that the point was made on the trial, and, as the facts are not as fully developed as they may be on another trial, we do not discuss it. The judgment should be reversed, and a new trial ordered.

Moore, J., concurred.

Rehearing denied.

Anton RIBICH

v.

LAKE SUPERIOR SMELTING COMPANY,
Plff. in Err.

(.....Mich.....)

1. A charge that a master should instruct his employee as to the nature, force, and probable effect of an explosion of a pot of molten metal taken by the employee from a blast furnace, in case it comes in contact with water, and that it is not sufficient merely to instruct that an explosion is likely to follow such contact, is not erroneous as requiring more than a warning that an explosion would be likely to cause injury.

2. Fifteen thousand dollars is excessive to award an employee as damages for injuries resulting in severe pain for several months and in the loss of an eye, where he is not wholly incapacitated for labor and the interest on the amount at 4 per cent would produce an income greater than his earning capacity before the injury.

(Grant, Ch. J., dissents.)

(March 27, 1900.)

ERROR to the Circuit Court for Houghton County to review a judgment in favor of plaintiff in an action brought to recover damages for negligence which resulted in injury to plaintiff. *Affirmed upon condition.*

Statement by Grant, Ch. J.:

The defendant, in connection with its business of refining, smelting, and manufacturing copper, operated cupolas in which mineral copper was smelted. From these cupolas molten copper, mixed with slag, was run into cone-shaped pots at a temperature of about 2,500°. The pots are about 2 feet in diameter at the top, and taper to about 6 inches at the bottom; are made of cast iron, about an inch thick all round; are put on two wheels, one on each side. The axle is built onto the rim of the pot on each side of the wheel. The pot is swung in the middle, with a handle about 4 feet long riveted to the axle, so that the whole can be pushed or

pulled by the handle. The pots are dumped by throwing the handle up and over, when the cone slides out upon the ground. The fall of the cone is only the thickness of the rim. About fifteen or sixteen pots are used in each cupola. Two men are employed in wheeling them away and dumping them. When the molten matter is ready to be drawn, each man takes a pot, wheels it to the spout, and, when it is filled to the required height, wheels it outside the building, leaves it, takes an empty pot, and returns. The second man does likewise. The pots are arranged in a semicircle. It takes from two to five minutes to fill a pot. Plaintiff testified that it took about five minutes. Fourteen or fifteen pots were used on the day of the accident. The time required for the slag to "set" so as to be safe to dump was fixed by the experienced witnesses at from eight to thirty minutes. The one wheeling out the next to the last pot would set it at the outer end of the line, take the pot at the other end, which had been cooling, dump it, and take it back to be filled. The one taking out the last pot would wheel it to the first place made vacant by the removal of the first pot taken. He would then take the next pot, dump it, and return to the cupola to refill it. Thus the process would continue until the cupola was empty. They commenced to fill the pots about 7 o'clock A. M., and commenced to dump them about 8 o'clock. The accident occurred about 9 o'clock, according to plaintiff's testimony. The snow had been cleared away from a space where the pots were to be dumped. There was some ice, which was, to some extent, melted by the hot cones. When plaintiff dumped the fifth or sixth pot, it exploded, and the molten matter flew into his eyes and upon his person. The only serious injury was to his eyes. He claims, as the result of the accident, that the sight of one eye was entirely destroyed, and the other seriously injured. He was an Austrian, about twenty-three years old; had been in this country about five years; began work for the defendant in December, 1896, and was injured on the 11th day of January following. He had been engaged in wheeling slag from the furnaces before, but this was his first run of emptying copper and slag mixed. The negligence charged is the failure to instruct him as to the dangerous nature of the work, and the liability of such molten copper and slag to explode on coming in contact with water, and "as to the danger that might result from an explosion." Plaintiff testified that he had no warnings or instructions, but that he simply did as his coemployee who had been engaged at this work for a long time, did. Several witnesses on the part of the defendant testified to informing him of the danger, and to instructing him how to do the work. Defendant also gave evidence to show that he dumped the wrong pot, contrary to instructions. Plaintiff recovered verdict and judgment for \$15,000.

Mr. A. R. Gray for appellant.

Mr. A. T. Streeter for appellee.

NOTE.—For duty of master as to warning servants of dangers, see *James v. Rapides Lumber Co.* (La.) 44 L. R. A. 33, and note.
48 L. R. A.

Montgomery, J., delivered the opinion of the court:

I am not able to agree with my Brother Grant that there was error in the instruction given. In *Smith v. Peninsular Car Works*, 60 Mich. 501, 27 N. W. 662, it was said that where extraordinary risks are or may be encountered, if known by the master, or should be known by him, the servant should be warned of them, their character and extent, so far as possible. I do not think the instruction which imposed upon the defendant the duty of explaining to plaintiff "the nature, purpose, and probable effect" of such an explosion as would be likely to occur from the contact of water with mixed copper and slag, fairly construed, goes beyond the doctrine of the *Smith Case*. It is a reflection upon the intelligence of the jury to assume that they would construe this language as imposing upon the defendant the duty of foretelling the precise result of any possible explosion. What the language fairly imports is that it was the duty of the defendant to warn the plaintiff that the explosion would be of such a nature and such force as would be likely to cause injury, and, so construed, the instruction is within the rule of the *Smith Case*. I agree with my Brother Grant that we should not evade the responsibility of ordering a new trial where a substantial injustice is clearly shown.

In my judgment, the verdict in this case is excessive, and a new trial should be awarded unless the plaintiff will remit from the verdict all in excess of \$10,000.

The other Justices concurred with Montgomery, J.

Grant, Ch. J., dissenting:

1. The court instructed the jury as follows: "And I charge you, on that subject, whenever there is any hidden, unusual, or latent danger connected with any work, the law imposes a duty on the master or employer, of informing the workmen or employee of the danger. It is not enough to tell him that the work is dangerous, but the particular danger must be pointed out and explained. In this case, if you find from the evidence that there was danger of an explosion from the contact of water with the mixed copper and slag, then I charge you that that was a danger that was known, or that should have been known, to the smelting company, and that it was its duty to warn Ribich, the plaintiff, of that danger, and to explain to him the nature, force, and probable effect of such an explosion." The objection urged against this instruction is that it was not the duty of the defendant to explain to plaintiff the "nature, force, and probable effect" of such an explosion. It is insisted that the defendant's duty was fully performed when it had instructed him how to do his work, had informed him that it was dangerous to dump the pots before they were sufficiently set, and that an explosion would likely result. The question is one of great practical importance in the law of negligence. The only authorities cited in the briefs of

either counsel are *Smith v. Peninsular Car Works*, 60 Mich. 501, 27 N. W. 662, and *Fox v. Peninsular White Lead & Color Works*, 84 Mich. 676, 48 N. W. 203. I must assume that counsel have made a careful examination of the authorities, and are unable to cite any which afford much light upon the question. After as careful an examination as I have been able to make, I do not find the question now presented discussed to any extent, or any authoritative declaration of law applicable to this case. In the *Smith Case* the plaintiff was engaged in carrying a ladle of molten iron from one building to another, whereby it became necessary to walk over ground covered with ice and water. The occurrence was an unusual one, made necessary by the fact that the fires had gone out in one room. No instructions or information were given as to the danger of an explosion if the molten iron came in contact with the water. The court below had directed a verdict for the defendant, evidently upon the ground that the plaintiff had assumed the risk. The language of the majority opinion does not go to the extent of the instructions now complained of. It is as follows: "Where extraordinary risks are or may be encountered, if known to the master, or should be known by him, the servant should be warned of these, their character and extent, so far as possible." It was further said that it was the duty of the defendant to inform the plaintiff "somewhat of its dangerous character." This language falls far short of holding that it was the duty of the defendant in that case, in addition to instructing him how to do the work, and notifying him that there was danger of an explosion if the molten iron was spilled upon the ice, to also inform him of the "nature, force, and probable effect" of the explosion. The *Fox Case* simply holds that it was the duty of the defendant to notify his employee, the plaintiff, of the danger and effect of inhaling Paris green, and the precautions necessary to prevent the injurious effect. Neither of these cases supports the soundness of the instruction now under consideration. The evidence from several witnesses on the part of the defendant was very strong that plaintiff was fully instructed how to do the work, the reason for thus doing it, and the danger of an explosion if the pots were dumped before the contents were sufficiently "set." Under this instruction, the jury may have found that this was true, and have based their exceedingly large verdict upon the failure of the defendant to further notify the plaintiff of the "nature, force, and probable effect" of the explosion. It is not quite clear to me what a jury would understand by the "nature" of an explosion, or why its nature, whatever it is, should have been explained to the plaintiff. If, by the information conveyed, he knew that there was danger of an explosion, what more notice did he require for his own protection? Should he have been told that it might kill him, it might burn him, it might put out his eyes, or it might blow off a limb? All these things, and others, might be the effect of the explosion. This would depend upon its se-

verity, which might be different on different occasions. If a fireman employed about an engine is informed of the liability to explosion if the boiler is not kept sufficiently supplied with water, and is told what to do, in watching the water gauges, etc., is the employer bound to inform him further of the "nature, force, and probable effect" of an explosion? Must he inform him that pieces of the engine may strike him and hurt him or kill him, and that steam will scald him? Where one employed to use kerosene or naphtha in lighting lamps or running engines is instructed how to do the work, and warned that an explosion may occur if the work is not done as directed, is it the duty of the employer to further inform him of the "nature, force, and probable effect" of an explosion, and that it will burn or injure him in other ways? It may safely be granted, and is undoubtedly true, that even an educated man would not be aware of the danger of an explosion from dumping this hot slag upon water or ice. But when he is notified that, if it is dumped there under those conditions, an explosion will follow, would not the average man understand that he was liable to be injured? Is it not a matter of common knowledge that explosions are liable to cause injury? In dumping this slag, plaintiff was obliged to stand close to, and almost over, the cone as it went upon the ice. Did he need to be told that if there was an explosion the hot metal would fly, and he was liable to be injured? There could not be an explosion without something flying. The only thing there was to fly was the molten slag, or the outside that had become somewhat hardened. The authorities are uniform, and hundreds of cases could be cited, holding that the law is that "if there are latent defects or hazards incident to an occupation, of which the master knows, or ought to know, and which the servant, from ignorance or inexperience, is not capable of understanding and appreciating, it is the master's duty to warn or inform the servant of them." *Consolidated Coal Co. v. Haenni*, 146 Ill. 620, 35 N. E. 162; *Beach*, Neg. § 359; 1 *Shearm. & Redf. Neg.* § 203, note 5; *Wharton*, Neg. § 206. Reasonable notice, in order that the employee may, by the exercise of due care, avoid the danger, is all that the law requires. Is not the law satisfied when the party has been fully instructed how to do the work, and is told that there is danger of explosion, and his work requires him to be in close proximity to the explosion if it occurs? I think it is. If the employee desires any further information before assuming the risk, he should be held to make further inquiries. The question of instruction and warning has arisen more frequently in the employment of infants, where the employer is held to more explicit instructions and warnings than in the case of adults. 1 *Shearm. & Redf. Neg.* § 40. The authorities are meager in determining what is a sufficient warning. Much must depend upon the circumstances of each case, in applying the rule. In *Powers v. Calcasieu Sugar Co.* 48 La. Ann. 483, 19 So. 455, plaintiff accidentally

stepped into a ditch of hot water in the evening, and was severely scalded. Defendant's manager testified that he told the plaintiff "to be careful, there was a ditch along side, and the floor was uneven." It was held that the admonition was insufficient. The court said, "If an admonition of danger is relied on, it must be timely and explicit," and held that the defendant should have informed him that the water in the ditch was hot. Where the negligence alleged was in permitting plaintiff to pick up sodium and potassium and put them into water, without warning him of their dangerous and explosive nature when placed in contact with water, it was held that proof of knowledge of facts which would naturally suggest it was all that the law required. *Hill v. Meyer Bros. Drug Co.* 140 Mo. 433, 41 S. W. 909. The ordinary man knows the effect of dangerous elements. It is the common education of all. He knows that hot water and steam will scald; that fire will burn; that water will drown; that explosions of powder, dynamite, oil, naphtha, and molten matter will injure. When he is instructed how to handle these elements in order to avoid explosion, and is informed that there is danger of explosion if he does not handle them as instructed, he has received from his employer all the warning that the law requires. I think that the instructions were erroneous.

2. It is earnestly urged by counsel for defendant that the court should have directed a verdict for it, because the evidence conclusively shows that if plaintiff, as he testified he did, took the pot in its order and dumped it, no explosion could possibly have occurred. This would require us to find that it took a half hour or more to fill the pots, while there is testimony that it took less time. It would also require us to leave out of consideration an important piece of testimony from Mr. Franz, plaintiff's coemployee and a witness for defendant, that he told plaintiff just before the explosion: "You had better leave them set a little while. They are too hot." The court explicitly instructed the jury that, if this witness so informed plaintiff, he could not recover. The contention upon this point cannot prevail.

3. Plaintiff alone testifies that no instructions or warning were given him. Several witnesses testify that they were given. Counsel strenuously urged that the preponderance of evidence is so great in favor of defendant that this court should grant a new trial, under a statute now authorizing this court to review motions for a new trial. Inasmuch as, in my judgment, the case should be reversed on other grounds, we need not consider this question.

4. Complaint is made that the verdict is excessive, and that for this reason the court should have granted a new trial. The statute above referred to imposes the duty upon us to review this question, and, however unpleasant this duty may be, we have no right to escape it. Plaintiff lost the sight of one eye. His left eye had been seriously injured by another accident. His own physician testified that he had 30 per cent of normal sight

of his left eye. He was in a hospital four weeks because his physician told him that he did not want to attend the case or be responsible unless he was removed to some place where he could get better care and nursing than he could get in his boarding house. He testified that he was better at the trial than when he came out of the hospital. "I was suffering from pain then nearly as bad as at the time I got burned. I could not tell the pain I suffered, but it was about two months after that. I was suffering about two months after that very bad. I have had pain since the two months." He is not deprived of all ability to labor. Soon after leaving the hospital he worked for defendant several months, helping teamsters, and earned from \$15 to \$20 a month. Before he was hurt he earned \$1.60 per day. At 4 per cent the \$15,000 would yield an annual income of \$600,—\$100 more than he could earn before he was injured. At 3 per cent it would yield \$450, which is within

\$50 of what he could earn if he labored every working day in the year, including holidays. Counsel cite *Retan v. Lake Shore & M. S. R. Co.* 94 Mich. 146, 53 N. W. 1094, where a verdict for \$30,000 was sustained. That case was decided before the statute above mentioned was passed. Besides, there is no parallel between that case and this. In that case by the loss of both feet the plaintiff was a helpless cripple for life, and was deprived entirely of the power of locomotion. I cannot avoid the conclusion that the verdict is excessive. As the verdict should be set aside upon other grounds, and as the testimony upon another trial may be different, it is unnecessary to determine upon this record by how much we think the verdict should be reduced, or a new trial ordered. On the question of excessive verdicts, see *Standard Oil Co. v. Tierney* (Ky.) 14 L. R. A. 677, note.

Judgment should be reversed, and new trial ordered.

MISSISSIPPI SUPREME COURT.

STATE of Mississippi *ex rel.* Monroe McClurg, Attorney General, *Appt.*,

v.

Robert POWELL.

(.....Miss.....)

1. The question whether a proposed constitutional amendment is in conformity with the constitutional requirements in constituting but a single amendment, and also the question whether the proposition has received such a majority as the Constitution prescribes for its adoption, are judicial questions for the courts to decide, notwithstanding the fact that the legislature has declared that the amendment is adopted and that it is a part of the Constitution of the state.

2. A proposed constitutional amendment providing in one proposition for the election of all judges, and fixing their terms of office, as well as for the division of the state into circuit and chancery court districts, with party nominations by districts, while it proposes to repeal Const. §§ 145, 149, 151-153, one of which provides for the appointment of supreme court judges, another fixes their term of office, another provides for appointments to fill vacancies, another for the division of the state into circuit and chancery court districts, while the other provides for the appointment of circuit and chancery court judges,—is void for lack of conformity to Const. 1890, § 273, requiring amendments, if more than one shall be submitted at one time, to be submitted in such manner and form that the people may vote for or against each amendment separately.

3. A majority of all the electors voting at the election for any purpose, and

not simply all who vote on the adoption or rejection of the constitutional amendment submitted at a general election, is necessary for the adoption of a constitutional amendment, under Const. 1890, § 273, requiring a majority of the qualified electors voting."

(1900.)

A PPEAL by relator from a judgment of the Circuit Court for Lincoln County in favor of defendant upon an information against him for unlawfully exercising the functions of a civil public officer. *Affirmed.*

The facts are stated in the opinion.

Mr. Monroe McClurg, Attorney General, for appellant:

The rules prescribed by the Constitution are all for the guidance of the legislature, and from the very nature of the thing the legislature must be exclusive judge of all questions to be measured or determined by those rules.

The governor and the courts have no authority to speak at any stage of this proceeding between the sovereign and the legislature, and when the matter is thus concluded it is closed, and the judiciary is as powerless to interfere as the executive.

Green v. Weller, 32 Miss. 650, 33 Miss. 735, Appx.: *Ex parte Wren*, 63 Miss. 512, 56 Am. Rep. 825.

Those who do not vote thereby agree to abide the majority of those who do. This applies to those who voted for candidates in this election, and did not vote on this question, just as it applies to those who did not vote at all.

Hawkins v. Carroll County Supers. 50

NOTE.—As to the sufficiency of majority to carry an election, see also *note* to *Lawrence v. Ingersoll* (Tenn.) 6 L. R. A. 310; *People ex rel. Wells v. Berkeley* (Cal.) 23 L. R. A. 838; *State ex rel. Little v. Langille* (N. D.) 32 L. R. A. 48 L. R. A.

A. 723; *Belknap v. Louisville* (Ky.) 34 L. R. A. 256; *State ex rel. Douglas County v. Correll* (Neb.) 39 L. R. A. 513; and *Montgomery County Fiscal Court v. Trimble* (Ky.) 42 L. R. A. 738.

Miss. 735; *Constitutional Prohibitory Amendment*, 24 Kan. 700; *Green v. State Bd. of Canvassers* (Idaho) 47 Pac. 259.

There is but one proposition stated to the electors,—to agree by ballot to the election of all judges, or to signify an unwillingness to agree, by voting against it.

One amendment means one subject, and that subject here is an elective judiciary; all else is detail and necessarily follows the change on the general subject; or, if it does not necessarily follow, may properly follow as an incident to such subject and for the purpose of carrying the subject into full effect.

State ex rel. Hudd v. Timme, 54 Wis. 318, 11 N. W. 785; *State ex rel. Morris v. Mason*, 43 La. Ann. 840, 9 So. 776; *State ex rel. Adams v. Herried*, 10 S. D. 109, 72 N. W. 93.

Mr. E. F. Noel, also for appellant:

Every word employed in the Constitution is to be expounded in its plain, obvious, and common-sense application, unless the context furnishes some ground to control, qualify, or enlarge it.

1 Story, Const. 451; Black, Interpretation of Laws, 28.

It is not required that a proposed constitutional amendment be limited to a single subject, as is required of statutes, nor that the subject be expressed in its title. Indeed, no title is necessary to a proposed amendment, and if one is inserted it may be disregarded.

6 Am. & Eng. Enc. Law, 2d ed. p. 906.

The insertion of amendments in the Constitution is confided to the legislature according as it "shall appear" to themselves. The decision of no question of mixed law and fact, such as this, has ever been revised or annulled by any judicial department. On the contrary, the judiciary of every state of the United States have uniformly declared that such judgment of the other co-ordinate department to which the Constitution had intrusted the question was conclusive, and its revision not within the judiciary province.

Ex parte Wren, 63 Miss. 512, 56 Am. Rep. 825; *Hunt v. Wright*, 70 Miss. 298, 11 So. 608; *Green v. Weller*, 32 Miss. 650, 33 Miss. 735, Appx.; *Vicksburg & M. R. Co. v. Lowry*, 61 Miss. 102, 48 Am. Rep. 76; *Luther v. Borden*, 7 How. 1, 12 L. ed. 581; *Hawkins v. The Governor*, 1 Ark. 570, 33 Am. Dec. 351; *People ex rel. Sutherland v. The Governor*, 29 Mich. 320, 18 Am. Rep. 92; *Dennett, Petitioner*, 32 Me. 508, 54 Am. Dec. 603; *Miles v. Bradford*, 22 Md. 184, 85 Am. Dec. 643; *Miller v. Johnson*, 92 Ky. 595, 15 L. R. A. 528, 18 S. W. 522; *Taylor v. Beckham*, 178 U. S. 548, 44 L. ed. —, 20 Sup. Ct. Rep. 890, 1009.

There is nothing in common acceptance, the dictionaries, or the law, that gives any technical meaning to "amendment."

All that was intended to be guarded against was a submission of a series of amendments together, on different and unrelated matters, for in that way the whole Constitution would be revised, in all its departments, by one vote for or against, and 43 L. R. A.

constitutional conventions be forever dispensed with.

The different subject-matters dealt with in one amendment need not be interdependent or indivisible; and it is largely within legislative discretion; and the legislature is "not compelled to submit, as separate amendments, the separate proposition necessary to accomplish a single purpose."

State ex rel. Hudd v. Timme, 54 Wis. 318, 11 N. W. 785; *State ex rel. Morris v. Mason*, 43 La. Ann. 840, 9 So. 776; *State ex rel. Adams v. Herried*, 10 S. D. 110, 72 N. W. 93.

Mr. A. J. McLaurin, also for appellant:

Section 273 is mandatory, and should be strictly construed.

The mandate of the sovereign was directed to the legislature alone, and it alone was answerable to the sovereign as to whether the mandate had been faithfully executed.

Koehler v. Hill, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609; *Green v. Weller*, 32 Miss. 650, 33 Miss. 735, Appx.; *Ex parte Wren*, 63 Miss. 537, 56 Am. Rep. 825; *Vicksburg & M. R. Co. v. Lowry*, 61 Miss. 102, 48 Am. Rep. 76.

The judiciary had no power to decide whether the legislature had properly performed any duty or executed any power conferred by the Constitution. Every controversy must be determined somewhere, and when one department was designated another could not interfere.

Worman v. Hagan, 78 Md. 152, 21 L. R. A. 720, 27 Atl. 616; *Collier v. Frierson*, 24 Ala. 110; *People ex rel. Sutherland v. The Governor*, 29 Mich. 329, 18 Am. Rep. 89.

"If it shall appear" means to the legislature.

State v. Swift, 69 Ind. 513; *State, Bentley, Prosecutor, v. Sippel*, 25 N. J. L. 530;

Mr. R. H. Thompson, for appellee:

Section 273 of the Constitution, providing the mode and manner of its amendment, was mandatory, and no change of the fundamental law is valid which is not passed in strict compliance with its terms. The question whether an amendment has been passed is necessarily a judicial one; it is judicial in its nature.

State v. McBride, 4 Mo. 303, 29 Am. Dec. 636; *State v. Swift*, 69 Ind. 505; *Collier v. Frierson*, 24 Ala. 108; *Westinghausen v. People*, 44 Mich. 265, 6 N. W. 641; *University of North Carolina v. McIver*, 72 N. C. 76; *State ex rel. Hudd v. Timme*, 54 Wis. 318, 11 N. W. 785; *Koehler v. Hill*, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609; *State, Bott, Prosecutor, v. Wurts* (N. J.) 45 L. R. A. 251, 43 Atl. 744, 881.

The amendments were improperly submitted. In the face of the Constitution they submit five separate amendments to be voted on as if but one: One, the election of supreme court judges; two, the change of the terms of the supreme court judges; three, the election of circuit judges; four, the election of chancellors; five, the nomination of circuit judges and chancellors by districts.

State ex rel. Hudd v. Timme, 54 Wis. 318, 11 N. W. 785; *State ex rel. Morris v. Mason*,

43 La. Ann. 500, 9 So. 776; *State ex rel. Adams v. Herried*, 10 S. D. 109, 72 N. W. 93.

Mr. Frank Johnston, also for appellee:

The amendment proposed is not in the form proposed by § 273 of the Constitution, being submitted as one amendment, while it should have been submitted in the form of several amendments, so that the different changes proposed could have been voted on separately by the people at the election.

Section 273 of the Constitution requires that when more than one amendment is proposed to be adopted, each must receive a majority of all the votes cast at the election, and not merely a majority of the votes of the electors who voted on the question of the amendment.

The construction and application of § 273 of the Constitution is not one that has been confided exclusively to the legislature. This is a judicial question, for the ultimate decision of the courts. It is for the courts to finally determine the question whether a constitutional amendment has been adopted in accordance with the requirements of the Constitution.

Spangler v. Jacoby, 14 Ill. 297, 58 Am. Dec. 571; *Miller v. Goodwin*, 70 Ill. 600; *Miller v. State*, 3 Ohio St. 475; *State ex rel. Loomis v. Moffitt*, 5 Ohio, 358; *People ex rel. Drake v. Mahaney*, 13 Mich. 481; *Southwark Bank v. Com.* 26 Pa. 446; *McCulloch v. State*, 11 Ind. 430; *Berry v. Baltimore & D. Point R. Co.* 41 Md. 446, 20 Am. Rep. 69; *People ex rel. Scott v. Chonango Supers.* 8 N. Y. 317; *Fordyce v. Goodman*, 20 N. S. 1; *State ex rel. Atty. Gen. v. Platt*, 2 S. C. N. S. 150, 16 Am. Rep. 647; *Jones v. Hutchinson*, 43 Ala. 721; *Moody v. State*, 49 Ala. 115, 17 Am. Rep. 28; *Opinion of the Justices*, 35 N. H. 579; *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640; *Smith v. Garth*, 33 Ark. 17; *Fowler v. Peirce*, 2 Cal. 165.

Mr. J. A. P. Campbell, also for appellee:

The question is a judicial one, and the court is not concluded by the action of the legislature.

Green v. Weller, 32 Miss. 650; *Sproule v. Fredericks*, 69 Miss. 898, 11 So. 472; *Collier v. Frierson*, 24 Ala. 100; *Livermore v. Waite*, 102 Cal. 113, 25 L. R. A. 312, 36 Pac. 424; *Kochler v. Hill*, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609; *State v. Swift*, 69 Ind. 505; *Miller v. Johnson*, 92 Ky. 589, 15 L. R. A. 524, 18 S. W. 522; *State. Bott, Prosecutor, v. Wurts* (N. J.) 45 L. R. A. 251, 43 Atl. 744, 881; *Westinghausen v. People*, 44 Mich. 265, 6 N. W. 641; *Secombe v. Kittelson*, 29 Minn. 555, 12 N. W. 519; *State v. McBride*, 4 Mo. 305, 29 Am. Dec. 636; *University of North Carolina v. McIver*, 72 N. C. 76; *United States v. Ballin*, 144 U. S. 1, 36 L. ed. 321, 12 Sup. Ct. Rep. 507; *Green v. Brown*, 146 Ind. 1, 44 N. E. 805.

The amendments are plural and were submitted as one, when they should have been separated.

State ex rel. Morris v. Mason, 43 La. Ann. 590, 9 So. 776; *State ex rel. Hudd v. Timme*, 54 Wis. 318, 11 N. W. 785; *State ex rel. Adams v. Herried*, 10 S. D. 109, 72 N. W. 93. 48 L. R. A.

Whitfield, Ch. J., delivered the opinion of the court:

Three questions are presented for solution: First. Is the question whether the proposition submitted to the voters for adoption as part of the Constitution be one amendment or more than one amendment a judicial question; and, likewise, is the question whether such proposition received the majority prescribed by the Constitution as essential to its valid adoption a judicial question? Second. If these questions are judicial questions, was the proposition one amendment, or two or more amendments; and, as necessarily involved herein, was the proposition submitted in the way the Constitution imperatively requires it to be submitted? Third. Was the proposition adopted by the majority of qualified electors prescribed by the Constitution as essential to the adoption of an amendment thereto?

As to the first proposition, we are clear that both questions are judicial questions. This is placed beyond cavil, as the settled doctrine of this state, by *Green v. Weller*, 32 Miss. 650, and *Sproule v. Fredericks*, 69 Miss. 898, 11 So. 472. The same response is given by an overwhelming weight of authority from other states. In the 6th volume of the American and English Encyclopedia of Law, at page 908, 2d edition, it is said: "The courts have full power to declare that an Amendment to the Constitution has not been properly adopted, even though it has been so declared by the political department of the state." And for this statement the following authorities are cited: *Collier v. Frierson*, 24 Ala. 100; *State v. Swift*, 69 Ind. 505; *Kochler v. Hill*, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609; *State ex rel. Hahn v. Young*, 29 Minn. 474, 9 N. W. 737; *Secombe v. Kittelson*, 29 Minn. 555, 12 N. W. 519; *State v. McBride*, 4 Mo. 303, 29 Am. Dec. 636; *State ex rel. Hudd v. Timme*, 54 Wis. 318, 11 N. W. 785; James on Constitutional Convention, 4th ed. 617. We have carefully examined each of these authorities, and they clearly and fully support the statement of the text; the case from Missouri being especially emphatic, as is also the case from Alabama. In this last case the court says: "We entertain no doubt that, to change the Constitution in any other mode than by a convention, every requisition which is demanded by the instrument itself must be observed, and the omission of any one is fatal to the amendment. . . . The Constitution is the supreme and paramount law. The mode by which amendments are to be made under it is clearly defined. It has been said that certain acts are to be done, certain requisitions are to be observed, before a change can be effected. But to what purpose are these acts required, or these requisitions enjoined, if the legislature or any other department of the government can dispense with them. To do so would be to violate the instrument which they are sworn to support; and every principle of public law and sound constitutional policy requires the court to pronounce against every amendment which is shown not to

have been made in accordance with the rules prescribed by the fundamental law." The learned editors of *Lawyers' Reports Annotated*, in the note to *Miller v. Johnson* (Ky.) 15 L. R. A. 524 expressly say that the question of lawful adoption of an amendment to the Constitution is a judicial question. Judge Handy and Chief Justice Smith clearly treat the question as a judicial question, in *Green v. Weller*, and language could hardly be clearer or stronger in support of this view than is that of Chief Justice Smith in that case. All that is said in *Ex parte Wren*, 63 Miss. 512, 56 Am. Rep. 825, on this subject, is pure *dictum*, the question not being before the court. The true view is that the Constitution, the organic law of the land, is paramount and supreme over governor, legislature, and courts. When it prescribes the exact method in which an amendment shall be submitted, and defines positively the majority necessary to its adoption, these are constitutional directions mandatory upon all departments of the government, and without strict compliance with which no amendment can be validly adopted. Whether an amendment has been validly submitted or validly adopted depends upon the fact of compliance or non-compliance with the constitutional directions as to how such amendments shall be submitted and adopted, and whether such compliance has in fact been had must, in the nature of the case, be a judicial question. It may be that where the Constitution creates a special tribunal, and confides to that tribunal the exclusive power to canvass the votes and declare the result, and make the amendment part of the Constitution, as a result of such declaration, by a proclamation, or otherwise prescribed method fixed for such tribunal by the Constitution, then the action of such special tribunal would be final and conclusive, whether its action be judicial or not. This is so because it was competent for the sovereign people, speaking through their Constitution, so to provide. Such provision was made in Maryland and Maine, and the three cases cited from those states rest expressly upon the fact that the Constitutions did so establish such special constitutional tribunal, clothed with exclusive power in the premises. In *Dennett's Case*, 32 Me. 508, 54 Am. Dec. 602, it was made the exclusive duty of the governor and council to open and compare votes returned, and the effort was (the governor and council declining to do so) to compel them, by mandamus, so to do. So, in *Miles v. Bradford*, 22 Md. 170, 85 Am. Dec. 643, it appears, at page 183, Am. Dec. page 644, that the 8th section of the act under review (Acts 1864, chap. 5) required the returns of the votes on the adoption or rejection of a Constitution to be made to the governor, and it was made his duty to count the vote and ascertain the result, and, by his proclamation to the people of the state, finally declare the fact whether the Constitution had been adopted or not. In this case, also, the effort was made, by mandamus, to control the discretion of the executive, as is seen from the 48 L. R. A.

opinion in chief, at page 185, Am. Dec. page 645, and from the concurring opinion of Bartol, J., at page 186, Am. Dec. page 646. In both of these cases the court, of course, held that it was not competent for the court, by mandamus, to compel the executive to act, or to direct him in what mode his discretion should be exercised in the matter intrusted exclusively to him. It is to be noted that Bartol, J., in the last case cited, thought the action of the governor under that particular statute, even, was subject to review. So, in *Worman v. Hagan*, 78 Md. at page 164, 21 L. R. A. 716, 27 Atl. 616, it is shown that it was made the duty of the governor to make publication of the bills which propose amendments to the Constitution, and the votes cast for and against the amendments were to be returned to him; and it was then provided that, if it should appear to him (the governor) that a majority had voted in favor of the amendment, he should, by his proclamation, declare that the amendment had been adopted by the people, and it was expressly provided that thenceforth it should become a part of the Constitution. It is perfectly obvious that the provisions of the Maine and Maryland Constitutions are wholly unlike § 273 of the Constitution of 1890. Those Constitutions did create the governor and council in one, and the governor in the other, a special tribunal to count the vote, canvass the returns, declare the result, and, upon its appearing to such tribunal that a majority did vote for the amendment, so to declare by proclamation to the people. Another case referred to is *State ex rel. Larabee v. Barnes*, 3 N. D. 323, 55 N. W. 883. But it is manifest from reading pages 323, 324 (bottom of one and top of the other) 3 N. D. and page 883, 55 N. W. that § 8 of the enabling act there required a separate vote on the Amendments to the Constitution, and that the facts as to that vote should be shown to the President of the United States, with a statement of the votes for and against the Constitution, and each specific proposition so separately submitted, and that the President, from these data, was required to determine whether or not the Constitution was republican in form, and whether or not the requirements of the enabling act had been complied with, and, if so, he was further required to issue his proclamation admitting the state, as a state, into the Union. Here, again, the matter was confided to the President, the act conferring upon him exclusive power in the premises. Counsel mistakes the case of *State v. Swift*, 69 Ind. 505, as can be seen from page 513 of the report. He says that the court did not go into the question, but held that, the governor having issued his proclamation, the matter was *res judicata*. What the court said was *res judicata*, at page 513, was the action of the governor and secretary of state under an act of the general assembly of 1873, —not the matter then before the court, into which last matter the court did examine, treating it as a judicial question, manifestly. Our constitutional provisions create no special provision to determine whether amend-

ments have been validly submitted or validly adopted. It is not said that "if it shall appear" to the legislature, upon which erroneous assumption is builded the argument counter to our view. Plainly and manifestly, the language "if it shall appear" means simply if it should be made manifest or evident; if it should be the fact that, etc. But whether it is a fact is a judicial question, determinable by the courts. The case of *Luther v. Borden*, 7 How. 1, 12 L. ed. 581, so much relied upon by counsel, was a case of two opposing governments, each claiming to be lawful; and it was said in that case that, if a state court should come to the conclusion that the government under which it acted had been put aside and is placed by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question. Here there is no question of opposing governments, or as to whether this court exists, so as to be able to pronounce a judgment, and the case of *Luther v. Borden* is of no aid in the solution of this case on its facts. See *note*, page 524, 15 L. R. A.

The Constitution can be amended in but two ways,—by the people assembled in a constitutional convention, or by observing the constitutional method marked out in § 273 of the Constitution of 1890. When the latter mode of amending the Constitution is sought to be followed, the conditions upon which alone the amendment can become a part of the Constitution are precisely prescribed in said § 273. It is the mandate of the Constitution itself, the paramount and supreme law of the land, that such amendment cannot become part of the Constitution unless two facts exist: First, unless such amendment or amendments should be submitted in the mode pointed out; second, unless such amendment or amendments should be adopted by the majority prescribed. These two conditions are facts which must exist in truth and in reality, and not simply be declared to exist by the legislature whether they do exist or not. The legislature is not given the power, as a special tribunal, to count the votes, canvass the returns, declare the result, and make the amendment part of the Constitution by proclamation. All that it does, all that it can do, is, in the first instance, to propose the amendment or amendments to the people for their vote in the way the Constitution directs. It is for the people, and the people alone, to say, by the majority prescribed in the Constitution, whether they adopt or reject the proposed amendment or amendments. Amendments which are adopted owe their vitality to the action of the people, primarily; that action to be had in accordance with the method prescribed in § 273. The legislature simply proposes an amendment in the first instance, and that is absolutely all that that legislature has to do with the matter. The people then act, and the next succeeding legislature, not the next session of the legislature proposing the amendment, is authorized to insert the amendment as a part of the Constitution, if the former leg-

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islature shall have validly submitted it, and the people shall have validly adopted it. The legislature, in what it has to do, acts ministerially, as the agent of the people, through the provisions of § 273, in first proposing and afterwards inserting the amendment; but the people cannot vote effectually upon an amendment unless it shall have been submitted in the mode pointed out, and the vital things are the existence of the facts named, submission in conformity with § 273, and adoption by the majority therein prescribed, upon which facts or conditions the vitality of the amendment itself—its right legally to be written and inserted into the Constitution—depends. The best-considered case we have seen on this subject is *State, Bott, Prosecutor, v. Wurts* (N. J.) 45 L. R. A. 251, 43 Atl. 744, 881. Speaking of the proposition that the question here is not a judicial question, the court says: "That such a proposition is not true seems to be indicated by the whole history of jurisprudence in this country." The court then reviews numerous decisions, all of which have been cited in the argument here, properly distinguishing *Worman v. Hagan*, 78 Md. 152, 21 L. R. A. 716, 27 Atl. 616. The court says, with great force: "If a legislative enactment which may be repealed in a year, or an executive act which affects only a single individual, cannot be allowed to stand if it contravenes the Constitution, *a fortiori* a change in the fundamental law, which is much more permanent, and affects the whole community, should not be permitted to take place in violation of constitutional mandates." Chief Justice Beasley put the pith of the whole matter in one sentence, saving in *State ex rel. Werts v. Rogers*, 56 N. J. L. 490, 610, 23 L. R. A. 354, 28 Atl. 726, and 29 Atl. 173: "When the inquiry is whether the legislature, or any other body or officer, has violated the regulations of the Constitution, it is entirely plain that the decision of that subject must rest exclusively with the judicial department of the government." That is the whole of it, resulting from the supremacy of the Constitution as the paramount law of the land,—supreme over all departments of the government.

As to the second proposition, we are satisfied that the proposition submitted to the voters contained at least four separate amendments. The sections proposed to be repealed, to wit, §§ 145, 149, 151-153, relate to separate matters. Section 145 deals alone with the supreme court, as does said § 149. Section 153 deals with the judges of the circuit courts and of the chancery courts. Section 151 deals with the method of filling vacancies in the supreme court. Section 152 deals with circuit and chancery court districts. It will thus be seen that the sections of the Constitution of 1890 sought to be repealed treat separately of the supreme court and supreme court judges, and of the judges of the circuit and chancery courts. Section 177, relating to vacancies in the offices of circuit judges or chancellors, and the method of filling them, where the vacancy occurs during the recess of the senate, was wholly

overlooked by the proposed amendments. It might well be that many voters might have been willing to vote for the election of circuit judges and chancellors who would be unwilling to vote for the election of supreme judges, and that many voters might have been willing to vote for the election of all judges, and yet wholly unwilling to vote for party nominations, by districts, of judges to be voted for over the whole state. Whether an amendment is one or many clearly must depend upon the nature of the subject-matter covered by the amendment. If the propositions are separate, one in no manner dependent upon the other, so that a voter may intelligently vote for one and against the other,—one being able to stand alone, disconnected wholly from the others,—then such amendments are many, and not one: are severable, and not a unit; are complete each in itself, and not each a part of an interdependent scheme; and such, manifestly, are the amendments in this case. A voter might have chosen to vote for the election of circuit judges, and not for the election of chancellors; and one might have chosen to vote for the election of both circuit judges and chancellors, and yet not for the election of supreme judges; one might have been willing to vote for the election of all judges, and yet not willing to sanction by his vote a scheme for party nomination, by districts, for judges to be voted for by electors of the entire state, such as proposed against one or more; and one amendment as in these amendments. And an elector might have exercised his choice between these four amendments, voting for one or more and to the election of circuit judges or chancellors or supreme judges might have been adopted and the others rejected, and our constitutional scheme remain perfectly symmetrical and harmonious. And so the people could have adopted the amendments providing for the election of all the judges, and rejected the scheme propounded for party nominations by districts, and such action would have been perfectly intelligent; and these three amendments could have been written into the Constitution without the other, which is not essential to any one of the three amendments. The argument is wholly fallacious which seeks to save this method of submission by saying that all of the amendments relate to the judicial department of the government. If that argument were correct, then the mere fact that amendments, no matter how many, and no matter how absolutely independent each of the other, relate to the legislative department, will permit all to be submitted as one, and so as to the judicial department, and so as to the executive department. Whether amendments are one or many must be solved by their inherent nature,—by the consideration whether they are separate and independent each of the other, so as that each can stand alone without the other, leaving the constitutional scheme symmetrical, harmonious, and independent on that subject, and not upon the mere blanketing of a name, such as "amendments relating to the judicial

department," or "amendments relating to the executive department" or to "the legislative department." Nothing could save these amendments, unless the fact that they relate to the same general broad subject of the judicial department could save them, and this is utterly in the face of reason and principle.

Three cases are cited by counsel as showing the oneness of this alleged amendment: *State ex rel. Hudd v. Timme*, 54 Wis. 318, 11 N. W. 785; *State ex rel. Adams v. Herried*, 10 S. D. 120, 72 N. W. 93; *State ex rel. Morris v. Mason*, 43 La. Ann. 590, 9 So. 776. In the Wisconsin case, at page, 336, 54 Wis., and page 791, 11 N. W., the court says: "In order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes, not dependent upon or connected with each other. Tested by this rule, the propositions submitted to the electors contained but one amendment." The purpose there, as stated, was to change from annual to biennial sessions of the legislature; and incidental and dependent upon this was the proposition to change the tenure of office of members of the assembly from one to two years, and to change the compensation of the members. The court said: "If they must be submitted separately, why must they? Certainly they should either both be defeated or both adopted. Why, then, should the people be permitted or compelled to vote upon each separately?" This conclusion shows that that court itself would have held, where the amendments were not such that all would have to be defeated or all adopted, that they were separate amendments; but it is further to be noticed in that case that great stress was laid upon the fact that all the departments of government had for a long period of time construed the question of the adoption of such amendments as the court construed it in that case. Here there has been no such uniform action of the departments of government. In the South Dakota case it is perfectly manifest that the proposed amendment was but one amendment. It abolished certain trustees of the university, and established one board of control for all educational institutions of the state supported by state taxation. It was clearly a single proposition, which stood or fell as an entirety. And yet even in that case the supreme court hesitated before declaring it one amendment. In the Louisiana case the proposition was to charter a lottery, upon its paying, as a consideration for its being chartered, to various charitable institutions, named sums of money. There were a great many incidental provisions and regulations auxiliary to the great, controlling scheme, to wit, the establishment of a lottery, all of which were manifestly only auxiliary to, and adjutory of, the proposition for the establishment of a lottery. The decision is manifestly correct. The whole scheme stood or fell together, and was manifestly one in design and purpose. These authorities therefore are of no value

in the determination of the question whether the proposition here submitted to our voters embraced one amendment or more than one amendment. The question whether, there being several amendments, they were submitted so that the voters could vote separately on each, was fundamentally vital. Says the supreme court of California (*Oakland Paving Co. v. Hilton*, 69 Cal. 489, 11 Pac. 8): "When a mode is thus established and ordained, it must be followed. The people of a state may impose a limit upon their own power, and when this is done by the Constitution it must be regarded as much a portion of the paramount law, and as obligatory on the whole people, as any other portion of the Constitution. If we do not so hold, we would sanction revolution and violence, and place lawlessness on a level with law. The majority of the people, according to law, having adopted the Constitution, with a mode of amendment in it, we must regard it as a solemn declaration to the minority in the state, as binding as a compact with such minority, that the majority, however large or overwhelming, will never exercise its irresistible power, its *vis major*, to change the law of its organization as a government in any other way. We hold it to be sound law that a Constitution adopted as was the present Constitution of the state of California is not lawfully changed by the votes of every elector in the state, unless in the mode provided in it. . . . The majority in favor of the change may be so irresistible in its physical power as to command the forced acquiescence or unwilling consent of an inconsiderable minority, but nevertheless a change of the Constitution so brought about, contrary to its provisions, would be lawless, revolutionary, and unconstitutional, and it would be the duty of this court, in obedience to the oath which its members have taken, so to declare it, in favor of any litigant who should invoke its judgment in the course of regular procedure, though the sole litigant invoking its aid and power should constitute the nonconsenting minority. If it did not so declare, the organic law would not afford that protection and refuge which it was intended to afford." See also what is said in this case at pages 502, 503, 60 Cal. and page 14, 11 Pac. The necessity for greater deliberation and strictness of procedure in respect to the adoption of constitutional amendments than that which applies as to the passage of acts of the legislature is pointed out with great clearness in *State v. Foraker*, 40 Ohio St. 692, 693, 6 L. R. A. 422, 23 Atl. 491. See also what is said by Justice Brewer in the *Prohibitory Amendment Cases*, 24 Kan., at page 712. Judge Brewer very strongly says in 24 Kan., at pages 711, 712, speaking of the part that the legislature plays when the constitutional requirements have not been obeyed: "It lacks the sanction of law, is a disregard of constitutional methods and limitations, and should be taken as a request for a change, rather than as a change itself. But notwithstanding this, legislative action is simply a determination to submit the question to popular decision. It is in no sense final. No number of legislatures and no amount of legislative action can change the fundamental law. This was made by the people, who alone can change it. The action of the legislature in respect to constitutional changes is something like the action of a committee of the legislature in respect to the legislative disposition of a bill. It presents, it recommends, but it does not decide. . . . It is the legislative action which is considered in determining whether the law has been constitutionally passed, and it is the popular action which is principally to be considered in determining whether a constitutional amendment has been adopted." We therefore hold, and so declare, that there were at least four amendments submitted to the people in this proposition, and that for that reason the amendments were not submitted in accordance with § 273 of the Constitution, and, notwithstanding the action of the legislature in inserting them in the Constitution, are null and void and form no part of said Constitution.

On the third proposition, we are satisfied that the majority required by § 273 of the Constitution of 1890 for the adoption of a constitutional amendment must be a majority of all the electors voting at the election.—not simply all voting on the adoption or rejection of the constitutional amendment submitted. A consideration of the history of § 273 in our Constitution demonstrates this beyond all controversy. In the Constitution of 1817, found in Hutchinson's Code, p. 35, this provision reads, as to this point: "If it shall appear that a majority of the citizens of the state voting for representatives have voted for a convention," etc. In the Constitution of 1832 (Hutchinson's Code, p. 51) as to this point, the section reads: "Public notice thereof shall then be given by the secretary of state, at least six months preceding the next general election, at which the qualified electors shall vote directly for or against such change, alteration, or amendment; and if it shall appear that a majority of the qualified electors voting for members of the legislature shall have voted for the proposed change, alteration, or amendment, then it shall be inserted by the next succeeding legislature as a part of this Constitution, and not otherwise." Note the language "and not otherwise." The Constitution of 1869 (Code 1871, p. 667, art. 13) as to this point reads: "If it shall appear that a majority of the qualified electors voting for members of the legislature shall have voted for the proposed amendments," etc. The Constitution of 1890, § 273, reads: "Whenever two thirds of each house of the legislature shall deem any change, alteration, or amendment necessary to this Constitution, such proposed change, alteration, or amendment shall be read and passed by a two-thirds vote of each house, respectively, on each day, for three successive days. Public notice shall then be given by the secretary of state, at least three months preceding an election, at which the qualified electors shall vote directly for or against such change, al-

teration, or amendment; and if more than one amendment shall be submitted at one time, they shall be submitted in such manner and form that the people may vote for or against each amendment separately; and if it shall appear that a majority of the qualified electors voting shall have voted for the proposed change, alteration, or amendment, then it shall be inserted by the next succeeding legislature as part of this Constitution, and not otherwise." It will be noticed that the Constitution of 1890 omits, after the word "voting," the words "for members of the legislature;" and the enrolled section of the Constitution, in the secretary of state's office, shows that there should be a comma after the word "voting" in § 273, as it now stands. The significant fact thus stands out, like a mountain in the landscape, that for the whole period of time from 1817 to 1890, the Constitution of the state having been four times changed during such period (a period of seventy-three years of state history), the people of this state, speaking through their sovereign instrument, the Constitution, had uniformly declared that no majority of electors less than a majority of those voting for members of the legislature (which election would bring out, it was presumed, the largest number of electors) should avail to change the organic law of the land. That law reaches with its protection everyone in the state. Unlike an act of the legislature, which may or may not be general, its effectiveness is universal. Its potency reaches in its power the territorial limits of the whole state, and protects all rights of life, liberty, and property thereunder. This charter of our liberties, this ark of the covenant, the people for seventy-three years had said should not be lightly touched or carelessly changed. That law expressly provided that such change could be effected only by a vote of a majority of all votes for members of the legislature. How did this clause, "for members of the legislature," come to be dropped? It was dropped, simply and only, because sessions of the legislature were then, and were thereafter to be, quadrennial. In view of this fact the framers of the Constitution wisely foresaw that if one legislature had to propose an amendment, and the succeeding legislature had to insert it, if a constitutional amendment could only be submitted when members of the legislature were to be voted for there would result a positive inhibition of an election on the question of adopting a constitutional amendment, except at intervals of at least every four years, and it might very likely occur that a period of eight years might intervene between the submission of an amendment and its insertion in the Constitution. That so long a period of time should be allowed to stand in the way of a demand for a change in the Constitution made exigent by some great public necessity was wholly unreasonable. It might be that a constitutional amendment ought to be submitted at a special election held for that purpose only. The public necessity might be such that, not waiting for a special elec-

tion, such amendment should be submitted at some regular election for state officers, or at a congressional election. The time for holding an election on the question of adopting a constitutional amendment was not vital. The majority by which the public policy of the state had always declared such amendments could alone be adopted was vital. Time could be fixed to suit the convenience of the voters. The great fundamental condition—the requisite majority—was to remain essentially unaltered. It would be imputing to the wise framers of the Constitution of 1890 the greatest folly to suppose that they meant to reverse the policy of this state for seventy odd years as to the majority necessary to adopt a constitutional amendment, when the real purpose of the omission of the words "for members of the legislature" lies on the very surface of the investigation, and was manifestly, as stated, the result alone of the fact that sessions of the legislature were then quadrennial. If an election should be held to determine alone whether the Constitution should be amended or not, a majority of the electors voting would in such case necessarily be a majority of those voting for or against the adoption of the amendment. Clearly, therefore, this consideration in no wise affects the soundness of our holding that whether or not the vote on a constitutional amendment occurs on a day when state officers are also voted for, there must be a majority of all the electors voting that day for anything, to make valid the adoption of the amendment, as is expressly held in *Stebbins v. Grand Rapids Super. Ct. Judge*, 108 Mich. 698, 66 N. W. 594. The court said: "We see nothing absurd, however, in the legislature providing that at a special election a majority of the votes should control, while at a general election a majority of all the votes cast at the election should control. There might have been in the legislative mind the very best of reasons for such provisions."

Nothing is gained by referring to the words, "an election at which the qualified electors shall vote directly for or against such amendment." The very same words ("directly for or against such amendment") occur in the same provisions in the Constitutions of 1869 and of 1832. Nor do the words "an election" mean, as alleged, a special election. If that construction were correct, then every constitutional amendment would necessarily have to be submitted at some special election called for that purpose alone: yet for seventy-odd years the policy of the state had been exactly the reverse. That policy of the state was never to submit a constitutional amendment except at an election for members of the legislature, for the reason that at such elections for members of the legislature the fullest possible vote would be polled. The Constitution framers of 1817, 1832, and 1869 correctly thought that the best way to secure a full vote was not by submitting an abstract proposition for a change in the organic law at a special election, but at an election when friends or others in whom voters might be

interested as candidates for the legislature should be chosen. This was an eminently wise and common-sense view, founded on good reason. "An election" simply means any election, whether it be a special election, or a regular election for state officers, or a congressional election. Electors voted directly for or against an amendment under the Constitutions of 1832 and 1869. Also, the dropping of the words "the next general" before the word "election," from § 273 of the Constitution, and the substituting for these words "an election," were made necessary solely because of the fact that sessions of the legislature were quadrennial. Prior to the Constitution of 1890 the electors would vote at an election directly for or against, and it then required a majority of the qualified electors voting for members of the legislature at that general election to adopt the amendment. Now qualified voters at an election special or general, at which they vote, vote directly for or against such amendment; but it requires a majority of all the qualified electors voting at that election, whether special or general, no matter for what officers or for what things or propositions they may vote. The number to be ascertained, so as to find what a majority of that number was, is the number of all the qualified electors who vote at the election,—who vote at that election, no matter for what they vote,—keeping up the uniform policy of this provision of the Constitution. This Constitution provides that not simply a majority of the qualified electors voting for members of the legislature should be required, but that a majority of all the qualified electors voting that day at that election, special or general, should be required. This might require a larger number of voters to adopt a constitutional amendment than would constitute a majority of the electors voting for members of the legislature. It cannot require less than such a majority. So that it is perfectly obvious that the policy of this state through all the days of statehood was, under the Constitution of 1890, not only maintained, but absolutely strengthened. It is not enough now that a majority of electors voting for legislators shall vote for the amendment. The adoption of such an amendment requires a majority of all the qualified electors voting for any purpose whatever. This construction conserves the policy the state manifested by these provisions in three Constitutions and by universal usage before and since the war, and conserves the great principle which imperatively demands that the great organic law of the state, its Constitution, supreme and paramount over every interest, shall never be altered or changed except upon the maturest judgment, and by a majority sufficient to warrant the conviction that the change has met the approval of intelligent freemen. Such is the view deduced from a history of this section, the public policy of the state as declared by this section in its various forms in the different Constitutions from 1817 to 1890, and from the construction of the several clauses of § 273 itself. It may be added 48 L. R. A.

that this would be entirely sufficient to dispose of the case, since it is admitted that these amendments did not receive a majority of all the qualified electors voting at the election.

Little aid can be gathered from the decisions of other states construing their particular clauses in their constitutions providing for amendments to their constitutions,—little aid, that is, of direct authority,—since a decision from another state would only be a persuasive authority, even where it was rendered in construction of a clause or clauses in its Constitution identical with like clause or clauses of our Constitution. But the overwhelming weight of authority adopts our view on this proposition also. In the *Case of Prohibitory Amendments*, 24 Kan. 707, the clause is, "if a majority of electors voting on said amendments," etc. Of course there was no room for doubt on that sort of a clause,—that only a majority of the electors voting on said amendments was required. There are many cases of propositions to remove courthouses and change county sites, to get franchises, and to vote bonds, etc., as to which there have been many conflicting decisions. Such decisions are of very little value in the solution of this question. *State ex rel. Little v. Langlie*, 5 N. D. 594, 32 L. R. A. 723, 67 N. W. 958, was a county-site case. *State ex rel. Durkheimer v. Grace*, 20 Or. 161, 25 Pac. 382, was another county-site case. It is to be remarked that both of the cases quote *Gillespie v. Palmer*, 20 Wis. 544,—a case thoroughly repudiated by many courts, and of no authority. See, specially, the criticism of this case in *Stebbins's Case*, 108 Mich. 695, 66 N. W. 594, in which it is shown that it has been overruled in Wisconsin (*Bound v. Wisconsin C. R. Co.* 45 Wis. 579); Chief Justice Ryan characterizing it as "a reproach to the court as judgments proceeding upon policy rather than upon principle." The case of *State ex rel. Larabee v. Barnes*, 3 N. D. 319, 55 N. W. 883, goes upon the fact that the vote upon the constitutional amendment was, by the provision of law therein controlling, made a wholly separate and special election, though occurring on the same day with an election for officers. Being made a special election, of course a majority of electors voting on the question of adopting the constitution would control. The case of *Marion County Comrs. v. Wislley*, 29 Kan. 40, is a purely local case, about a hedge bounty submitted to the people of a county. The distinction between a local election and this sort of a state election on the adoption of a constitution is too obvious for comment. Our view as to the majority required for the valid adoption of a constitutional amendment is directly and clearly supported by the following cases: *State v. Foraker*, 46 Ohio St. 692, 6 L. R. A. 422, 23 N. E. 491; *State ex rel. Litson v. McGover*, 138 Mo. 193, 39 S. W. 771; *State v. Swift*, 60 Ind. 503; *Tecumseh Nat. Bank v. Saunders*, 51 Neb. 801, 71 N. W. 779; *Bayard v. Klinge*, 16 Minn. 252, Gil. 221; *Stebbins's Case*, 108 Mich. 693, 66 N. W. 594,—and

many others in briefs of counsel. In the Nebraska case it was held that it required a majority of the highest aggregate number of votes cast, whether for an officer or for an amendment. In *State v. Swift*, 69 Ind. 520, the distinction was pointed out between the reasons for requiring a different majority to elect an officer and to adopt a constitutional amendment,—a distinction which the framers of the Constitution of 1890 evidently had in mind when they provided, as they have done, that the majority now required to amend the Constitution must be a majority of all the qualified electors voting, whether such majority be equal to or larger than a majority of all the qualified electors voting for members of the legislature. All the statements to be found in different decisions touching the doctrine that electors absenting themselves from an election, and those present and not voting for some candidate for every office, or on every proposition submitted, are held to assent to the action of those who do vote, are not applicable to a case like this, which is governed by a constitutional standard, as to the necessary majority, expressly defined in the constitution itself; that being, as stated, that the requisite majority shall be a majority of all the qualified electors voting at the election for any purpose or for any officer, as held in *Stebbins's Case*, 108 Mich. 609, 66 N. W. 594. Manifestly, when the Constitution itself, in § 273, expressly declares that no amendment shall be adopted except where it shall be a fact that it received at the election a majority of all qualified electors voting, we have a positive rule prescribed and a fixed standard set up, and nothing short of strict compliance with the rule, or of a majority measuring up to that standard, will avail to change the organic law.

There is one other most important consideration, and that is that the members of the constitutional convention of 1890 used language with the greatest precision when talking about the majority required to accomplish different ends. In § 259 it is provided: "No county seat shall be removed, unless such removal be authorized by two thirds of the electors of the county voting therefor: but when the proposed removal shall be towards the center of the county it may be made when a majority of the electors participating in the election shall vote therefor." Section 260 provides: "No new county shall be formed unless a majority of the qualified electors voting in each part of the county," etc. Section 101 provides: "The seat of government of the state shall be at the city of Jackson, and shall not be removed or relocated without the assent of a majority of the electors of the state." It is perfectly idle to contend, in the face of all these different provisions of §§ 259, 260, 101, and 273, that the members of the constitutional convention of 1890 (very many of them the ablest lawyers in this or any other state) did not carefully use, with exact precision, words apt to convey the different and distinct meanings they had in view in the adoption of these different provisions. See the

forceful reasoning of the supreme court of Missouri in *State ex rel. Litson v. McGowan*, 138 Mo. 193, 39 S. W. 771, along this line. There are other authorities, which we have not thought it necessary to cite at length. There was but one election. It is a complete fallacy to argue that, because the constitutional amendments were submitted and voted on at a general election, the election was separate, and that these were two in number. There was but one election, held at the same time and place, though officers were voted for, and these amendments were voted for or against. The ballot used was a single ballot, on which was printed, along with the names of the candidates, the amendments, with directions to vote for or against them in one body. In the case of *Tecumseh Nat. Bank v. Saunders*, 51 Neb. 802, 71 N. W. 779, it is shown that votes were deposited for and against the amendments in boxes used for receiving ballots thus cast, all over the state: that these votes were canvassed separately; and that the whole number of votes so cast was 122,000, of which 84,000 were for and 37,000 against. Speaking in round numbers, but 217,000 votes were cast for governor. And the contention was that it was a separate election as to the amendments. See page 803, 51 Neb., and page 780, 71 N. W. But the court held that there was but one election. That was a far stronger case for the idea that it was a separate election, than this one. Here there was no separate deposit of ballots touching the amendments, in separate boxes, and no separate canvass of such ballots. The whole conduct of the election shows it to have been one election.

One final observation: We are not embarrassed in this case, as some of the courts whose decisions we have discussed were embarrassed, by the fact that a construction different from ours has been uniformly acted upon for a long period of time by all the departments of government, and that rights have grown up under such different constructions. The governor of this state, foreseeing the evil effects to come from long delay, and the confusion which would be introduced by waiting for years, it might be, until the validity of these amendments should be otherwise presented, wisely determined to have this question settled now, in advance, finally and authoritatively, by this, the court of last resort in this state. This action saves the people of this state the very great embarrassments which would certainly have attended a delay of the settlement of this much-vexed question. This court recognizes the importance of the co-ordinate legislative department of the government. It has the highest regard for the legislature as a co-ordinate branch of the government, and for its members individually. It is one of the very ablest legislative bodies that has ever assembled in this capital. We do not seek a jurisdiction not imposed upon us by the Constitution. We could not, if we would, escape the exercise of that jurisdiction which the Constitution has imposed up-

on us. In the particular instance in which we are now acting, our duty to know what the Constitution of this state is, and, in accordance with our oaths, to support and maintain it in its integrity, imposes upon us a most difficult and embarrassing duty,—one which we have not sought, but one which, like all others, must be discharged when the hour comes. The action of the court below is in accordance with the views we have announced. It declared, and we now declare, that for the reason that the said amend-

ments were not submitted to the voters in the state in accordance with the provisions of § 273 of the Constitution of 1890, and because these amendments were not adopted at said election by a majority of all the qualified electors voting at said election, as required by said § 273, the said amendments are null and void, and form no part of the Constitution, and that all the sections of the Constitution which they sought to repeal remain in full force and effect.

Affirmed.

NEW YORK COURT OF APPEALS.

Re Will of Isabella ANDREWS, Deceased.

(162 N. Y. 1.)

An instrument is not subscribed at the end thereof, as required by statute to constitute a valid will, where it consists of four pages in one sheet folded lengthwise down the middle, with the formal opening and a portion of the bequests on the first page of the sheet, another portion on the third page, which is marked page 2, while the remainder and the signature are on the second page, which is marked page 3, there being nothing to connect the portions on the third page with those above the signature.

(February 27, 1900.)

A PPEAL by claimants from an order of the Appellate Division of the Supreme Court, Second Department, affirming a decree of the Surrogate's Court for Kings County refusing to admit to probate the will of Isabella Andrews, deceased. *Affirmed.*

The facts are stated in the opinion.

Messrs. G. G. Reynolds and F. Reynolds, for appellants:

The end of an instrument naturally means where it leaves off; the close of the writing; not necessarily the end of any particular piece of paper.

The different parts of a will need not be physically connected, provided they are connected by their internal sense, or by a coherence and adaptation of parts.

Schouler, Wills, § 284, note 5.

Looking at the evil intended to be guarded against by the statute, abstractly considered, there is not as much danger of a fraudulent alteration of the will by this arrangement as if the will had been so short as to occupy only half of the first page, there leaving a long blank between the writing and the printed closing part of the instrument.

Eagan's Will, N. Y. L. J. 1893; *In Goods of Carver*, 1 Notes of Cases, 276; *In Goods of Gore*, 2 Notes of Cases, 479; *Hitchcock v. Thompson*, 6 Hun, 279; *Re Dayger*, 47 Hun, 127; *Re Singer*, 19 Misc. 679, 44 N. Y. Supp. 606; *In Goods of Stoakes*, 31 L. T. N.

NOTE.—As to sufficiency of signature to will when not placed at the end of it. see *Warwick v. Warwick* (Va.) 6 L. R. A. 775; *Re Conway* (N. Y.) 11 L. R. A. 796; and *Re Booth* (N. Y.) 12 L. R. A. 452.
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S. 552; *In Goods of Coombs*, L. R. 1 Prob. & Div. 302; *In Goods of Kimpston*, 3 Swabey & T. 427.

Even if the "second page" is not, strictly speaking and on the face of it, a part of the body of the will, which is ended and signed on the "third page," it is then to be considered testamentary matter, which, by its paging and its being joined to the will as it was while in the possession of testatrix and when executed by her, is identified and demonstrated so far as to be deemed incorporated into it.

Allen v. Maddock, 11 Moore, P. C. C. 427; *In Goods of Almosino*, 1 Swabey & T. 503; *In Goods of Watkins*, L. R. 1 Prob. & Div. 19; *In Goods of Pascall*, L. R. 1 Prob. & Div. 606; *Van Straubenzee v. Monck*, 3 Swabey & T. 12; *Tonnele v. Hall*, 4 N. Y. 140; *Brown v. Clark*, 77 N. Y. 369; *Caulfield v. Sullivan*, 85 N. Y. 155; 59 Albany Law Journal, 445.

Mr. Armour C. Anderson, also for appellants:

While the statute requires the will to be signed at the end thereof, these words should be taken in their ordinary and popular signification; in other words, at the place where the testator intended to stop, not on the last or back page of the paper.

Sisters of Charity v. Kelly, 67 N. Y. 409; *People ex rel. Eakins v. Roosevelt*, 14 Misc. 536, 35 N. Y. Supp. 1085, *Affirmed* in 149 N. Y. 574, 43 N. E. 989; *Tompkins v. Hunter*, 149 N. Y. 117, 43 N. E. 532; *Re Laudy*, 78 Hun, 479, 29 N. Y. Supp. 136; *Younger v. Duffie*, 94 N. Y. 535, 46 Am. Rep. 156.

The will in this instance was properly executed. It is signed at the end thereof.

A substantial compliance with the statute is sufficient, "a literal compliance is not required."

Re Dayger, 47 Hun, 127; *Gilbert v. Knox*, 52 N. Y. 125; *Younger v. Duffie*, 94 N. Y. 539, 46 Am. Rep. 156; *Sisters of Charity v. Kelly*, 67 N. Y. 409.

The will may be on separate sheets, fastened together only with a pin.

In Goods of Braddock, L. R. 1 Prob. Div. 433.

When they are found so fastened together, the presumption is that it was done by the testator.

Rees v. Rees, L. R. 3 Prob. & Div. 84; Schouler, Wills, 2d ed. § 314.

Mr. Frederic W. Ades, for respondents: The paper propounded for probate is not subscribed or attested in the manner required by the statute of wills of the state of New York.

2 Rev. Stat. 63, § 40; 2 Rev. Stat. Banks & Bros. 9th ed. p. 1877; 3 Birdseye, Rev. Stat. p. 3510; *Willis v. Lowe*, 5 Notes of Cases, 428; *In Goods of Parslow*, 5 Notes of Cases, 112; *In Goods of Tooky*, 5 Notes of Cases, 386; *Ayres v. Ayres*, 5 Notes of Cases, 375; *Sweetland v. Sweetland*, 4 Swabey & T. 6; *Smee v. Bryer*, 6 Moore, P. C. C. 404; *Dennett v. Taylor*, 5 Redf. 561; *McCord v. Lounsbury*, 5 Dem. 68; *Sisters of Charity v. Kelly*, 67 N. Y. 409; *Re O'Neil*, 91 N. Y. 516; *Re Conway*, 124 N. Y. 455, 11 L. R. A. 796, 26 N. E. 1028; *Hays v. Harden*, 6 Pa. 409; *Glancy v. Glancy*, 17 Ohio St. 134.

No evidence upon probate can remove the fatal defects in subscription and attestation. *Re Hewitt*, 91 N. Y. 261.

The doctrine of incorporation, ineffectually evoked on behalf of the proponent in both of the lower courts, has no bearing upon the case upon appeal.

Re O'Neil, 91 N. Y. 516; *Re Conway*, 124 N. Y. 455, 11 L. R. A. 796, 26 N. E. 1028; *Booth v. Baptist Church of Christ*, 126 N. Y. 215, 28 N. E. 238; *Re Whitney*, 153 N. Y. 259, 47 N. E. 272; *Dennett v. Taylor*, 5 Redf. 561.

The court of appeals has not only definitely settled the law against probate of instruments subscribed and attested like the one in question, but has affixed thereto the seal of *stare decisis*.

Re Conway, 124 N. Y. 455, 11 L. R. A. 796, 26 N. E. 1028; *Re Blair*, 84 Hun, 581, 32 N. Y. Supp. 845; *Re Whitney*, 153 N. Y. 259, 47 N. E. 272.

The doctrine of *stare decisis et non quicquam movere* rests upon clear reason, upon manifest justice, indeed upon a necessity inherent in the constitution of civil society.

1 Bl. Com. *70; 1 Kent, Com. 475, 479; 3 Bl. Com. *432; Chamberlain, *Stare Decisis*, p. 19; *Spicer v. Spicer*, Cro. Jac. 527; *Doe ex dem. Mansfield v. Peach*, 2 Maule & S. 576; *Proprietors of Liverpool Waterworks v. Harpley*, 6 East, 507; *Bowen v. Shapcott*, 1 East, 542; *Lonsdale v. Littledale*, 2 Anstr. 357; *Bradford v. Tinkham*, 6 Gray, 494; *Cohen v. Virginia*, 6 Wheat. 399, 5 L. ed. 290; *Rockhill v. Nelson*, 24 Ind. 424.

Bartlett, J., delivered the opinion of the court:

This case comes before us under circumstances so unusual that a few words of comment may not be out of place. The surrogate of Kings county refused probate to the will we are about to consider, on the ground that it was not subscribed at the end thereof, as required by the statute of wills (2 Rev. Stat. p. 63, § 40; 2 Rev. Stat. Banks & Bros. 9th ed. p. 1877). In so doing, he followed the settled law of this court for years, and many well-reasoned English

cases, when construing a statute similar to our own. 1 Vict. chap. 26. The learned appellate division affirmed the surrogate's decree with a divided court, giving utterance at the same time to a protest both emphatic and unanimous. The opinion states that the conclusion reached was solely under the stress of authority, and that, unaided by the light of judicial decisions, a contrary result would have followed. One of the dissenting justices stated that, while he recognized the principle of *stare decisis*, cases sometimes arise when a judge is justified in refusing to follow a decision of the court of last resort. The other dissenting justice wrote an opinion in which he succeeded in reaching the conclusion that neither the statute of wills, nor the cases which had compelled the majority of his brethren to reluctantly affirm the surrogate's decree, called for any such result. As the opinion of the appellate division concedes that the question presented is not an open one in this court, we might well content ourselves with an affirmation of the judgment, did we not feel constrained by judicial courtesy to re-examine the legal situation that has been so pointedly called to our attention.

It has long been the settled policy of this state to require certain formalities to be observed in the execution of wills. These provisions are exceedingly simple, and calculated to prevent frauds and uncertainty in the testamentary dispositions of property. *Re O'Neil*, 91 N. Y. 520; *Willis v. Lowe*, 5 Notes of Cases, 428. 2 Rev. Stat. p. 63, § 40 (2 Rev. Stat. Banks & Bros. 9th ed. p. 1877), reads as follows: "Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner: (1) It shall be subscribed by the testator at the end of the will. (2) Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him, to have been so made, to each of the attesting witnesses. (3) The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament. (4) There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator." These are the only restrictions imposed upon a testator when executing his will, and they appear to be wise, reasonable, and easily understood. It has been repeatedly laid down as the rule in this state, in cases we shall presently discuss, that the intention of the testator is not to be considered when construing this statute, but that of the legislature. The question is not. What did the testator intend to do? but. What has he done in the light of the statute? It is undoubtedly true that from time to time an honest attempt to execute a last will and testament is defeated by failure to observe some one or more of the statutory requirements. It is better this should happen under a proper construction of the statute, than that the individual case should be permitted to weaken those

provisions calculated to protect testators generally from fraudulent alterations of their wills.

It may be well, before examining the will which is the subject of this appeal, to refer to a few of the cases which construe the provision of the statute requiring the testator and the witnesses to subscribe at the end of the will. In *Sisters of Charity v. Kelly*, 67 N. Y. 409, it was held that the provision of the statute requiring the testator to subscribe "at the end of the will" means the end of the instrument as a completed whole, and where the name is written in the body of the instrument, with any material portion following the signature, it is not properly subscribed, nor can it be claimed that the portion preceding the signature is valid as a will. In *Re O'Neil*, 91 N. Y. 516, a printed blank was used, and the formal commencement was printed on the first page, and the formal termination printed at the foot of the third page. The entire blank space was filled with writing, and, apparently for want of room, a portion of a paragraph containing material provisions was carried over to, and the paragraph finished at, the top of the fourth page. The two portions were not, however, sought to be connected by means of a reference, or anything indicating their relation to each other. The name of the testator was written at the end of the printed form, and the names of the witnesses written below the formal attestation clause on the third page. This court held that there was no legal subscription of the will, and affirmed the judgment denying probate. Chief Judge Ruger, who wrote the opinion of the court, said: "While the primary rule governing the interpretation of wills, when admitted to probate, recognizes and endeavors to carry out the intention of the testator, that rule cannot be invoked in the construction of the statute regulating their execution. In the latter case courts do not consider the intention of the testator, but that of the legislature. . . . The statute fixes an inflexible rule by which to determine the proper execution of all testamentary instruments. . . . It will be seen in all of the cases cited there was no reason to doubt the testator's intention to make a valid disposition of his property, and yet in each case the will was denied probate because in the execution thereof the testator did not conform to the provisions of the statute in failing to place his signature at the physical end of the will." In *Re Conway*, 124 N. Y. 455, 11 L. R. A. 796, 26 N. E. 1028, a blank form was used, the whole of which was upon one side of the paper. A space was left for the dispositions to be made, preceded by the words, "I give, devise, and bequeath my property as follows." The blank space was filled up by three complete devises. At the end of the last were underlined, in parentheses, the words, "Carried to back of will." Upon the back of the sheet was written the word "Continued." Following it were various bequests, and then the words, "Signature on face of the will." The signature of the testator appeared at the 48 L. R. A.

end of the testimonium clause on the face of the paper, and those of the witnesses under the attestation clause. It was held by the second division of this court that there was not such a subscription and signing by the testator as required by the statute, and that the will had been improperly admitted to probate. Judge Parker, in delivering the opinion of the court, said: "The aim of the statute is to prevent fraud; to surround testamentary dispositions with such safeguards as will protect them from alteration." The learned judge also declared, in substance, that the admitted intention of the testator that the provisions appearing on the page following his signature should form a part of his will would in no way affect the question before the court. In *Re Whitney*, 153 N. Y. 259, 47 N. E. 272, it was held that a will drawn upon a printed blank, covering only one page, and signed by the testator and subscribing witnesses at the foot of the page, is not subscribed by the testator at the end of the will, as required by the statute, when the blank space in the printed form is filled up by subdivisions marked, respectively, "First" and "Second," followed by the words "See annexed sheet," and additional subdivisions marked, respectively, "Third" and "Fourth," are written on a separate piece of paper attached to the face of the blank, immediately over the first and second subdivisions, by removable metal staples. It was held that the question presented was not an open one in this court, and that the will was not legally subscribed. The court again approved the doctrine that the existence of good faith did not affect the question pending, as the intention of the legislature, and not that of the testator, governed. In *Re Blair*, 84 Hun. 581, 32 N. Y. Supp. 845, this court affirmed the judgment of the general term, first department, on the opinion below, which reversed a decree of the surrogate's court admitting the will to probate. This instrument consisted of eight pages. The testator signed at the bottom of the seventh page, and the witnesses signed at the end of a proper witnessing clause at the top of the eighth page. After the place for the signatures of the witnesses, but before they were actually signed or the will executed, a clause was added directing the executor to sell at private sale a certain piece of real estate, and to devote the proceeds of sale to liquidating any deficiency in interest or cash bequests under the will. The will was then executed, as before stated, and the testator signed the added clause, but the witnesses did not. 152 N. Y. 645, 46 N. E. 1145. In each of the cases cited it was very clear that the will was not legally subscribed, and that to have admitted it to probate, by yielding to the suggestion that it was an honest attempt to make a will which have been a practical repeal of the statute as to subscription at the end of the instrument. Our present statute of wills, requiring that a will should be subscribed at the end thereof, is similar to 1 Vict. chap. 26, which was in force in England from 1837 until 1853, when it was amended by 15 & 16

Viet. chap. 24, known as "Lord St. Leonards' Act." Prior to this amendment the English courts construed the act as strictly as our own have the present statute of wills. *Willis v. Lowe*, 5 Notes of Cases, 428; *In Goods of Parslow*, 5 Notes of Cases, 112; *In Goods of Tookey*, 5 Notes of Cases, 386; *Ayres v. Ayres*, 5 Notes of Cases, 375; *Sweetland v. Sweetland*, 4 Swabey & T. 6; *Smee v. Bryer*, 6 Moore, P. C. C. 404. In the latter case, Lord Langdale, delivering the opinion of the court, said at page 410: "It may happen, even frequently, that genuine wills, namely, wills truly expressing the intentions of the testators, are made without observation of the required forms; and whenever that happens the genuine intention is frustrated by the act of the legislature, of which the general object is to give effect to the intention. The courts must consider that the legislature, having regard to all probable circumstances, has thought it best, and has therefore determined, to run the risk of frustrating the intention sometimes, in preference to the risk of giving effect to or facilitating the formation of spurious wills, by the absence of forms. It is supposed, and that authoritatively, that the evil of defeating the intention in some cases, by requiring forms, is less than the evil probably to arise by giving validity to wills made without any form in all cases." The reasoning of our own and the English courts finds support in two states where the statute of wills is substantially the same as in New York. *Hays v. Harden*, 6 Pa. 409; *Glancy v. Glancy*, 17 Ohio St. 134.

We come, then, in view of the law as it now stands, to the will before us. The testatrix was an unmarried woman, aged about sixty years. She left her surviving no nearer relatives than first and second cousins. No part of her estate is given to any relative. A stranger to her blood is sole executor. The will is in his handwriting, and the proceeds of sale of testatrix's house and lot in Brooklyn are given one half to him and one half divided equally between two religious societies. In addition to this the testatrix gave eight money bequests,—four to religious societies and a cemetery, and the others to persons not of her blood. These bequests aggregate about \$4,200. The residuary clause is as follows: "The rest, residue, and remainder of my estate I give unto my executor, to make disposition of and divide in such manner as he, in his judgment, may deem best and proper." No undue influence is charged. The estate is estimated at about \$15,000. The will was drawn on a printed blank, being one piece of paper consisting of a sheet of four pages, the two leaves of which were joined from top to bottom on the left side. The formal opening part of the will is printed on the top of the first page, leaving the rest of that page blank. The closing part, containing the clause for the appointment of the executor, and that which follows, including the attestation clause, was printed on the top of the second page of the first leaf, leaving the rest of that page and both pages of the second leaf blank.

The draftsman filled the blank on the first page, and then turned to the first page of the second leaf, being the third page of the blank, and filled that, marking it at the top "2nd page." He then turned to the second page of the first leaf, containing the closing part of the will as before stated, in print, marked it at the top "3rd page," and completed the instrument, save as to its execution, by filling the blanks at the top of that page, except the blank for the date, which was left to be filled in at the time of execution. It is to be observed that a complete will was made out on the two sides of the first leaf, being the first and second pages of the blank. All of the first side of the third leaf, marked "2nd page," could have been written after execution, as no sentence thereof is continued from the first page of the will, nor carried over to the alleged third page thereof. The fourth page of the blank could have been written over in the same way. The first page of the will contains the money legacies, the direction to sell the real estate and divide the proceeds, and two legacies of personal property. The alleged second page of the will contains bequests of personal property and the residuary clause. We have here on one entire piece of paper, folded so as to make four pages, a complete will, so far as form goes, on the first and second pages; and then follows on the third page of the blank, and after the signatures of testatrix and witnesses on the second page of the blank, a page marked "2nd page," not connected with the will proper in any way, but complete by itself. The question is not whether, from the proofs in this case, the page following the signatures of the will is in fact a part of testatrix's will, by reason of her established intention, but, Is the instrument so drawn subscribed at the end thereof, as the statute commands? We are of opinion that it is not legally subscribed, and that to hold otherwise would open the door to gross fraud, and be contrary to the statute and the settled law. It was suggested on the argument of this case that the effect of the statute of wills, as strictly construed by this court, is to defeat the intention of many testators, while the fraudulent addition to wills was a crime of rare occurrence. The fallacy of this argument consists in overlooking the fact that the number of frauds prevented by our wise and simple statute can never be known. We might as well ask how many commercial crimes have been prevented by the statute of frauds. The case at bar is one of the strongest illustrations of the wisdom of the statute of wills that has ever come to the attention of this court. With a complete will on the first and second pages of a blank containing four pages, there is nothing to prevent filling up the vacant third and fourth pages with any number of additional provisions, including, as in this case, a residuary clause allowing an executor to dispose of the residue in such manner as he deemed proper. The defeat of testamentary intention in a few cases is not due to the statute, or the construction of it by the courts, but to the fact that scriv-

ers and other laymen, ignorant of the simple and clear provisions of the statute, are permitted to draw wills.

It is urged with much ability by the learned senior counsel for the appellants that the alleged second page of this will can be read into it by invoking the doctrine of incorporation as established in England, and to some extent in this state. We are of opinion that under the facts here disclosed that doctrine has no application. If it were otherwise, the evasion of the statute would be so easily accomplished as to render its repeal unnecessary.

We have to say in conclusion that it is quite possible we have given to this appeal undue importance, involving, as it does, a question of law settled in this court; but we desire to express in the most emphatic manner our approval of the statute of wills as now construed.

The order appealed from should be affirmed, with costs to respondent and special guardian, to be paid out of the estate.

Parker, Ch. J., and Gray, O'Brien, Haight, Martin, and Vann, JJ., concur.

Annette B. WETMORE, now Annette B. Markoe, *Respt.*,
v.

William Boerum WETMORE, Impleaded,
etc., *Appt.*

(162 N. Y. 503.)

1. An appeal as from a final order in a special proceeding or a final judgment in an action lies from an order of the appellate division of the supreme court to the court of appeals, reversing an order of a special term, which modified provisions of a former decree in a divorce proceeding as to payment of income of a trust fund as alimony, which proceeding was instituted in accordance with permission contained in the former decree upon affidavits that were given the effect of pleadings, the facts becoming the subject of reference, and the order being based upon the report of the referee.
2. The fact that defendant in a divorce suit is guilty of contempt in refusing to come into the jurisdiction of the court and submit to cross-examination is not sufficient where the record does not show a reversal on the facts, and the statute requires the reviewing court under such circumstances to presume it was on the law, to authorize the court of appeals to affirm an order of the appellate division of the supreme court which reversed an order of the special term modifying a decree awarding the income of a fund held in trust for his benefit, as alimony, but some legal error in the order must be pointed out.
3. The remarriage of a divorced woman to one whose ability to support her is unquestionable will prevent the further application for her benefit as alimony of the

income of a testamentary trust instituted for the support of the husband from whom she was divorced.

(Bartlett and Martin, JJ., dissent.)

(April 17, 1900.)

A PPEAL by defendant from an order of the Appellate Division of the Supreme Court, First Department, reversing an order of a Special Term for New York County which denied defendant's application to reduce the amount to be paid to plaintiff alimony out of the income of a trust fund established for defendant's benefit. *Reversed.*

The facts are stated in the opinion.

Mr. Thomas P. Wicken, for appellant:

The manner in which the defendant has been accustomed to live is a controlling feature upon this application.

Moulton v. De Ma Carty, 6 Robt. 533; *Sillick v. Mason*, 2 Barb. Ch. 79; *Hann v. Vorhees*, 1 Law Bull. 65; *Stow v. Chapin*, 21 N. Y. S. R. 38, 4 N. Y. Supp. 496; *Nichols v. Eaton*, 91 U. S. 727, 23 L. ed. 257.

This action is in equity to apportion a fund of which equity has sole jurisdiction. It is not an action in which the defendant can be punished for his alleged misdoings in the past.

Mr. Flamen B. Candler, for respondent:

The court should not grant any relief to the defendant William B. Wetmore until he shall return to this state and submit himself to the jurisdiction of the court and purge himself from his contempt in not complying with the judgment of divorce when he was able to do so.

The motion papers did not disclose any adequate reason for a reargument of the motion which was denied by Mr. Justice Stover.

A reargument will be granted only where some question decisive of the case and duly submitted by counsel was overlooked, or where a decision is in conflict with the express statute or a controlling decision to which attention was not called by counsel.

Banks v. Carter, 7 Daly. 417; *Heald v. Macgowan*, 15 Daly. 233, 5 N. Y. Supp. 450; *Stearns v. Hemmens*, 22 N. Y. S. R. 24, 3 N. Y. Supp. 16; *Mahon v. Newell*, 27 N. Y. S. R. 816, 7 N. Y. Supp. 600; *Duncan v. Root*, 23 N. Y. S. R. 58, 4 N. Y. Supp. 613; *Propler rel. Ward v. Purroy*, 45 N. Y. S. R. 49, 18 N. Y. Supp. 953.

O'Brien, J., delivered the opinion of the court:

The record in this case is the concluding part of the history of a long and bitter controversy between husband and wife. The appeal is from an order of the court below reversing an order of the special term, which modified the last judgment entered, with respect to the payment of alimony by the de-

NOTE.—For former decision in this case, see 33 L. R. A. 708.

As to power of court to modify alimony after decree therefor has become final, see *Sampson v. Sampson* (R. I.) 3 L. R. A. 349; *Kemp-R. A.*

ster v. Evans (Wis.) 15 L. R. A. 391; *Cole v. Cole* (Ill.) 19 L. R. A. 811, and note; *McKay v. San Francisco City & County Super. Ct.* *Cole* (Ill.) 19 L. R. A. 811, and note; *McKay v. Anderson* (D. C.) 45 L. R. A. 806.

defendant to the plaintiff. In order to get a clear view of the questions involved, it will be necessary to recall briefly the history of the litigation: In April, 1892, the plaintiff obtained an absolute divorce from the defendant dissolving the marriage, and awarding to her the custody of the three children, and alimony of \$3,000 per annum for her own use, and \$3,000 more per annum for the support of her children. The defendant failed to pay the alimony, and went to reside in another state, remaining out of the jurisdiction of the courts of this state. The defendant's father, who died in 1885, made a provision by will for the benefit of his son, whereby a fund of \$100,000 was created, the net income of which was to be paid to the defendant during his life. The plaintiff brought another action, to which the trustee of the fund was made a party, for the purpose of procuring a judgment appropriating the income of the trust to the payment of the alimony accrued or to accrue. In this action she was successful, and the judgment in her favor was finally affirmed in this court. 149 N. Y. 520, 33 L. R. A. 708, 44 N. E. 169. But, as the judgment devoted the whole income of a trust for the defendant's benefit to the payment of the plaintiff's alimony, this court modified it by giving permission to the defendant to apply at any time in the future for leave to share in the income, or to have the award of alimony modified or reduced by a proper provision at the foot of the decree in the action. Since the entry of that judgment the income of the trust has been paid to the plaintiff. The decision of this court in that regard was based upon the assumption that the circumstances of the parties might be so changed in the future as to render it inequitable for the wife to absorb the entire income of the trust. The defendant insists that this contingency has now happened, and this proceeding now before us was commenced to meet it. The defendant applied to the court below, at special term, for a modification of the judgment which appropriated the income of the trust to the payment of the plaintiff's alimony. In his affidavit bearing date July 11, 1896, the history of the litigation is stated with considerable detail. There were two facts stated, however, that had a direct bearing on the application, namely, that he was then possessed of no property of any substantial value, and was without means of support, since the income of the trust had been diverted to the use of the plaintiff and the children, and that the plaintiff was not in need of the income, for the reason that she had married a man of means, and was then on a visit to Europe with her new husband and the children. The defendant was then forty-six years of age, without a profession or any business capacity; he having graduated from West Point, and spent his early life in the army. The court was requested to modify the judgment by reducing the allowance of alimony payable from the income of the trust to the \$3,000 awarded to the children, and providing for the payment of the

balance, if any, to the defendant for his support. The plaintiff, by her counsel, opposed the application, in an affidavit recalling at considerable length what had appeared previously in the course of the litigation in regard to the defendant's pecuniary condition. The defendant's application was denied at the special term, but on appeal the order was reversed, and the case remanded to the special term for another hearing. The appellate court appointed a referee to take the proofs, and report the same to the court at special term, with his opinion. The order of reversal also directed the referee to treat the affidavits used on the previous motion as in the nature of pleadings, and as a supplemental application to modify the judgment. It was said in the opinion that, while the absolute denial of the motion was improper, it should not be granted upon affidavits, without a trial of the issue, where the witnesses must appear before the referee and submit to examination and cross-examination. 20 App. Div. 507, 51 N. Y. Supp. 797. The referee made his report to the court, in which he found, among other things, that the defendant had been adjudicated a bankrupt in one of the district courts of the United States on the 13th of January, 1899; that the plaintiff on November 22, 1894, was married to Dr. Markoe, of New York, who was in receipt of an income of about \$6,000 per annum; that the defendant had failed to appear before him for examination as to the facts stated in the affidavit; and that his application to share in the income of the trust fund should be denied. When the report was submitted to the special term it was treated as advisory, merely, and not as conclusive; and the learned judge proceeded to examine the testimony and determine the facts, treating the affidavits as pleadings in an action upon an issue of fact, wherein the allegations on each side not denied by the other side were deemed to be admitted. It appeared from the proceedings reported by the referee that the defendant's counsel at the hearing offered to produce the defendant for examination and cross-examination if the plaintiff's attorney would stipulate that no attempt would be made to arrest him for nonpayment of alimony or disobedience of the decree, while in attendance, or in going to and returning from the place of the hearing; but the plaintiff's attorney distinctly refused to enter into any such stipulation. The court was of the opinion that the omission of the defendant, under these circumstances, to appear for examination before the referee, was not conclusive against the application; that, while the plaintiff was under no obligation to enter into any such stipulation, yet it could not have deprived her of any advantage which she otherwise had; and that her refusal to make it, coupled with the absence of any denial of the defendant's statements as to his present financial condition, warranted the conclusion that she believed that a cross-examination of the defendant would not tend to disprove the allegations of his affidavit as to his financial condition. After a careful exami-

nation of the referee's report and the testimony contained in it, and of the moving and opposing affidavits, treating them as in the nature of pleadings, the special term granted the application, and determined that the judgment should be modified by reducing the amount to be paid from the income of the trust fund to \$3,000 for the children alone. The learned appellate division reversed this order upon the plaintiff's appeal, and it is from this order of reversal that the present appeal to this court was taken.

The learned counsel for the plaintiff insists that this court has no power to review the order. It certainly has, if it is a final order in a special proceeding. Whatever it may be called, it is clear that it is a final determination of the proceeding, since it not only reversed the order of the special term, but denied the application. It was a proceeding instituted in pursuance of the provisions of the judgment in the action to sequester the income of the trust fund, based upon affidavits on both sides that by the order of the court were given, in some sense, at least, the effect of pleadings. The facts were the subject of a reference, and a report to the court upon which the order was made that has been reversed. It seems to me that the objection that it was not a special proceeding is without force. But, if it was not a special proceeding, then it must have been a proceeding in an action, supplemental in character, to modify the judgment by provisions at the foot of the decree. If so, the final determination was a judgment, since it finally determined the rights of the parties. So that it must be either a final order in a special proceeding, or a final judgment in an action. It is not very material to determine which, since either or both are appealable to this court.

Assuming, therefore, that we are required to review this order, it must be admitted that the special term had full power and jurisdiction to make the order that it did, granting the application. The motion called for the exercise of discretion upon the facts. The learned appellate division had power to reverse the order upon the facts, and, in its discretion, deny the application. But, since the order does not contain any statement that the reversal was upon the facts, or in the exercise of discretion, this court is required to presume that it was upon the law. Code, § 1438. So we must look at the order and proceedings of the special term for some error of law, in order to sustain the reversal. It is quite obvious that there was no question of law before that court, except the one hereafter considered, but not referred to in either of the courts below. The questions actually considered were all questions of fact or of discretion. The decision of these questions was open to review on appeal, but the statute requires this court to presume that they were not reviewed, but that the reversal was upon some question of law. The opinion of the learned court below indicates very clearly that it was convinced that the application should not be granted until the defendant re-

turned from another state to the jurisdiction of the court, and submitted to examination and cross-examination. The fact that the defendant has been and is in contempt of the authority of the court has been a potent argument against him in this litigation, and, if this court had any discretion in the case before us, we would feel inclined to uphold the court below, within the limits of its power, in the enforcement of its authority and the defense of its own dignity. It is clear, however, that we must find some legal error in the decision of the special term before we can sustain the order appealed from, and, obviously, none can be pointed out.

But we think the record presents a question much broader and more important than any statutory rule for the disposition of appeals by this court, and, while it is a question of law, it tends to sustain the special term, instead of the order appealed from. The judgment in this case appropriated the income of a testamentary trust, made for the support of the defendant to the use of his wife and children, after an absolute divorce. The defendant resisted the proceeding on the ground that what was proposed amounted to a violation of the terms and the purpose of the trust in his father's will. When the discussion of that question in this court and in the courts below is examined, it will be seen that the defendant's contention was answered by arguments based upon the unity of husband and wife, and the obligation of the husband to support her and his children. While the defendant, by his misconduct, was adjudged to have forfeited all the rights growing out of that relation, the wife and children, being innocent, still retained them all. It was said, in substance, that the testator, in constituting a trust for the benefit of his son, must have contemplated that it should also be for the benefit of his wife, should he marry, and his children, should any result from the marriage. This, we thought, was a reasonable and just view of the question presented. The plaintiff had not then contracted another marriage, or, if she had, the record before the court did not disclose that fact. If the same facts appeared then that appear now in the record before us, the line of argument in answer to the defendant's contention would have had little application. The relation of the parties to each other is now completely changed. The unity of that relation then existing has been dissolved. The facts and circumstances upon which the judgment was rendered no longer exist. The question now is not whether the testator, in creating a trust for the benefit of his son, necessarily contemplated that his wife and children should share with him in the enjoyment of the income, but whether the plaintiff, who was once his wife, and is now the wife of another man, shall continue, in her new relations, to share in that income. Unless the courts can, in reason and justice, hold that the testator contemplated such a disposition of his bounty, the income of the fund cannot now be diverted to that purpose without a plain violation of the trust. The

protection and enforcement of such trusts, according to the spirit and intention of the founder, is one of the peculiar functions of a court of equity. We are not now concerned with the effect of a second marriage upon a decree awarding alimony generally. The only question we are now dealing with is when and under what circumstances such alimony can be made a charge upon the income of a testamentary trust created for the benefit of the husband, from whom the wife has procured an absolute divorce, and remarried. Upon the plaintiff's marriage to her present husband, she ceased to be, in any sense, the defendant's wife; and hence the reason upon which her right to share in the income of the trust rested ceased also. In contracting that marriage she became the wife of another man, who, as it appears from the record, is abundantly able to support her. The contingency contemplated by this court, in modifying the judgment, has, therefore, happened; and after the second marriage the courts cannot devote the income of the trust fund to her support without diverting it to a purpose that could not have been contemplated by the testator. Some incongruous results frequently follow with respect to alimony and property rights when the wife procures an absolute divorce from the husband, and it may be possible that, under certain circumstances and conditions, the wife may be entitled to support from two husbands at the same time. But however that may be, we think that, upon a second marriage of the wife to a husband whose ability to support her is unquestionable, she ceases to have any claim in law or equity to the income of a trust fund created by will for a very different purpose.

For these reasons, we are of opinion that the order appealed from should be reversed, and that of the special term affirmed, without costs to either party.

Parker, Ch. J., and Haight, Vann, and Landon, JJ., concur.

Bartlett, J., dissenting:

We have here a defendant who is in flagrant contempt of the supreme court, and, under its well-settled rule, is entitled to no hearing or relief until he places himself in a proper attitude to ask it. The order appealed from is not reviewable upon the facts in this court, for the technical reason that it does not state that the reversal of the order of the special term was upon the facts as well as the law. While it is true that we will not look into the opinion of the court below to ascertain whether the reversal was on the facts, nevertheless it is the practice of this court, in exceptional cases, to hold the appeal, and permit the appellant to apply to the court granting the order to amend it so as to show that the reversal was on the facts as well as the law, if such be the case. I think the present appeal presents a very clear exception to our general rule, and that this order should be amended, as the opinion of the appellate division shows that the reversal was upon the facts, and for the addi-

tional reason that the requirement of the court respecting proof to be made before the referee of the changed condition of the defendant's circumstances was not complied with in any sense, "either technically or in spirit" as stated in opinion below. The question as to what extent the income of a trust created for the husband's benefit can be devoted to the payment of alimony due from him to his divorced wife, after her second marriage, was not considered by the special term or the appellate division, and has not been argued at our bar. A question of such importance, so far-reaching in its results, ought not to be determined without full argument and careful consideration. I am also of opinion that we should aid the supreme court in enforcing obedience to its mandates and vindicating its authority.

Martin, J., concurs.

Albert L. PURDY, *Respt.*,
v.

ERIE RAILROAD COMPANY, *Appt.*

(.....N. Y.....)

1. A railroad company which was incorporated and acquired its property rights and franchises after the enactment of Laws 1895, chap. 1027, requiring such companies to issue 1,000-mile tickets at reduced prices, is not deprived of property without due process of law by the enforcement of such statute.
2. An amendatory statute is not invalid on the ground that it imposes burdens on a pre-existing corporation, if the amendments merely modify a statute to which the corporation was subject, by making the provisions more favorable to the company.
3. The court cannot take judicial knowledge of the history of railroad lines operated by a particular railroad company.
4. A state statute requiring the issuance of mileage books at reduced rates for transportation wholly within the state is not invalid as an attempt to regulate interstate commerce, although a railroad affected thereby extends into other states.

(February 27, 1900.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, denying defendant's motion for new trial on exceptions heard before it in the first instance after verdict in plaintiff's favor at the Allegany County Circuit in an action brought to recover the statutory penalty for refusal to sell a mileage ticket. *Affirmed.*

The facts are stated in the opinion.

Messrs. Moot, Sprague, Brownell, & Marcy, for appellant:

As the statute in question violates the Constitution of the state of New York, which provides: "No person shall be . . .

NOTE.—For statute as to mileage books, see also *Atty. Gen. v. Old Colony R. Co.* (Mass.) 22 L. R. A. 112.

deprived of life, liberty, or property without due process of law;" also the Constitution of the United States, which provides: "No state shall . . . deprive any person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."—it follows that said statute is void, and the judgment herein has no foundation on which to rest.

N. Y. Const. art. 1, § 6; U. S. Const. art. 14, § 1.

The power of making bargains for individuals has not been delegated to any branch of the government. It is not to be presumed that such a power exists, and those who set it up should tell where it may be found.

Taylor v. Porter, 4 Hill, 140; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *Forster v. Scott*, 136 N. Y. 577, 18 L. R. A. 543, 32 N. E. 976; *Smith v. Lake Shore & M. S. R. Co.* 114 Mich. 460, 72 N. W. 328; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

The legislation in question does not apply to this defendant, because of the statute incorporating the Erie, and subsequent statutes, and therefore judgment should have been rendered against plaintiff, not defendant.

The fact is so public and well known that this defendant is the successor of the railroad company which was originally called "The Erie," although its name was "The New York & Erie Company," that the court will take judicial cognizance of it.

The original Erie Company was incorporated by chapter 224 of the Laws of 1832.

This act incorporating the Erie, and giving it the power to fix tolls, was acted on and relied on by the Erie, and was a contract between the Erie and the state. The state reserved the power to alter or modify the act, but it could not take all income from defendant by such alteration.

Corington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

The legislation in question amounts to a regulation of interstate commerce, and is therefore void.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

Mr. Clarence A. Farnum, for respondent:

The mileage book act is not invalid as being in violation of art. 14, § 1, U. S. Const. or art. 1, § 6, N. Y. Const. in this, that the defendant is deprived of its property without due process of law.

What is "reasonable compensation" is a judicial question to be determined by the courts in each particular case when the question is presented. The rates fixed by the leg-

islature are to be deemed reasonable, and proof is required to overcome such presumption.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468, Affirming 117 N. Y. 1, 5 L. R. A. 559, 22 N. E. 670, 682; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 9 Sup. Ct. Rep. 334, 388, 1191; *Cooley, Const. Lim.* 6th ed. 734-738; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Winchester & L. Turnp. Road Co. v. Croxton*, 98 Ky. 739, 33 L. R. A. 177, 34 S. W. 518; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400.

This act does not attempt to regulate commerce between the states, and does not purport to, nor could it, act outside of the state of New York.

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532; *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40.

The mileage book acts do not deny to the defendant the equal protection of the laws.

Hayes v. Missouri, 120 U. S. 71, 30 L. ed. 580, 7 Sup. Ct. Rep. 350; *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *State v. Broadbelt (Md.)* 45 L. R. A. 433, 43 Atl. 771; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

The mileage book act (chap. 1027, Laws 1895) being in force at the time the defendant was incorporated, it does not lie within the power of the company to allege its invalidity.

Pierrepont v. Loveless, 72 N. Y. 216; *Plumb v. Christie*, 103 Ga. 686, 42 L. R. A. 181, 30 S. E. 759; *Cooley, Const. Lim.* 6th ed. 196, 197; *People v. Rensselaer & S. R. Co.* 15 Wend. 113; *Reid v. Eatonton*, 80 Ga. 755, 6 S. E. 602.

The legislature having the power to give or refuse the defendant corporate life and existence, the created being cannot question the powers of its creator, existing at the time of its creation.

Cooley, Const. Lim. 6th ed. 479; *People ex rel. West Side Street R. Co. v. Barnard*, 110 N. Y. 548, 18 N. E. 354; *New York v. Broadway & S. Ave. R. Co.* 17 Hun, 242; *Ashley v. Ryan*, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; *Columbia & G. R. Co. v. Gibbs*, 24 S. C. 60; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; *Brushwick & N. Bridge & Turnp. R. Co. v. Lb-*

lets, 3 Edw. Ch. 353; *Philadelphia v. Com.* 52 Pa. 451; *Owen v. St. Louis & S. F. R. Co.* 83 Mo. 454; *Nolensville Turnp. Co. v. Quinby*, 8 Humph. 476; *Charlotte, C. & A. R. Co. v. Gibbs*, 27 S. C. 385, 4 S. E. 54; *Alabama & F. R. Co. v. Odeneal*, 73 Miss. 34, 19 So. 202; *McDonald v. Richmond & D. R. Co.* 38 S. C. 103, 18 L. R. A. 440, 16 S. E. 429.

Cullen, J., delivered the opinion of the court:

This action, similar in character to that of *Beardsley v. New York, L. E. & W. R. Co.* 15 App. Div. 251, 44 N. Y. Supp. 175, is brought to recover penalties for the refusal of the defendant to issue mileage books, as prescribed by chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896. The record in this case, however, differs materially from that in the *Beardsley Case*, both in its facts and in the objections taken by the counsel to the right of the plaintiff to recover. The complaints (there were originally several actions, which were subsequently consolidated into one) allege that the defendant is a railroad corporation organized under the laws of this state, and then set forth the various matters necessary to bring the defendant within the terms of the statute, and the details of the plaintiff's applications for mileage books, and the defendant's refusal to issue them. They do not state when the defendant was incorporated. The answers to the several causes of action admitted the incorporation of the defendant, and certain other allegations of the plaintiff in reference to the mileage of road operated by the defendant, and its rates of fare, and put in issue the other averments of the complaint. They further set up that the defendant owned and operated a railroad extending through several states, and charge that the statute of 1896 "is unconstitutional and void, because it is in violation of the provision of the Constitution of the United States, which commits to Congress the sole power to regulate commerce between the several states; and that it is unconstitutional and void, because it is in violation of various other provisions of the Constitution of the United States and of the Constitution of the state of New York." On the trial of the action the plaintiff put in evidence the certificate of the defendant's incorporation, of which the record contains only the following: "Certificate referred to shows that the Erie Railroad corporation, defendant, was duly organized and incorporated November 14, 1895, under the general laws of the state of New York for the incorporation of railroads." The earliest refusal to issue a mileage book for which it is sought to recover the penalty occurred on June 23, 1896. The defendant put in evidence a map showing the various lines of the Erie Railroad, extending through this state and others, and, "to make the description of the lines of the defendant more certain," as was stated by the counsel in offering them, two deeds,—one from Arthur H. Masten, special master, to Charles Caster and others; and the other from Caster and others to the de-

fendant. All the record states of these deeds is that they were "of the New York, Lake Erie, & Western lines," and that they were delivered and recorded in November, 1895. This is all that appears concerning the original title to defendant's road. There is nothing to show the defendant has succeeded to the rights or franchises of any company antedating the enactment of the statute of 1895. While our personal knowledge may inform us of the history of the railroad lines operated by the defendant, to that we cannot appeal, and we can indulge in no presumption as to the existence of facts not appearing in the record. As the case stands before us, we have a railroad company created after the statute of 1895, and whose franchises and property rights must be assumed to have accrued subsequently to that time. The question, therefore, is whether the statute of 1895, though void as to existing railroad companies, is not constitutional and valid as to companies organized and acquiring property and franchises in the future. That a statute, which is unconstitutional so far as it purports to operate retrospectively, may be upheld as to future cases, is settled by authority. *People v. O'Neil*, 100 N. Y. 251, 16 N. E. 68; *Cooley*, Const. Lim. 180. We do not assent, however, to the broad claim of the learned counsel for the respondent that a corporation cannot object to the constitutionality of any statute enacted by the state prior to the time of its organization. Whether the proposition contended for is true or false depends on the ground on which the validity of the statute is assailed or its invalidity declared. If the state should require or enact that railroad companies thereafter organized must subject the management and conduct of any interstate transportation and business they may carry on to state control, such a statute would be void, as in contravention of the Constitution of the United States, which commits to Congress the regulation of interstate commerce. It is probable that there are provisions of the state Constitution, such as those regulating the administration of justice, and ordained for the security of persons and property, which the legislature could not require even future corporations to waive as a condition of their charters. But the ground on which the Supreme Court of the United States in the case of *Luke Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 358, 19 Sup. Ct. Rep. 565, held the mileage book act unconstitutional, was that it was an invasion of the property rights of the railroad company, in that it required the company to transport persons' willing and able to purchase 1,000-mile books at a less sum than the general or maximum rate allowed by law; in other words, that it compelled the company to surrender, as to such persons, the difference between the special rate of fare and the regular rate. This exaction was illegal, because it was without due process of law. We know of no reason, however, why a railroad company may not agree, upon sufficient consideration,

to surrender or transfer any specific pecuniary right. The right to contract as to property is one of the inherent rights of a citizen, of which he cannot be deprived, except as to that class of contracts which are condemned in the exercise of the police power; such as usury and the like. *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343. The same liberty of contract exists in the grant of charters by the legislature. Therefore a regulation as to the price of transportation, which would be an illegal exaction when sought to be imposed on existing corporations solely by legislative fiat, may, in the case of future corporations, be the mere performance of the obligation of a contract. The authority to construct and operate a railroad is not the natural right of a citizen, but a franchise proceeding from the favor or grant of the state. As a condition of such grant, the legislature might require the company to transport passengers at any prescribed rate of fare. Equally, it may require that certain classes of passengers be transported at a particular rate of fare, or that any passenger, under certain circumstances, and on compliance with certain requirements, be transported at such rate. In *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456, 22 L. ed. 678, the Supreme Court of the United States said: "This unlimited right of the state to charge, or to authorize others to charge, toll, freight, or fare for transportation on its roads, canals, and railroads arises from the simple fact that they are its own works, or constructed under its authority. It gives them being. It has a right to exact compensation for their use." So it was held that a reservation by the state to itself of one fifth of the receipts for transportation of passengers was valid, and it was said that the state might have exacted the whole receipts. See also *Ashley v. Ryan*, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865, and *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714.

The statute of 1896 was passed subsequently to the incorporation of the defendant, and if the statute increased the burden imposed on the defendant by the act of 1895, as to such additional burden it would be invalid. But a comparison of the two acts shows that all the modifications of the statute of 1895 effected by the statute of 1896 are favorable to the railroad company. By the first act the mileage books entitled the holder—i. e., the bearer or assignee—to transportation; by the second the use of the book is limited to the purchaser and to certain members of his family and employees. By the act of 1895 there was imposed on the company the general duty to issue mileage books; by that of 1896 the company is required to keep such books for sale only at stations in incorporated villages and cities. By the earlier statute the company was practically required to accept the mileage books from passengers on the train in lieu of tickets; by the latter act the mileage book can be used only in the purchase at the ticket

office of a ticket for the proposed journey. We are of opinion, therefore, that the enactment of 1896 is constitutional and valid in the same cases where the statute of 1895 would be upheld.

While we have discussed at some length the constitutionality of the statutes of 1895 and 1896 as applied to future corporations, we doubt very much whether the defendant's objections and exceptions are sufficient to raise the question. So far as the pleadings are concerned, the only attack on the validity of the statutes is that already quoted from the defendant's answer. At the opening of the trial the defendant moved to dismiss the complaint because it failed to state facts sufficient to constitute a cause of action for a penalty. No particular ground for the attack on the complaint is stated. At the close of the evidence, the defendant renewed its motion to dismiss the complaint, but the sole ground on which it assailed the validity of the statute itself was that it constituted an interference with the regulation of interstate commerce, and hence was in violation of the Constitution of the United States. The objection that the statute was an invasion of the defendant's property rights, and contravened, for that reason, either the Constitution of the United States or the Constitution of this state, does not anywhere appear in the record; and the rule seems settled that such an objection, to be available here, must have been raised in the courts below. *Vose v. Cockcroft*, 44 N. Y. 415; *Delaney v. Brett*, 51 N. Y. 78.

The objection that the statutes of 1895 and 1896 are regulations of interstate commerce, and hence in conflict with the Federal Constitution, is satisfactorily dealt with in the very clear opinion of Mr. Justice Merwin, of the appellate division, delivered in the *Beardsley Case*, 15 App. Div. 251, 44 N. Y. Supp. 175. That such a statute, if limited in its scope to transportation wholly within the limits of the state, is a valid exercise of state authority, is settled by the decision of the Supreme Court of the United States in *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191, where it was said: "It [the state] may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the state." This doctrine has never been overruled or limited; on the contrary, it is fully recognized in the later cases. *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *Western U. Teleg. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 713, 19 Sup. Ct. Rep. 465. In *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4, a statute of Illinois regulating fares was held void solely on the ground that the act, as interpreted by the supreme court of the state, included cases of transportation partly within and partly without the state. It was there stated: "If the Illinois statute

could be construed to apply exclusively to contracts for a carriage which begins and ends within the state, disconnected from a continuous transportation through or into other states, there does not seem to be any difficulty in holding it to be valid." There is nothing in the language of the statutes now before us that shows they were intended to affect any but interstate transportation, but, if their interpretation be doubtful, "the courts must so construe a statute as to bring it within the constitutional limitations, if it is susceptible of such a construction." *Sage v. Brooklyn*, 89 N. Y. 189; *People ex rel. Sinkler v. Terry*, 108 N. Y. 1, 14 N. E. 815. Within this principle these statutes must be construed as applying to transportation wholly within the state, and, so construed, they do not infringe upon the Constitution of the United States.

The judgment appealed from should be affirmed, with costs.

Parker, Ch. J., and Gray, Bartlett, Vann, and Werner, JJ., concur. Martin, J., concurs in result.

J. Francis MURRAY, by Guardian *ad Litem*,
Respt.,
v.

Harvey A. DWIGHT, Appt.

(161 N. Y. 301.)

A servant of a truckman who is sent with a horse by his master, by whom he is paid, to a warehouse, to use the horse in operating tackle for hoisting goods, which work is under the direction of the foreman of the warehouseman, is not a fellow servant with the warehouseman's servants, by whose negligence in putting in place the pulley blocks and tackle he is injured.

(Gray, J., dissents.)

(January 9, 1900.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Third Department, reversing a judgment of a Trial Term for Albany County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinions.

Mr. Randall J. Le Boeuf, for appellant: The relation of master and servant existed between the defendant and plaintiff at the

NOTE.—As to which of two or more persons is the master of another who is conceded to be the servant of one of them, see *Hardy v. Shedden Co.* (C. C. App. 8th C.) 37 L. R. A. 33, and *note*; also *Gagnon v. Dana* (N. H.) 41 L. R. A. 389; and *Channon v. Sanford Co.* (Conn.) 41 L. R. A. 200.

As to the right of a servant to recover damages from persons other than his master for injuries received in the performance of his duties, see *Cleveland, C. C. & St. L. R. Co. v. Berry* (Ind.) 46 L. R. A. 33, and *note*.

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time and in respect to the very transaction out of which the injury arose.

Wyllie v. Palmer, 137 N. Y. 248, 19 L. R. A. 285, 33 N. E. 381; *McInerney v. Delaware & H. Canal Co.* 151 N. Y. 411, 45 N. E. 848; *Higgins v. Western U. Teleg. Co.* 156 N. Y. 75, 50 N. E. 500; *Murray v. Currie*, L. R. 6 C. P. 26; *Rourke v. White Moss Colliery Co.* L. R. 2 C. P. Div. 205; *Hasty v. Sears*, 157 Mass. 123, 31 N. E. 759; *Powell v. Virginia Constr. Co.* 88 Tenn. 692, 13 S. W. 691.

The defendant, as plaintiff's master, did not fail in the performance of any duty which he owed to Murray by reason of that relation, and plaintiff could not, therefore, recover.

Kimmer v. Weber, 151 N. Y. 422, 45 N. E. 860; *Sisco v. Lehigh & H. R. Co.* 145 N. Y. 296, 41 N. E. 90.

The execution of the part of the work during which the accident happened was a mere detail of that work which defendant might properly intrust to his employees. Having furnished all the appliances which experience had shown were safe and adequate, it was no part of the work which required personal supervision, or which was so important in its character as to have placed the servant carrying it into execution in the place of the master, and therefore make him responsible as if he had himself directed it to be done.

Kimmer v. Weber, 151 N. Y. 422, 45 N. E. 860; *Perry v. Rogers*, 157 N. Y. 251, 51 N. E. 1021.

Plaintiff at the time of the injury was a coservant engaged with the other servants of Dwight in a common employment, and if any negligence other than his own contributed to the injury it was that of a fellow servant.

Plaintiff, as the servant of the defendant, was required to show by direct proof that the defendant had failed in the performance of some duty which he owed him by reason of their relation to each other.

Dobbins v. Brown, 119 N. Y. 188, 23 N. E. 537; *Clark v. Ritter-Conley Co.* 39 App. Div. 598, 57 N. Y. Supp. 755; *Allen v. Banks*, 7 App. Div. 405, 39 N. Y. Supp. 1016; *Denefeld v. Baumann*, 40 App. Div. 502, 58 N. Y. Supp. 110.

Messrs. Countryman & DuBois, for respondent:

The plaintiff was not a fellow servant with defendant's employees.

The plaintiff, while engaged in the care and management of his master's property, was engaged with such property in his master's business, and, except as he was directed by signal when to stop and when to go forward, was in no way under the direction or control of the defendant, but was performing the duties, and only the duties, that he owed to his master, in connection with his master's property, and in the general course of his employment as his master's servant and driver.

He remained the servant of his general master, and in no way became a fellow servant with defendant's employees.

1 Shearm. & Redf. Neg. 5th ed. § 162, pp. 244, 245, § 225, pp. 402, 403; *Laugher v. Pointer*, 5 Barn. & C. 579; *Quarman v. Burnett*, 6 Mees. & W. 497; *Jones v. Liverpool*, L. R. 14 Q. B. Div. 890; *Jones v. Scullard* [1898] 2 Q. B. 565; *Michael v. Stanton*, 3 Hun, 462; *Gerlach v. Edelmeyer*, 15 Jones & S. 292, Affirmed in 88 N. Y. 645; *Bradley v. New York C. R. Co.* 3 Thomp. & C. 288, Affirmed in 62 N. Y. 99; *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304; *Wabash, St. L. & P. R. Co. v. Farver*, 111 Ind. 195, 60 Am. Rep. 696, 12 N. E. 296; *Story, Agency*, 453a, 453b, 454a, 455, pp. 561-565; *Huff v. Ford*, 126 Mass. 24, 30 Am. Rep. 645; *New Orleans, B. R. V. & M. R. Co. v. Norwood*, 62 Miss. 565, 52 Am. Rep. 191; *Fuhrmeister v. Wilson*, 163 Pa. 310, 30 Atl. 150; *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755; *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. 1017; *Johnson v. Netherlands American Steam Nav. Co.* 132 N. Y. 576, 30 N. E. 505; *Svenson v. Atlantic Mail S. S. Co.* 57 N. Y. 108; *Kilroy v. Delaware & H. Canal Co.* 121 N. Y. 22, 24 N. E. 192; *Kelly v. Cohoes Knitting Co.* 84 Hun, 154, 32 N. Y. Supp. 459; *Sanford v. Standard Oil Co.* 118 N. Y. 571, 24 N. E. 313; *Sullivan v. Tioga R. Co.* 44 Hun, 304, Affirmed in 112 N. Y. 643, 20 N. E. 569; *Currier v. Henderson*, 85 Hun, 300, 32 N. Y. Supp. 608.

The principle of the rule of the nonliability of the master for injuries to a servant, occasioned by the negligence of his fellow servant, rests on the implication of law that, as part of the contract of service, the servant agrees to and does assume the risk of injury from the negligence of other servants, and he is presumed to have contracted with reference to such risks.

Sherman v. Rochester & S. R. Co. 17 N. Y. 153; *Wood, Railway Law*, § 388; *Shearm. & Redf. Neg. 5th ed. § 236*, pp. 430, 431; *Smith v. New York & H. R. Co.* 19 N. Y. 127, 75 Am. Dec. 305.

Even assuming that the fellow-servant rule and the *ad hoc* doctrine would apply had the accident happened during the operation of the work, the defendant cannot claim the benefit of either, as the accident did not occur in the performance of any work with which the plaintiff had any connection whatever.

1 Shearm. & Redf. Neg. 5th ed. § 234, p. 428.

O'Brien, J., delivered the opinion of the court:

The plaintiff, a young man about twenty years of age, received a personal injury from the falling of a pulley block at the defendant's warehouse on the 24th day of March, 1894. The evidence tended to show that the block fell by reason of the negligence of the defendant's general employees, or some of them, and the question presented at the trial was whether the plaintiff was a coservant with them, within the rule that relieves employers from liability in cases of accidents of this character. The trial court held that the plaintiff was a coservant of the person whose negligence caused the injury, and the com-

plaint was dismissed. On appeal to the appellate division, this judgment was reversed, and a new trial granted, and in this condition the case comes here.

The opinion of the learned court below contains a clear and concise statement of the facts concerning the accident, the substance of which we may safely adopt. The defendant was the owner of a warehouse in which there was a hoisting apparatus for the purpose of hoisting and lowering heavy articles from one story to another. There is a projection at the roof in which there is an iron wheel, over which a chain passes down in front of the building, and about a foot and a half therefrom. This chain at the roof passes into the building, and around a drum, and thence to the back part of the building. An endless rope is attached to the drum, by means of which a man in the building may operate it and hoist or lower the chain outside. If it is desired to use horse power in hoisting, a pulley block is attached to the door post in the lower story, and another pulley block, with tackle, is hooked on the chain, and drawn up to the top of the building. A rope connected with the upper block passes down and over the lower pulley, and thence into the building, and to this a horse is attached. In operating the tackle, the horse moves forward and backward within the building. The plaintiff was the servant of a truckman, and was sent by his master with a horse to hoist at the defendant's warehouse. The goods to be moved from the first to a higher floor in the warehouse were barrels of lime. The plaintiff, on arriving at the warehouse with his horse, stopped near the curbstone in front of the door, while other men in the employ of the defendant were putting in place the pulley blocks and tackle. The upper pulley block was hooked onto the chain, and was being drawn up to its place by one of the men operating the drum inside. When the block was nearly up the plaintiff was told to go in, and as he started to do so, the block fell upon the plaintiff. He had not worked there before, and, as the testimony tended to show, knew nothing about the apparatus for hoisting. He had nothing to do with placing it in position. The horse belonged to the truckman, the plaintiff's master, and the plaintiff was paid by him. The work of moving the barrels of lime from the lower to a higher story was under the direction of the defendant's foreman.

The question when and under what circumstances the servant of a general master becomes the servant of another is often difficult of solution. There is some apparent conflict in the authorities, due more to the difficulty of applying the legal principle to ever-varying facts than to any discord with respect to the principle itself. Moreover, the rule is subject to some distinctions that are not always easy to state in such a way as to render the result in every case so plain as to command acquiescence, or to give to the decision the character of a conclusive authority. Counsel upon both sides have in

the argument of this case before us, subjected the leading authorities to a very careful and able examination, that has thrown so much light upon the question that we have been greatly aided in arriving at what appears to us to be the proper conclusion. We think the judgment of reversal in the court below is correct. The opinion of Judge Merwin contains such a clear statement of the law as deduced from the numerous cases, and such a judicious application of it to the facts, that we would not attempt to add anything to his reasoning but for the fact that the learned counsel for the defendant has attempted to prove by an argument, which bears all the marks of industry and discrimination, that it is in conflict with two or three recent cases in this court. Before referring to these cases, it may not be amiss to point out a feature of the controversy peculiar to this case, and which distinguishes it from many, if not all, of those cited.

The relation of master and servant is often confused with some other relation. The mere fact that one person renders some service to another for compensation, expressed or implied, does not necessarily create the legal relation of master and servant. There are many kinds of employment which are peculiar and special, where one person may render service to another without becoming his servant in the legal sense. A servant is one who is employed to render personal services to his employer otherwise than in the pursuit of an independent calling. The truckman who transports the traveler's baggage or the merchant's goods to the railroad station, though hired and paid for the service by the owner of the baggage or the goods, is not the servant of the person who thus employs him. He is exercising an independent and quasi-public employment in the nature of a common carrier, and his customers, whether few or many, are not generally responsible for his negligent or wrongful acts, as they may be for those of other persons in their regular employment as servants. A contract, whether express or implied, under which such special jobs are done or such special services rendered, is not that of master and servant, within the law of negligence. *Jackson Architectural Iron Works v. Hurlbut*, 158 N. Y. 34, 52 N. E. 665; 1 Parsons, Contr. 101-109.

The plaintiff, beyond all doubt, was in the general service of the truckman, and so was his general servant. In that capacity he represented his master, and hence was a truckman himself. In the pursuit of that calling he was directed by his master to render special services to the defendant, not in moving goods from the store or warehouse to a place of shipment, but from the lower floor of the warehouse to an upper floor. It so happened that in this particular job it was not necessary to use the truck, but it was necessary to use the horse in order to furnish power to hoist the goods. Neither the time, nor duration of employment, nor the rate of compensation, was the subject of any express contract with the defendant, and

from the nature of the case there could not well have been any well-defined agreement on the subject. The employment, in its scope and character, was in no respect essentially different from that which every truckman enters into with his numerous customers in the course of a day as a carrier of baggage or goods. The fact that the plaintiff detached the truck and performed the job with a horse alone did not change the character of the employment, nor the legal relation that exists between an ordinary truckman and his customers. The goods were moved, it is true, not by the truck, but by another contrivance, and the plaintiff's duty was to manage and guide the horse which was the real power behind the pulleys and tackle, as it would have been when hitched to the truck. In this capacity the plaintiff represented his general master, the truckman, and was all the time his servant, and did not become, in any legal sense, the servant of the defendant any more than he would if employed to move the goods to a railroad station on the truck, and if not such servant he could not, of course, have become the co-servant of the defendant's regular workmen.

The recent cases in this court cited by the learned counsel for the defendant, and to which we will now briefly refer, differ widely from this in the nature of the employment, and in the legal relations held by the person guilty of the wrong or negligent act and the party sought to be charged with its consequences.

In *Wyllie v. Palmer*, 137 N. Y. 248, 19 L. R. A. 285, 33 N. E. 381, the defendants sold fireworks to an organized committee in a city for the purpose of a celebration. They agreed to, and did, send to the committee, at its own expense, a competent man, who was their general servant, to set off these fireworks, under the direction of the committee, and this man brought with him a boy, also in the general service of the defendants, as a helper. In the course of the display the committee virtually separated the boy from the control of the man, and set him at firing rockets, a work which he was not competent to do, and which neither his general master nor the man intended that he should do. One of these rockets was discharged into a crowd through his negligence, and the plaintiff, a bystander, was injured. This court held that, if his negligent act was to be imputed to any third party, it should be imputed to the committee giving the order to the boy to do something for which he was incompetent, rather than to his general master, who was not present, and who had sent him there for a different purpose.

In *Higgins v. Western U. Teleg. Co.* 150 N. Y. 75, 50 N. E. 500, the plaintiff was injured by the negligent act of a person operating an elevator, and who was the general servant of the defendant. The plaintiff was the servant of the contractor for the repair of the building, including the furnishing of the elevator itself. The contractor had placed the elevators in the building some time before the accident, and they were in

use at times by the defendant to carry passengers and by the contractor for purposes of his own. But he had not completed the contract, and had not turned over the building, with the elevators, to the defendant. They were still, for all practical purposes, under the control of the contractor, who had a right to use them for the purpose of carrying materials and workmen from the lower to the higher floors. The plaintiff's master wanted to use the elevator on the day of the accident as a platform upon which to stand while plastering the shaft in which it had been placed, and procured the defendant's general servant to operate it by moving it up and down through the shaft for the convenience of the plaintiff engaged in the work of plastering. The injury to the plaintiff occurred while the elevator was being used for this purpose, and, as the proof tended to show, by the negligent act of the operator. This court held that the operator, at the time of the accident, was not engaged in his general master's work, but was acting under the orders of the plaintiff and in a different capacity. It is apparent, I think, that the plaintiff in that case occupied a different relation to the person moving the elevator than he would had the injury occurred while being conveyed as a passenger in the elevator to his place of duty on an upper floor, and while the elevator was being used as a passenger elevator, and while it was in law the defendant's elevator and in charge and control of its servants.

In McInerney v. Delaware & H. C. Co. 151 N. Y. 411, 45 N. E. 848, the question that we are now concerned with was not involved, as will be seen by the opinion, which expressly disclaims any intention to deal with the question whether the plaintiff in that case was injured by the act of a fellow servant. So, we think that the case at bar is not governed by these decisions, since there is a material difference in the facts, as we have attempted to point out.

The judgment of the court below should therefore be affirmed, and judgment absolute ordered for the plaintiff, with costs.

All concur except **Parker**, Ch. J., not sitting, and **Gray**, J., dissenting.

Gray, J., dissenting:

While it is true that a variance in the facts of a case of negligence may vary the application of established rules, courts should aim at consistency, and, where the facts do not materially differ, apply them strictly. This case, in my opinion, falls clearly within certain recent authoritative decisions in this state, as it does within recent decisions in Massachusetts and in England. A general principle of the law of master and servant is that, among the risks which the employee assumes upon entering an employment, is that of injury caused by the negligence of his fellow servants engaged in the same employment. Where one servant is injured by the negligence of a fellow servant, the master, if the negligence was with respect to a duty pertaining to a workman, and not to

some duty owing from the master, is not liable for the injury. *Crispin v. Babbitt*, 81 N. Y. 522, 37 Am. Rep. 521. The facts of this case are clear and undisputed. The defendant dealt in building materials, and owned two warehouses, into and from which it was frequently necessary that the materials should be hoisted or lowered. Hoisting tackle, made fast to chains running through the upper part of the warehouses and over a drum within them, was used upon these occasions. The drum was worked by an endless rope in the hands of a man within the building, and, as it was made to revolve, caused the chain to descend to the street, or to be pulled up, as it was required. To the end of the chain was attached the hoisting tackle, and, when it was necessary to hoist materials, the chain was pulled up, and ropes, running over pulleys upon the tackle, fell down and passed over a pulley fastened at the entrance to the warehouse. A horse would be attached to one of the ropes, and, as he was driven forward or backward, within the basement of the warehouse, the article would be hoisted up or lowered. A foreman of the defendant supervised the workmen, when engaged in the work of hoisting articles in or out, and it was customary, at the time, to employ a man and horse to aid them. The plaintiff was in the general employment of a truckman named McManus, who was not usually resorted to by the defendant for this assistance; but upon this occasion he was applied to, and the plaintiff was sent with a horse as he says, "to hoist at Dwight's," meaning the defendant. He went to one of the defendant's warehouses, and, under the directions of the latter's foreman, in common with the other employees upon the premises, took part in the work of hoisting up barrels of lime into the lofts, by driving the horse forward or backward in the basement, as he was bidden. After the hoisting was completed at that warehouse, he, with the other men, went off to do similar work at the other warehouse, near by. Until the hoisting tackle was made fast, and the chain drawn up, preparatory to the hoisting of the barrels, the plaintiff, instead of going within the building, remained outside, upon the street and under the tackle. Owing to the carelessness of one of the men, who was stationed in the doorway to signal another man, who was operating the drum through the endless rope, the hoisting tackle was allowed to strike with force against the wheel or frame over which the iron chain passed, and, breaking thereby, fell upon and caused the injuries to the plaintiff for which this action was brought.

I had supposed that the principles of law which were applicable to the facts of such a case, and which were to determine the relative rights of the plaintiff and defendant, were well settled by recent cases, and that their doctrine was well applied by the learned trial judge when he dismissed the plaintiff's complaint. The question is, Was the plaintiff, while engaged with the defendant's servants in doing the work described, for the

time being, in the service of the defendant? That he was, and that he was in no wise acting independently in the matter, or as a stranger to the defendant, seems to me to be a very plain proposition, in view of what this court and other courts have laid down as guiding principles. If I read these cases right, they sustain the doctrine that one who is the servant of the general master may, if employed elsewhere temporarily, *ad hoc* become the servant of the special master, and it is of no consequence whether he is loaned for the purpose, or whether he is hired, not directly, but through his general master. If the particular employment subjects him to the directions and orders of another than his general master, he ceases to be the latter's servant for the time, whose responsibility for his acts also ceases. *Wyllie v. Palmer*, 137 N. Y. 238, 19 L. R. A. 285, 33 N. E. 381; *McInerney v. Delaware & H. Canal Co.* 151 N. Y. 411, 45 N. E. 848; *Higgins v. Western U. Teleg. Co.* 156 N. Y. 75, 50 N. E. 500; *Hasty v. Sears*, 157 Mass. 123, 31 N. E. 759; *Donovan v. Laing, W. & D. Constr. Syndicate* [1893] 1 Q. B. 629; *Rourke v. White Moss Colliery Co.* L. R. 2 C. P. Div. 205. In the case of *Higgins v. Western U. Teleg. Co.* 156 N. Y. 75, 50 N. E. 500, this court passed upon a state of facts which cannot be distinguished, in the principle of the decision, from those in the case before us. The telegraph company had contracted with a contractor to restore its building and to replace the elevators within it. Before the completion of the contract, the contractor was making use of the elevator as a platform upon which the plaintiff, one of his men, might stand in doing some plastering upon the shaft. It was necessary to move the elevator up and down for the work to be done, and the contractor, instead of making use of one of his own men, procured from the defendant one of the men in its regular service for the purpose of running the elevator. The defendant was using the elevator for the purpose of carrying passengers up and down during portions of the day; but, on the day of the accident in question, the elevator ceased carrying passengers about noon, and after that time was made use of by the contractor for the rest of the day. The conductor of the elevator was negligent, and allowed the car to start up without signal from, or warning to, the plaintiff, who was at work upon it, with the result of causing serious injury to the latter. The judgment which the plaintiff had recovered below was reversed here, upon the theory that the relation of master and servant between the conductor of the elevator and the defendant was suspended during the time he was doing the work for the contractor, in moving the plaintiff up and down in the shaft. In the opinion, which was delivered by my Brother O'Brien, who now differs with me in his view of this case, the question of the responsibility of the defendant for the negligence of its servant was carefully considered in the light of the authorities in this state and in England, and 48 L. R. A.

the principles there laid down seem to me to be strictly apposite to the discussion here. It was observed that there was no question with respect to the fact that the conductor of the elevator, whose negligence caused the accident, was in the general service and pay of the defendant; but the question was whether, at the time of the accident, he was engaged in doing the defendant's work, or the work of the contractor, and that, as he was not at the time taking any orders from the defendant, but was directed by the contractor's servant in moving the elevator up and down, he became the servant of the contractor, engaged for the time being in doing his work and subject to his orders. The general proposition was advanced that servants who are employed and paid by one person may, nevertheless, be *ad hoc* the servants of another in a particular transaction, and that, too, when their general employer is interested in the work. He quotes the remark of Lord Cockburn in *Rourke v. White Moss Colliery Co.* L. R. 2 C. P. Div. 205, that, "when one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him." The conclusion that was reached by Judge O'Brien, that the conductor of the elevator had become, at the time, the servant of the contractor, fits exactly the facts of this case, inasmuch as this plaintiff, like the conductor of the elevator, was, for the time being, engaged in the employment of another than his general employer in the common work which was being done, and therefore was the servant of the defendant. If we apply the test, which was believed in the *Higgins Case* to be the true one in such cases, namely, who directs the movements of those who are engaged in the work, we see that the plaintiff was, in the performance of his work, at the time solely under the direction of the defendant or his foreman. As cases supporting and justifying his conclusions, Judge O'Brien very properly relied upon *Wyllie v. Palmer*, 137 N. Y. 248, 19 L. R. A. 285, 33 N. E. 381; and *McInerney v. Delaware & H. Canal Co.* 151 N. Y. 411, 45 N. E. 848, which illustrated how the servant of a general employer may be, for a particular employment, the servant of another and dealt with accordingly. In the *Wyllie Case*, the defendants, with whom a contract had been made to furnish fireworks for an exhibition in the city of Auburn, sent with the articles contracted for two of their servants to render aid in the exhibition. An accident occurred, due to the negligence of one of these servants while obeying an order of a member of the committee having in charge, for the city, the exhibition of the fire works, and the plaintiff was injured. He sued the contractors to recover for the injury inflicted by their servant's carelessness; but a judgment of nonsuit was affirmed in this court, upon the ground that the plaintiff was not engaged in

the defendants' business at the time, but was a servant of the committee. In the *McInerney Case* the defendant railroad company had furnished an engine and a crew, which Willard, an owner of a lumber yard, had requested for the purpose of moving cars which were being loaded in his yard. When they arrived at his yard, Willard assumed direction, and ordered the moving of the engine, until the cars were all attached which were to be moved out. The plaintiff was one of Willard's servants, and upon the occasion in question, not having been warned by anyone, was caught between two cars, and injured, by the backing down of the engine. He brought an action against the railroad company, and a judgment of nonsuit was affirmed in this court, upon the theory that the crew of the engine were under Willard's orders, who was held to be, as to them, as well as to his own men who were engaged in the work, their common master.

If Higgins and the conductor of the elevator were fellow servants under the contractor, although the telegraph company had merely loaned the conductor, was not this plaintiff quite as much a fellow servant with the employees of this defendant? If *McInerney* and the crew of the railroad engine were fellow servants while doing the work of moving cars in Willard's yard, although the railroad company had furnished its own men to operate the engine, how can it be fairly said that this plaintiff was not a fellow servant with the defendant's employees? The doctrine laid down by the supreme court of Massachusetts in *Hasty v. Sears*, 157 Mass. 123, 31 N. E. 759, is exactly applicable. There the plaintiff, who was a carpenter in the employ of N. & Co., was sent by them to do some work for the defendant upon his building. The defendant's superintendent directed him to do work upon the elevator shaft. The conductor of the elevator had received orders not to run down below the second floor until the plaintiff had finished his work. He disobeyed the order, and, in consequence, the plaintiff received injuries, for which he sued the defendant, who was the owner of the building. It was held that he and the elevator conductor were both servants of the defendant at the time of the injury, and, as their employment was a common employment, the negligence of the conductor was an obvious risk which the plaintiff assumed, and for which the defendant was not answerable to him.

The English cases fully recognize the rule that a man may be a general servant of one person, and yet, at the same time, be the servant of another in relation to a particular matter. They hold that the important element, in determining whose servant for the time being he is, is, Which of the two persons had the control of him in the conduct of the particular business? *Jones v. Scullard* [1898] 2 Q. B. 565; *Donovan v. Laing, W. & D. Constr. Syndicate* [1893] 1 Q. B. 629. In *Donovan v. Laing, W. & D. Constr. Syndicate*, we find a situation which is not to be distinguished from the one in the present

case. In that case, Jones & Co. were wharfingers, and contracted with the defendants, a construction company, to send their crane, with one of their men to run it, for the purpose of loading a ship at the firm's wharf. When the defendants' crane and man arrived at the wharf, the plaintiff, a servant of Jones & Co., acted in giving signals to set the crane in motion for the purpose of raising and lowering the goods. The defendants' man, without waiting for a signal, negligently allowed the crane to swing around, and the plaintiff was injured. It was held, in an action against the defendants, that they were not liable; for they had placed their crane and man at the disposal of Jones & Co., and had no control over the work he was to do, and that, in the working of the crane, he was no longer their servant, but was bound to work under the orders of Jones & Co. The court relied upon *Rourke v. White Moss Colliery Co.* Lord Esher, M. R., observed that, "so far as the working of the crane went, . . . the man in charge was the servant of Jones & Co., and was not the servant of the defendants." Lords Lindley and Bowen agreed in that view: the former remarking that Jones & Co. "must, for that particular job, be considered as Wand's [the defendant's servant] masters," and the latter holding the law to be clear, and pointing out the distinction between the carriage cases (*Laugher v. Pointer*, 5 Barn. & C. 547, and *Quarman v. Burnett*, 6 Mees. & W. 499) and the case at bar, where the general master has placed the servant under the control of another. It was also observed by Lord Bowen that "we have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense: that by the employer is meant the person who has a right at the moment to control the doing of the act." Whether, therefore, we regard the recent authorities in this state, or in Massachusetts, or in England, we find the doctrine to be well settled that one who is the general servant of a master, who employs and pays him, may, nevertheless, become the servant of another in a special employment, and that it is immaterial that he does not enter the special employment by any direct hiring or contract. In the *Higgins Case*, the telegraph company loaned its servant to the contractor, and in other cases, from our and from other courts, payment for the services of the servants was made to their general master.

The plaintiff in this case was as much in the defendant's employment, and under his direction and orders, as though the latter had engaged him, individually, to come in and assist in the work which was to be done in his building. That the plaintiff was in the general employment of a truckman, having an independent business, cannot possibly affect the question of the relation which he bore towards the defendant, or the servant of the defendant, when he entered upon the performance of the particular work under the directions of the latter or his foreman. In all the cases the existence of the relation

of fellow servants between the plaintiffs and those from whose negligence their injuries were received depended upon the sole question of whether, at the time, they were under the direction and control of the temporary employer in performing the special work for which they were loaned or contracted. In no essential respect can the position of this plaintiff be regarded as differing essentially from that in any one of the cases referred to, where the plaintiffs, though in the service of a general master, were held, for the time being, to become the servants of other masters. Of course, cases of independent contractors, where the contracts of the parties have fixed their relative obligations, including the furnishing of men and defining their duties, are mostly inapplicable.

Nor do I consider it to be any answer to the proposition that the plaintiff was injured by the act of a fellow servant, and therefore cannot hold the defendant liable, that at the particular moment when the accident happened the plaintiff was not at work. His engagement was "to hoist" at the defendant's warehouses, and his employment in that respect was continuous from the time when he reported for duty. The preliminary work of hoisting the tackle, which was necessary to be done at the second building before the plaintiff could go on with his part of the work, was being done by the defendant's servants, with whom he was engaged in the same employment, namely, to hoist bags of lime from the street into the upper lofts of the warehouses. He was as much, at the time, under the control and direction of the defendant, or his foreman, as he had been at any time during the day. If the defendant did not direct him to take part in the hoisting up of the tackle, that was a mere matter of the division of labor, and it seems to me to be the purest kind of technical reasoning to say that because at the moment the plaintiff was at rest, and not actually driving his horse to and fro, or helping in getting up the tackle, he was therefore withdrawn *pro tanto* from the defendant's employment. I think that the judgment of nonsuit at the circuit was correct, and in accordance with the principles of the adjudged cases.

Mary W. LYNDE

v.

Charles W. LYNDE.

(162 N. Y. 405.)

1. A binding judgment against defendant in a divorce proceeding is authorized by his voluntary appearance, without reservation and without objection to jurisdiction, seeking advantage of the decree in opposition to an application for amendment of the decree so as to allow alimony.

NOTE.—As to the effect of appearance by a nonresident to give jurisdiction of a divorce suit, see *Ellis's Appeal* (Minn.) 23 L. R. A. 287, and note.
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although it is void as to him for want of service of process.

2. The supreme court of New Jersey will enforce a final decree of the New Jersey chancery court adjudging a defendant in a divorce proceeding over whom it has jurisdiction indebted to plaintiff in a definite sum as alimony, but it will not enforce provisions as to future alimony and as to equitable remedies to enforce compliance with the decree.
3. The provisions of the New York statute upon the subject of alimony in divorce proceedings are not available to a plaintiff seeking to enforce in the courts of that state a decree of another state granting alimony and providing for its own enforcement.

(April 6, 1900.)

CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court, Second Department, modifying a judgment of a Special Term for Suffolk County in a proceeding to enforce a decree for alimony; the defendant appealing from so much as undertook to enforce the decree; and plaintiff appealing from so much as refused to enforce it in its entirety. *Affirmed.*

Statement by Gray, J.:

This action was brought upon a final decree of the court of chancery of the state of New Jersey, which, as the result of proceedings to recover alimony, adjudged that the plaintiff is entitled to recover of the defendant the sum of \$7,840, and a counsel fee of \$1,000; that the defendant pay to her permanent alimony at the rate of \$80 a week from the date of the decree, and that he give security for the payment of the several sums directed by the decree to be paid; and further provided, upon his failure to comply with the decree, that application might be made for sequestration proceedings, for a receivership, and for an injunction. The complaint also asked to have enforced an order, made subsequently to the final decree, which appointed a receiver, and enjoined the defendant from disposing of his property, etc. The plaintiff and the defendant were married in the state of New Jersey in 1884, and were domiciled there. In 1892 the plaintiff filed her petition in chancery in that state, which alleged, among other things, desertion by her husband, and cruel treatment, and prayed that she might be divorced from him, and that reasonable alimony might be decreed to be paid to her. The defendant was not served personally, but by publication of process, and did not appear in the action, nor answer the petition. Thereafter such proceedings were had in the case that in 1893 a final decree was made, divorcing the petitioner from the defendant upon the ground of his wilful and continued desertion, but containing no provision with respect to alimony. In 1896 the plaintiff filed a petition upon affidavits for the amendment of the decree of divorce so as to provide for an award of alimony. The grounds of the application were that, though her petition in the divorce proceedings prayed for alimony, through the inadvertence

tence or neglect of her solicitor the decree was entered without making provision adjudging the payment of alimony, or reserving the consideration thereof for hearing upon a future application. An order was granted by the chancellor directing the defendant to show cause why the petition should not be granted, which, with the moving papers, was personally served upon the defendant in this state. The defendant appeared in opposition to the application by J. Herbert Potts as his solicitor, and without any reservation upon the record as to the appearance. He filed an affidavit, in which he alleged that his residence was in the state of New York; that he "was, by the decree of this court, divorced from the said petitioner from the bond of matrimony, upon her petition, on August 7, 1893, and that since that time he has been married again to another woman, with whom he is now living," etc.; that "the decree for divorce was purposely drawn without providing for or reserving any alimony," etc.; that he was "financially unable to pay alimony;" and "that he is advised by counsel and believes that, the said decree having been made without reserving the question of alimony, and this defendant having been absolutely divorced from the said petitioner by said decree, and having since formed new relations and matrimonial obligations, that it would be illegal, inequitable, and unjust to now impose upon him the burden of alimony, so long after the granting of said absolute decree dissolving his first matrimonial relations absolutely without terms." After testimony had been taken pursuant to an order of the chancellor, during the course of which Mr. Potts appeared as defendant's solicitor, and after argument upon the same by the solicitor for the petitioner and the solicitor for the defendant, the chancellor ordered that the decree of divorce theretofore made should be amended by inserting therein that "it is further ordered, adjudged, and decreed that the petitioner, Mary W. Lynde, shall have the right to apply to this court at any time hereafter, at the foot of this decree, for reasonable alimony, and such other relief in the premises touching alimony as may be equitable and just; and this court reserves the power to make such order or decree as may be necessary to allow and compel the payment of alimony to petitioner by defendant, or to refuse to allow alimony." It appears in the opinion of the chancellor, which is made a part of the record (54 N. J. Eq. 473, 35 Atl. 641), that he was satisfied that the omission of the decree to reserve the question as to alimony was due to the inadvertence of the petitioner's counsel, and that under the rule recognized by the court it will "amend its enrolled decree when the amendment is necessary to give full expression to its judgment." From the order amending the decree of divorce the defendant appealed to the court of errors and appeals, where the order was affirmed. 39 Atl. 1114. Thereupon, after reciting the various proceedings relating to the amendment of the decree of divorce, an order of reference

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was made as to whether alimony should be allowed to the petitioner, and, if so, how much. This order was entered after service of a notice upon the defendant's solicitor, and the reference was proceeded with after personal service upon the defendant of a summons to attend. Neither the defendant nor his solicitor appeared upon the reference, although duly notified, and such proceedings were had that the final decree herein sued upon was made on December 23, 1897, by the chancellor, which, after reciting the proceedings had, and the report of the master to whom it had been referred to report as to alimony, and "adjudging that a money judgment should be rendered against the defendant," adjudged and decreed as first hereinabove briefly described. Thereafter, upon proof of the failure of the defendant to comply with the final decree, an order dated February 8, 1898 (referred to in the complaint as of "24th day of March, 1898"), was made, appointing a receiver of the defendant's property in New Jersey, and directing the issuance of an injunction, etc. The receiver was unable to obtain possession of any of the defendant's property in New Jersey, and the defendant did not comply with the decree in any respect. The trial court decided that the plaintiff was entitled to a judgment against the defendant enforcing against him the decree of the chancery court of New Jersey, and further enforcing against him the order of that court which provided for the enforcement of the decree by the appointment of a receiver and by an injunction. She was held entitled to judgment against the defendant for the amount of alimony, counsel fees, and costs due or incurred under the New Jersey decree; for the amount of alimony accrued since the decree; that he pay to her the sum of \$80 a week from the date of the decision as and for permanent alimony; that he give a bond in the sum of \$100,000 to secure the payment of the several sums of money specified; and that, upon his failure to comply with the provisions of the decision, a receiver might be appointed, ancillary to the receiver appointed by the court of chancery of New Jersey. Exceptions were filed to the decision, and thereafter judgment was entered in conformity with the decision. The appellate division, upon the defendant's appeal, modified the judgment so as to adjudge that the plaintiff recover of the defendant the sum of \$8,840, and, as so modified, affirmed it. 41 App. Div. 280, 58 N. Y. Supp. 567. The amount of the recovery, as allowed by the appellate division, represents the only and the precise amount of money which the final decree of the court in New Jersey adjudged to be due and payable from the defendant to the plaintiff at the date of its rendition. Cross-appeals were taken by the parties from the judgment of the appellate division; the plaintiff because of its modification, and the defendant because of its affirmation, of the judgment of the trial court.

Messrs. Henry B. Gayley and Matthew C. Fleming, with **Mr. James Westervelt,** for plaintiff:

The chancery decree awarding alimony has the same effect in New Jersey as a judgment at law in *personam*.

Aspinwall v. Aspinwall, 53 N. J. Eq. 684, 35 Atl. 470.

Defendant's solicitor, Potts, was authorized to appear generally on the application for alimony, and he did so.

Lynde v. Lynde, 54 N. J. Eq. 473, 35 Atl. 641, Affirmed in 55 N. J. Eq. 591, 35 Atl. 641; *Crane v. Brigham*, 11 N. J. Eq. 29.

A decree of divorce and a subsequent order fixing alimony pursuant to a reservation in the decree are both parts of one action, no matter how many years may intervene, and jurisdiction having once attached in the cause, the court can provide for alimony whenever it becomes necessary.

Forrest v. Forrest, 25 N. Y. 501; *Galusha v. Galusha*, 138 N. Y. 272, 33 N. E. 1062; *Hauschild v. Hauschild*, 33 App. Div. 296, 53 N. Y. Supp. 831.

Where a court of equity has jurisdiction and entertains a case it will ordinarily retain the case until the whole subject is disposed of.

Ostrander v. Weber, 114 N. Y. 95, 21 N. E. 112; *Taylor v. Taylor*, 43 N. Y. 578; *Henderson v. New York C. R. Co.* 78 N. Y. 423; *Lynch v. Metropolitan Elev. R. Co.* 129 N. Y. 274, 15 L. R. A. 287, 29 N. E. 315; *Madison Ave. Baptist Church v. Baptist Church*, 73 N. Y. 82.

Where a state court has obtained jurisdiction of the subject-matter, and of defendant's person, any error arising thereafter is an irregularity, and can be taken advantage of only by way of motion or by appeal. No evidence can be introduced of such irregularity to impeach the judgment in an action brought in another state to enforce it.

Jones v. Jones, 108 N. Y. 415, 15 N. E. 707; *Rigney v. Rigney*, 53 Hun. 457, 6 N. Y. Supp. 141, 127 N. Y. 408, 28 N. E. 405; *Latting v. Rigney*, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366; *Nations v. Johnson*, 24 How. 195, 16 L. ed. 628; *Cornett v. Williams*, 20 Wall. 226, 22 L. ed. 254; *McVitt v. Turner*, 16 Wall. 866, 21 L. ed. 348; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *Dunstan v. Higgins*, 138 N. Y. 70, 20 L. R. A. 668, 33 N. E. 729.

It is proper to apply summarily by petition to amend or supplement a final decree in equity, without the necessity of again setting the cause down.

Dan. Ch. Pl. & Pr. 6th Am. ed. pp. 991, 996; *Campbell v. Gardner*, 11 N. J. Eq. 423, 69 Am. Dec. 598; *Lynde v. Lynde*, 54 N. J. Eq. 473, 35 Atl. 641. Affirmed in 55 N. J. Eq. 591, 35 Atl. 641; *Dorsheimer v. Rorback*, 24 N. J. Eq. 33; *Jarmon v. Wiswall*, 24 N. J. Eq. 68.

The Constitution of the United States requires that full faith and credit be given to the decree and order of the New Jersey court.

U. S. Const. art. 4; U. S. Rev. Stat. § 905; *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 48 L. R. A.

152; *Fletcher v. Ferrel*, 9 Dana, 372, 35 Am. Dec. 143; *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604; *Barber v. Barber*, 21 How. 582, 16 L. ed. 226; *Shields v. Thomas*, 18 How. 253, 15 L. ed. 368; *Nations v. Johnson*, 24 How. 195, 16 L. ed. 628.

It is proper to file a bill in equity to enforce in all its parts a chancery decree of a sister state.

Bullock v. Bullock, 52 N. J. Eq. 561, 27 L. R. A. 213, 30 Atl. 676; *Fletcher v. Ferrel*, 9 Dana, 372, 35 Am. Dec. 143; *Barber v. Barber*, 21 How. 582, 16 L. ed. 226; *Shields v. Thomas*, 18 How. 253, 15 L. ed. 368; *Nations v. Johnson*, 24 How. 195, 16 L. ed. 629; *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604.

The supreme court is the successor of the old court of chancery having general equity jurisdiction, and as such may grant equitable relief independent of the Code.

Youngs v. Carter, 10 Hun. 194; *Sherman v. Felt*, 2 N. Y. 186, Approved in *Wegman v. Childs*, 41 N. Y. 159; *Shields v. Thomas*, 18 How. 253, 15 L. ed. 368; *Post v. Neafie*, 3 Cai. 22; *Pennington v. Gibson*, 16 How. 65, 14 L. ed. 847.

A court of equity has power to bring its judgment down to date, and make it conform to the facts as they exist when the judgment is rendered.

Lynch v. Metropolitan Elev. R. Co. 129 N. Y. 230, 15 L. R. A. 287, 29 N. E. 315; *Van Allen v. New York Elev. R. Co.* 144 N. Y. 174, 38 N. E. 997; *Inderlied v. Whaley*, 85 Hun. 63, 32 N. Y. Supp. 640; *Kilbourne v. Sullivan County Supers.* 137 N. Y. 170, 33 N. E. 159.

Mr. John H. Kemble, with **Mr. George S. Ingraham,** for defendant:

The courts of this state have the right to examine judgments of courts of other states on jurisdictional grounds.

Jacobs, Domicil, § 47; *Thompson v. Whitman*, 85 U. S. 457, 21 L. ed. 897; *Ward v. Boyce*, 152 N. Y. 191, 36 L. R. A. 549, 46 N. E. 180; *Douglass v. Phenix Ins. Co.* 138 N. Y. 209, 20 L. R. A. 118, 33 N. E. 938.

The original basal decree of divorce was and is void as against the defendant for want of jurisdiction.

People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274; *O'Dea v. O'Dea*, 101 N. Y. 23, 4 N. E. 110; *Atherton v. Atherton*, 155 N. Y. 129, 40 L. R. A. 291, 49 N. E. 933; *Re Kimball*, 155 N. Y. 62, 49 N. E. 331.

Notice by publication is not sufficient to lay the foundation for a personal judgment.

Jacobs, Domicil, § 47; *Potter v. Ogden*, 136 N. Y. 384, 33 N. E. 228; *Kilburn v. Woodcorth*, 5 Johns. 37, 4 Am. Dec. 321; *People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Cooley, Const. Lim.* 405; *St. Clair v. Cor.* 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237; *Owens v. Henry*, 161 U. S. 642, 40 L. ed. 837, 16 Sup. Ct. Rep. 693; *Hemietta Min. & Mill. Co. v. Johnson*, 173 U. S. 221, 43 L. ed. 675, 19 Sup. Ct. Rep. 402.

The void decree for divorce will not sup-

port a judgment *in personam* awarding alimony.

Erkenbrach v. Erkenbrach, 96 N. Y. 456; *Rigney v. Rigney*, 127 N. Y. 408, 28 N. E. 405.

An appearance only in a supplemental proceeding will not render an otherwise void judgment of another state valid.

Ward v. Boyce, 152 N. Y. 191, 36 L. R. A. 549, 46 N. E. 190.

Gray, J., delivered the opinion of the court:

I think that the appellate division has very correctly decided the questions in the case, and the opinion of Mr. Justice Bartlett, speaking for that court, leaves little, if anything, to be added to its reasoning. With respect to the main question—whether the court of chancery of the state of New Jersey acquired jurisdiction over the defendant to render the final decree for the payment of alimony—it is argued in his behalf that the decree of divorce was invalid as to him, and therefore afforded no support for the decree of alimony. That the decree of divorce was of no force as to him cannot be disputed. It is quite settled, at the present day, that no state can exercise jurisdiction and authority over persons or property without its territory. Its laws and the judgments of its tribunals can have no extra-territorial operation, except so far as the former may be allowed such by comity. The decree of divorce which the plaintiff obtained in New Jersey was effectual to determine her status as a citizen of that state towards the defendant, but as to him it effected nothing, and was void for want of personal service of process, or of an appearance by him in the divorce proceedings. One or the other of these conditions was required to be shown to enable the court to proceed with jurisdiction *in personam*. As the service of process was constructive, by publication, however authorized by the laws of the state, it was ineffectual against the defendant for any purpose. *People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274; *Re Kimball*, 155 N. Y. 62, 49 N. E. 331; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; Story, Conf. L. § 539. This action, however, is upon a final decree of the chancery court of New Jersey, which rendered a money judgment *in personam* against the defendant in a proceeding in which there was a voluntary appearance on his part. Upon service of the order of the chancellor directing him to show cause why the petition of the plaintiff for the amendment of the decree of divorce should not be granted, he appeared in the proceeding, without any reservation of record, and without making any objection to the jurisdiction of the court. Not only was that so, but in his affidavit which was filed in the proceeding, he asserted that he had been divorced from his matrimonial relations upon the plaintiff's petition: that he had subsequently married again: and his objections to the granting of the plaintiff's petition were carefully formulated. He alleged that "the decree for divorce . . . 48 L. R. A.

was purposely drawn without providing for or reserving any alimony," etc.: that he was "financially unable to pay alimony;" and "that, the said decree of divorce having been made without reserving the question of alimony, and this defendant having been absolutely divorced from said petitioner by said decree, and having since formed new relations and matrimonial obligations, that it would be illegal, inequitable, and unjust to now impose upon him the burden of alimony," etc. In short, he appeared and submitted himself to the jurisdiction of the court, appealing to its consideration of the facts, and not objecting to its power to proceed; not repudiating the divorce, but relying upon it. There cannot be the slightest question that his appearance was general. He was represented by counsel until the order of the chancellor, which amended the decree of divorce by reserving to the petitioner the right to apply at the foot thereof for alimony, and to the court the power to make any further order with respect thereto, had been affirmed by the court of errors and appeals upon his own appeal, and until the application for a reference to determine the amount of alimony. Is he, then, in a position to invoke the invalidity of the original decree of divorce? As he was not personally served, and did not appear in the divorce action, the decree divorcing the plaintiff could not have given her any judgment *in personam*. It did not reserve the right to apply thereafter for alimony when jurisdiction *in personam* was obtained of the defendant; but that was an unintentional omission, as the chancellor decided, which was due to the inadvertence of plaintiff's counsel, and would be remedied by amending the decree. The affirmation of the order in that respect on defendant's appeal settled the law of that state to be that the court may, upon petition, amend its enrolled decree, when the amendment is necessary to give full expression to its judgment, and is matter which would, without doubt, have been incorporated in the decree when made, if attention had been called to it. *Lynde v. Lynde*, 54 N. J. Eq. 473, 35 Atl. 641. The demand for alimony in a divorce suit is not an essential part of the cause of action, but is merely incidental to the action and the judgment. *Forrest v. Forrest*, 25 N. Y. 501; *Galusha v. Galusha*, 138 N. Y. 272, 291, 33 N. E. 1062; *Lynde v. Lynde*, 54 N. J. Eq. 473, 35 Atl. 641. In *Kamp v. Kamp*, 59 N. Y. 212, the question was not up as to whether the court might amend its judgment granting divorce *simpliciter*, when the omission to reserve the question of alimony was shown to have been through inadvertence. The application there was for an order directing the payment of alimony upon a judgment of divorce which was silent as to alimony, and it was held that the power to allow it in subsequent proceedings does not exist, in view of the legal presumption that the judgment had finally decided every question involved in the action, which would include the right of the plaintiff to claim alimony.

In my opinion, assuming, as we must, that

the decree of the chancery court, which amended the original decree of divorce, expressed the law of the state of New Jersey (*Loing v. Rigney*, 160 U. S., at page 542, 40 L. ed. 528, 16 Sup. Ct. Rep. 366), jurisdiction was obtained over the defendant by his appearance, plea, and submission, to so far cure the invalidity of the divorce decree as to render it effective as a basis for alimony proceedings. But, whether its invalidity was cured or not in the subsequent proceeding to which the defendant was a party, a final decree was entered adjudging that he pay to the plaintiff a certain sum of money. The jurisdiction once obtained could not be dervested by his refusal to appear in the later stages of the proceeding. He cannot now attack the final decree of the court collaterally, after having had his day in court. In *Loing v. Rigney*, 160 U. S. 542, 40 L. ed. 528, 16 Sup. Ct. Rep. 366, after the wife had filed a bill against her husband in the court of chancery in the state of New Jersey, alleging acts of adultery, and the defendant had appeared, and answered, denying the allegations, the plaintiff filed a supplemental bill, wherein she alleged that the defendant had committed adultery with a person named since the commencement of the suit, and prayed that she might have the same relief against the defendant as she might if the facts had been stated in the original bill. Process upon the supplemental bill could not be served personally upon the defendant, who was a nonresident, and there was a substituted service by publication. He fled no answer to the supplemental bill, nor did he appear, and a final decree was rendered by the chancellor granting the divorce and awarding alimony, etc. An action was then brought in this state by the wife upon the decree to recover against her husband the amount awarded for alimony and costs, and the question was whether the New Jersey court had jurisdiction to render the decree. In the Supreme Court of the United States, to which the case was taken from this court (127 N. Y. 408, 28 N. E. 405) by writ of error, it was held that, in affirming the dismissal of the plaintiff's complaint upon the trial, due effect had not been given to the provisions of article 4 of the Constitution of the United States, which require that full faith and credit shall be given in each state to the judicial proceedings of every other state. It was conceded that, if the judgment of the court of chancery was not binding upon the defendant therein personally in that state, no such force could be given to it in the state of New York; but it was held that the law of the state of New Jersey must be deemed to be as declared by the chancellor, who had rendered a final decree, based upon the original bill, the process under which had been served upon the defendant within the state, and upon the supplemental bill, a copy of which, with the rule to plead, had been served upon the defendant without the state. It was said that, "so long as this decree stands, it must be deemed to express the law of the state. If the defendant deemed himself aggrieved thereby, his rem-

edy was by appeal." In other words, the Supreme Court of the United States held that, the New Jersey court having once acquired jurisdiction of the defendant in the action, whether it retained that jurisdiction, so as to render the final decree in the proceedings leading thereto, was a question depending upon the law of that state, which could not be attacked collaterally. *Loing v. Rigney* is much in point, inasmuch as jurisdiction of the defendant, in this case, having been obtained in the proceeding, it was retained by the court until it made the final decree. The jurisdiction conferred the power to render the decree, and it will be regarded as valid and binding until set aside in the court in which it was rendered. *Kinnier v. Kinnier*, 45 N. Y. 542, 6 Am. Rep. 132. *Ward v. Boyce*, 152 N. Y. 191, 36 L. R. A. 549, 46 N. E. 180, has no application. The action was upon a promissory note made by the defendant to the plaintiff's order, and the issue between the parties was as to the plaintiff's ownership. The defendant claimed that the record of a certain proceeding in a justice's court in the state of Vermont was conclusive evidence that the note was not her property, but was that of her husband. The proceeding in the Vermont court was by way of trustee process, and was instituted by a creditor of Mr. Ward, this plaintiff's husband, against him and Boyce, the maker of the note, as his debtor. Ward was a nonresident, did not appear, and judgment went against him by default. Boyce, the other defendant, appeared, and stated that he gave the note to Mrs. Ward for cattle purchased, and he asked that she be cited to appear. A citation was served upon her in the state of Vermont to show cause why the note should not be adjudged to be held as her husband's property by his creditor. She did not appear, and judgment was rendered in conformity with the terms of the citation. We held that the judgment did not conclude Mrs. Ward, because she was not a party to the proceeding, and was cited to appear at a stage of it when she had no opportunity to litigate the fundamental issue. The principal fact had then been adjudged,—that the indebtedness for the cattle, for which the note was given, was owing to the husband,—and this in a special statutory proceeding, in which the court had acquired no jurisdiction by service of any process upon him, or upon his wife, who held the note. When she was cited, it was not that she might contest the validity of the judgment against her husband, but merely to show cause why the note she held should not be adjudged as her husband's property, and to be held by his creditor. I can perceive no resemblance in the principle of the decision in *Ward v. Boyce* to that involved here. I am satisfied, without further discussion, that the court of chancery in New Jersey had ample jurisdiction to render the final decree now in question against the defendant.

With respect to how far the supreme court of this state will enforce the final decree of the New Jersey court, I think the determin-

ation of the appellate division to be quite correct. The action was to recover upon a final decree of the court of another state, which, being rendered with jurisdiction over the person of the defendant, is to be deemed conclusive, in so far as it adjudged the defendant to be indebted to the plaintiff at the date of its rendition. The proceeding in chancery had terminated in an unconditional decree that the defendant must pay a definite sum of money, established as a debt against him, and therefore it had extraterritorial value and force. Wharton, Conf. L. § 804. As a debt of record against the defendant, the courts of this state should give it full credit and effect; but as to its other provisions for future alimony, and for equitable remedies to enforce compliance, I do not think we should say that it falls within the rule of the Federal Constitution. I do not think that the courts of this state should give effect to the decree by enforcing any of the collateral remedies which the prevailing party may be entitled to in New Jersey, and which the subsequent order gave to her. So far as it made provision for the payment of alimony in the future, it remained subject to the discretion of the chancellor, and lacked conclusiveness of character. The chancellor's action was not final on the subject. As he observed in *Lynde v. Lynde*, 54 N. J. Eq. 473, 35 Atl. 641, referring to the law of New Jersey: "The statute exhibits an intention that the subject shall be continuously dealt with according to the varying conditions and circumstances of the parties." The provision of the Federal Constitution which requires that full faith and credit shall be given to the judicial proceedings of another state, in my opinion, should be deemed to relate to judgments or decrees which not only are conclusive in the jurisdiction where rendered, but which are final in their nature. If they, once and for all, establish a debt or other obligation against a party, the record is available in other jurisdictions as a foundation for a judgment there. The provisions of our Code for the enforcement of a direction, in a judgment of divorce, for the payment of alimony, by equitable remedies, pertain only to such judgments as are recovered here. Article 4, chap. 15. The jurisdiction of the supreme court of this state to dissolve a marriage is conferred solely by statute, and its provisions upon the subject of alimony are not available to the plaintiff in aid of her decree. The plaintiff's decree was, therefore, available to her as evidence in this action that the subject-matter of the proceedings leading to its rendition, viz., the liability for alimony, had become a debt of record in the state of New Jersey, which could not be avoided but by plea of *nul tiel record*. *M'Elmoyle v. Cohen*, 13 Pet. 312, 324, 10 L. ed. 177, 183.

The case of *Barber v. Barber*, 21 How. 582, 16 L. ed. 226, cited by the plaintiff in support of her claim that the decree of the New Jersey court should be enforced in all its parts, was not parallel in its facts, and the observations of Justice Wayne, which are 48 L. R. A.

referred to, if intended as supposed, were not necessary to the decision of the particular question. In that case the wife had obtained a judgment of divorce from her husband in the court of chancery of this state, and the final decree awarded her a sum of money representing alimony retrospectively due to her for the interval between the filing of the bill and the rendition of the decree, directed execution therefor, and further, ordered the payment of permanent alimony in the future, during her life, in quarterly payments, which was "vested in her for her own and separate use, and as her own and separate estate, with full power to invest the same, . . . to dispose of the same by will, or otherwise, from time to time during her life, or at her death," etc. The husband then left this state, and went to Wisconsin. A bill was filed there in the United States court by the wife, through her next friend, setting forth the proceedings had in the New York court and the decree, charging the husband with not having paid any part of the alimony adjudged to his wife, and alleging that there was then due to her a certain amount of money on that account. In his answer he admitted the rendering of a decree of divorce after contestation, and that by it he "was subjected to the payment of alimony to the extent and in the way it is claimed in the bill," and alleged that, as he had obtained a divorce from his wife in Wisconsin, she thereby "became a *feme sole*, and, being so, could not sue by her next friend," etc. The action resulted in a decree, adjudging that a stated amount of money "is due from the defendant upon the alimony sued for," and, upon his default in payment, ordering execution therefor. It will be observed that the situation of the parties was quite other than it is here; that the decree of the New York court was the basis of a bill in equity in the Federal court; and that its finality as an adjudication with respect to alimony past due and in the future (in which latter respect it was made a vested estate in her for life) was admitted by the answer to the bill. It will also be observed that the decree obtained in the United States court in Wisconsin merely adjudged a certain amount to be due complainant which the defendant must pay. The question in the case was stated to be whether the wife might sue in another state, "by her next friend, in equity, in a court of the United States, to carry into judgment the decree;" and much of the discussion proceeded upon the jurisdiction in equity. As to the nature of a decree which awards alimony, it was remarked, in the course of the opinion, that when the court having jurisdiction of the wife's suit for divorce, allows her alimony, "it becomes a judicial debt of record against the husband." As Mr. Justice Bartlett very correctly suggests in his examination of *Barber v. Barber*, Mr. Justice Wayne, when he further observed in his opinion that the wife might sue her husband in another jurisdiction, "to carry the decree into a judgment there with the same effect that it had in the state in which the decree was given,"

could not have intended that she could carry with her judgment into another state the right to any particular remedies for its enforcement, because that would have been in conflict with the rule which he had laid down many years earlier in *M'Elmoyle v. Cohen*, 13 Pet. 312, 324, 10 L. ed. 177, 183. So far, therefore, as the final decree of the court in New Jersey adjudged moneys to be due and payable to the plaintiff from the defendant, it became a judicial debt of record, which the former was entitled to have enforced by the courts of this state, under the provisions of the Federal Constitution, and a judgment recovered thereupon could be executed only as our laws permit (*Barber v. Barber*, 21 How. 582, 16 L. ed. 226), which would not include the particular equitable remedies provided by the statute in the chapter on matrimonial actions. So far as the plaintiff's decree provided for methods to enforce payment, its provisions were in the nature of execution, and operative upon the defendant only as he, or property belonging to him, might be found within the jurisdiction of the courts of New Jersey. The subsequent order, dated February 8, 1898, and which is set out in the complaint (but referred to as of March 24, 1898), is not enforceable here, for it was merely an order which sought to carry the final decree into execution within the state by the equitable remedies of a receivership and of an injunction. No action will lie upon such an order. *Sheehy v. Professional Life Assur. Co.* 2 C. B. N. S., at page 256.

I advise an affirmance of the judgment, without costs.

Parker, Ch. J., and Haight and Werner, JJ., concur. O'Brien, J., not voting. Cullen, J., not sitting.

London, J., concurring:

I concur in the opinion of Gray, J., in overruling the defendant's appeal. I would go further, and sustain the plaintiff's appeal. The plaintiff seeks such equitable judgment in this state as shall give full faith, credit, and effect to a decree of the court of chancery of New Jersey awarding her alimony against her husband. The case embraces a Federal question, and the decisions of the United States Supreme Court become authoritative, so far as they are applicable. The question is not whether the jurisdiction of the courts of this state to grant alimony is equitable or statutory, but whether a plaintiff who has obtained a decree for alimony in another state can, in an equitable action in this state, upon sufficient allegations and proofs, not only obtain judgment upon such foreign decree, but also such means of enforcing it as are suited to periodical payments, and the peculiar duty incumbent upon the husband in respect of alimony, which means equity alone can give. *Barber v. Barber*, 21 How. 582, 16 L. ed. 226, holds that equity has jurisdiction in such a case. In *Wood v. Wood*, 7 Misc. 579, 28 N. Y. Supp. 154, the court refused to follow the decision, and the appellate division has 48 L. R. A.

adopted the refusal. But the case there was upon a French decree, and no Federal question existed, and the court was not bound by the authority of the *Barber Case*. It is otherwise here. If equity has jurisdiction, then it can adapt its remedies to the exigencies of the case. This the special term did, and I think did right.

Frederic B. VANDEGRIFT, *Respt.*,
v.

COWLES ENGINEERING COMPANY *et al.*, Impleaded, etc., *Appts.*

(161 N. Y. 435.)

1. A general assignment for creditors, made by a contractor, does not abrogate the contract or constitute a breach of it, so as to entitle the other party to take possession of the property on which the work is being done before the expiration of the time agreed upon for performance, although the assignment contains no provisions with respect to the assignee's power to carry out contracts.
2. Taking possession of a vessel which is being built by a contractor before its completion or the expiration of the time therefor, merely because the contractor has made an assignment for creditors, though it might be treated by his assignee as a trespass, may be regarded, instead, at his option, as an acceptance under the contract.
3. One who takes possession of a vessel which a contractor is building is estopped from denying that he has accepted it under the contract, when he could lawfully take it only by accepting it.
4. A penalty which by the terms of a contract is to be paid only by a deduction from the final payment cannot be recovered when no part of that payment has been made.

(*Bartlett, Gray, and O'Brien, JJ., dissent.*)

(January 9, 1900.)

APPEAL by defendants from an order of the Appellate Division of the Supreme Court, First Department, reversing a judgment of the New York County Circuit in defendants' favor in an action brought to recover damages for breach of a contract to build a steamboat. *Reversed.*

Statement by **Martin, J.:**

Appeal from an order of the first appellate division, reversing a judgment which dismissed the complaint, and granting a new trial. From that order the defendants the Cowles Engineering Company and Vaulx Carter, its assignee, appealed to this court. On the 3d day of March, 1893, the engineering company entered into a written contract with the Interstate Steamboat Company, by which the former agreed to build and complete for the latter a steamboat of the char-

NOTE.—As to right to rescind or abandon contract because of other party's default, see note to *Lake Shore & M. S. R. Co. v. Richards* (111.) 30 L. R. A. 33.

acter, dimensions, and speed therein provided, and to deliver the same at a time and place provided in the contract. In consideration thereof the Interstate Company was to pay \$50,000 as follows: Ten per cent on the signing of the agreement; 25 per cent when all the steel for the steamer was in the yard and shops of the defendant company, being worked upon; 25 per cent when the steamer was in the frame, and the principal forgings, castings, plates, and tubes for the engines and boilers were in the shops of the defendant company, being worked upon; 25 per cent when the steamer was launched; and the remaining 15 per cent upon its completion in accordance with the agreement. Five thousand dollars of the fourth and \$5,000 of the fifth payments were permitted to be paid in the bonds of the plaintiff's assignor, to be made and to become due as therein mentioned, and to be secured by a first mortgage upon property therein described. It was also mutually agreed that in case the defendant company should not complete the steamer on or before the 22d of August, 1893, it should forfeit to the plaintiff's assignor the sum of \$100 per day after that date as damages for each day's delay in the completion of the steamer, to be deducted from the amount of the bonds which the plaintiff's assignor might pay on the final payment. It was also agreed that, if the steamer was not completed within two months after the time named, the plaintiff's assignor might accept or reject her upon her completion, and that, if she was rejected, then the defendant company should repay, with interest, all sums paid to it under this agreement. It was likewise agreed that all the time which delay in the completion of the steamer should be caused by strikes of workmen, whether in the works of the defendant company, or in the works where any of the materials or machinery for such steamer were made, or by epidemics, or by the elements, or by delays of carriers, or by other causes beyond the control of the defendant company, should be added to the time fixed for the completion of such steamer, and the time extended accordingly. A bond in the penal sum of \$25,000 was executed by the defendant company, and by the defendants Nevins and Tumbidge as sureties, conditioned for the performance of the contract by the defendant company. The latter entered upon its performance, and in August, 1893, the first four instalments provided for, amounting to \$42,500, had been paid by the plaintiff's assignor. During that month the defendant company failed, and upon the 30th day of the month it executed a general assignment to the defendant Carter for the benefit of its creditors.

Upon the trial the plaintiff proved the contract and specifications, the bond, and an assignment by his assignor to him, which assigned the bond and all the debt and obligation thereby secured; that the plaintiff's assignor executed a mortgage upon its real estate and upon certain personal property to the Camden Safe-Deposit Company, as trustee, to secure its bonds; and that bonds were issued under that mortgage to the amount of \$26,48 L. R. A.

000. The plaintiff then proved that his assignor made all the payments required by the contract, except the last; that the boat was launched the early part of August, 1893, was named by the plaintiff's assignor, but was never completed by the defendant company; that when launched she had some decking, her hull, and engines, but no boilers, and there was nothing above the hull; that no offer or tender of the boat to the plaintiff's assignor was made by the defendant company; that there were parts of the boat in the shops of the defendant company, brass works, part of the rudder, tiller wheel, brass fittings for the different parts of the boat, and a number of things; that the boilers, brass fittings, and other things were sold by the sheriff of Kings county, but it was not proved when the sale occurred; that they were not purchased by the defendant company, but were bought by a young man in the office of Parsons, Shepard, & Ogden; that the boat laid at Bush's Wharf, Brooklyn, six weeks, during which time she was in charge of the employees or officers of the Interstate Company, and on the 9th or 15th of October was, by the direction of the president of that company, taken to Philadelphia and completed by direction of the plaintiff's assignor. Briefly stated, this is all the evidence that was given upon the trial.

When the plaintiff rested, the defendants moved to dismiss the complaint upon the grounds: "First. That there is no evidence tending to show that the Interstate Steamboat Company or its assignee, Vandegrift, has sustained any damage by reason of the failure to complete the boat. Second. That it appears that within the time within which, by the terms of the contract, the Cowles Engineering Company was to complete the boat, the Interstate Steamboat Company removed the boat from the possession of the assignee, and deprived him and the Cowles Company of the power of completing the boat. Third. That the removal of the boat within such time, and prior to the expiration of the time for her completion, was an acceptance by the Interstate Steamboat Company of the boat as a completed boat in accordance with the terms of the contract. Fourth. Upon the further ground that there is no evidence of a breach of the contract by the Cowles Engineering Company. On the further ground that he has not shown that the defendant the Cowles Engineering Company was not prevented from completing the boat by strikes." This motion was granted, and the plaintiff duly excepted.

Messrs. Henry W. Goodrich and Jerry A. Wernberg, with Messrs. Shepard & Prentiss, for appellants.

Messrs. Essek Cowen and Robert D. Benedict, for respondent:

By the fair construction of the contract of March 3, 1893, the Cowles Company was to deliver the boat on or before August 22, 1893, unless delayed by "causes beyond the control" of that company.

Where one party to a contract under seal refuses to perform his part, the other may

either sue on the contract for damages for the breach, or rescind the contract and recover on assumpsit the money paid, for which he receives no benefit.

American L. Ins. Co. v. McAden, 109 Pa. 399, 1 Atl. 256.

The assignment by the Cowles Company of the subject-matter of the contract to a trustee, with instructions to sell the boat and divide the proceeds among its creditors, thus divesting itself of all title to the boat, and of all right to complete and deliver it, was of itself a breach of the contract, and gave the plaintiff an immediate right of action.

If one party to an executory contract, by his own act, makes the performance of his promise impossible, the other party may at once bring an action for a breach, and is not bound to make a tender, or perform any other condition precedent on his part.

Hard v. Bowers, 23 Pick. 455; *Newcomb v. Brackett*, 16 Mass. 161; *Ford v. Filey*, 8 Barn. & C. 325; *United States v. Behan*, 110 U. S. 339, 28 L. ed. 168, 4 Sup. Ct. Rep. 81; *Ruscus v. Mexican Nat. Constr. Co.* 22 Fed. Rep. 522; *Hawley v. Keeler*, 53 N. Y. 114; *Woolner v. Hill*, 93 N. Y. 576; *Burtis v. Thompson*, 42 N. Y. 240, 1 Am. Rep. 516; *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. 436.

Where a party has a contract to sell and deliver personal property on a future day, and before that day has arrived has sold and delivered the property to another, he is immediately liable to an action at the suit of the party with whom he had first contracted.

Bowdell v. Parsons, 10 East, 359; *Crist v. Armour*, 34 Barb. 378; *Raymond v. Minton*, L. R. 1 Exch. 244.

There is a plain distinction between an assignment to an individual, and one to a general assignee in trust, in the case of an executory contract.

Clark v. Dickinson, 74 N. Y. 47; *Mandeville v. Reed*, 13 Abb. Pr. 173; *Woolner v. Hill*, 93 N. Y. 576.

Martin, J., delivered the opinion of the court:

This controversy is based upon the agreement between the plaintiff's assignor and the defendant company, and the bond given to secure its performance by the latter. To authorize a recovery upon the bond, upon the contract or for the money paid thereon, it was incumbent upon the plaintiff to show that there was something due under the agreement, or that it had been broken by the defendant company without fault of the plaintiff's assignor, and anterior to any breach by the latter. This involves a determination as to the time within which the defendant company was required to complete and deliver the steamer to the plaintiff's assignor. The appellants insist that, in any event, the time for the fulfilment of the contract did not expire until the 22d day of October, 1893, and as there was no proof that the company was not delayed by strikes, epidemics, delays of carriers, or other causes beyond its control, it was not shown that its

time did not extend beyond that day. The first clause of the contract relating to the subject provides that the steamer shall be completed on or before the 22d day of August, 1893. If this was all of the agreement relating to the question of time, there would be no difficulty in determining it. But we find two others, both of which relate to, and bear directly upon, the intention of the parties as to the time within which the defendant company was bound to complete and deliver the boat. The first is to the effect that the company should forfeit \$100 for each day's delay in completing her after August 22d, and, if she was not completed within two months after that time, the plaintiff's assignor might, at its option, accept or reject her upon completion. From this provision the plain and necessary implication is that the defendant company was to have two months' further time for her completion, although it might be liable to pay the specified penalty for its delay. The next provides that any delays caused by strikes or other conditions mentioned should be added to the time fixed for the completion of the work, and that the time should be extended accordingly. Thus, it is manifest that the time for the completion of the vessel was not fixed absolutely as the 22d of August, so far as the defendant company was concerned. While it may be that the plaintiff's assignor could not have been required to accept the boat and pay the full consideration before that time, yet the provisions of the contract show a clear intent that the defendant company should not be absolutely required to complete her on or before that date. It is true, if it did not it might become liable to pay the penalty prescribed. But this was the only loss or liability to which it was to be subjected until two months after that time, when the plaintiff's assignor might accept or reject her as it saw fit. Thus, prior to October 22d, it possessed no right to reject her, and, consequently, if she was completed in accordance with the contract within that time, it was bound by its agreement to accept her and pay the contract price, less only the penalty which was provided for delay after the 22d of August. Moreover, in case of strikes, epidemics, delays of carriers, or other causes beyond the control of the defendant company, the time of such delays was, by virtue of the contract, added to the time provided for her completion. It is therefore obvious that under the contract the defendant company had at least until the 22d of October within which to complete its work. As there was no rejection of the steamer by the plaintiff's assignor, and no breach of the agreement upon the part of the defendant company by reason of her noncompletion, it follows that the plaintiff's assignor had no right of action at the time it took possession of and removed her. The contract being then in force, the defendant company having broken none of its provisions, the plaintiff's assignor had no right to the possession of the vessel, and the contract was first broken by it when, about six weeks before the 9th of October, it took

possession of her, and thus prevented her completion. It is no answer to say that the steamer could not have been completed between the time it was taken and the 22d of October, as there was no proof that it could not have been thus completed, nor that the time had not been extended by reason of strikes, or some other of the causes mentioned in the agreement. The defendant company had the full time given by the contract, of which nearly two months remained, within which to perform it if possible; and the plaintiff's assignor was not authorized to prevent its performance, or its attempted performance, during that time, by the removal of the boat. That the title to it remained in the defendant company until it was delivered and accepted by the plaintiff's assignor, is expressly admitted by the respondent.

While impossibility of performance is, in general, no answer to an action for damages for nonperformance of a contract, provided the contingency was such as the promisor should have foreseen and provided against, yet, if the impossibility arises directly or even indirectly from the acts of the promisee, it is a sufficient excuse for nonperformance. This is upon the principle that he who prevents a thing may not avail himself of the nonperformance which he has occasioned. *Dolan v. Rodgers*, 149 N. Y. 489, 491, 44 N. E. 167.

Nor was there any proof of a tender of performance by the plaintiff's assignor, or demand that the defendant company should perform the contract upon its part. It is evident from the agreement that the intention of the parties was that the completion and delivery of the vessel, and the payment of the last instalment, should be dependent and concurrent acts. Where, by the terms of a contract, the acts are to be concurrent, it is the duty of him who seeks to maintain an action for its breach, either by way of damages for its nonperformance, or for the recovery of money paid thereon, not only to be ready and tender performance upon his part, but he must demand performance from the other party. *Ziehen v. Smith*, 148 N. Y. 558, 42 N. E. 1080; *Higgins v. Eagleton*, 155 N. Y. 466, 50 N. E. 287; *Glenn v. Rossler*, 156 N. Y. 161, 50 N. E. 785; *Benjamin, Sales*, 7th ed. § 592; *Gazley v. Price*, 16 Johns. 267. While there are qualifications to this rule where a formal tender or demand becomes unnecessary, such as a refusal in advance to comply with the terms of the contract, or where its performance is proved to have been impossible, yet they have no application here, as neither of those facts was established upon the trial.

The respondent, however, contends that the general assignment by the defendant company constituted a breach of the contract, and hence this action could be maintained. We do not assent to that proposition. A general assignment does not constitute a breach of a contract with the assignor, by reason of the insolvency which such an act imports. The insolvency of one of the parties to an executory contract of

sale is not equivalent either to a rescission or a breach. *Pardee v. Kanady*, 100 N. Y. 121, 2 N. E. 885. Where the subject of the contract involves no personal relation or confidence between the parties, or the exercise of personal skill or science, and there are no words restraining its assignment, the mere assignment by one of the parties will not operate as a rescission or termination of the agreement. *Devlin v. New York*, 63 N. Y. 8; *Rochester Lantern Co. v. Stiles & P. Press Co.* 135 N. Y. 209, 216, 31 N. E. 1018; *Wells v. Alexandre*, 130 N. Y. 642, 15 L. R. A. 218, 29 N. E. 142. Nor is the rule different where the assignment is for the benefit of creditors. *New England Iron Co. v. Gilbert (Metropolitan) Elev. R. Co.* 91 N. Y. 153. In the case last cited, where there was a general assignment for the benefit of creditors, it was expressly held that insolvency and the making of such an assignment did not justify the defendant in treating the contract as abrogated, or give cause for rescinding, and did not discharge the defendant from its obligations thereunder. The principle of that case seems to be controlling upon the question we are now considering, unless it is distinguishable from the case at bar. The only distinction claimed is that in the *New England Iron Co.* case there was a provision in the assignment which gave the trustees power to make such arrangement and disposition of the company's contracts as they should deem judicious, while no such provision is found in the assignment in this case. Hence, in determining the pertinency and weight of that decision, the question arises whether that provision in the assignment in any way changed its effect. It seems to us not. It in no way changed the rights of the assignees. The same duties were imposed and the same rights existed by virtue of the assignment, independently of that provision, as existed under it. Indeed, if it had changed the character of the assignment, it would, for that reason, have rendered it void. *Dunham v. Waterman*, 17 N. Y. 9, 72 Am. Dec. 406; *Robbins v. Butcher*, 104 N. Y. 575, 11 N. E. 272. "It frequently occurs that the assignor had entered into contracts prior to his assignment, which at the date of the execution of that instrument were still incomplete, or, if executed, remained unpaid for. The interest in all such contracts passes, with the rest of the debtor's property, to the assignee; and he may enforce the same against the parties interested in the same manner as his assignor might have done, or may, at his option, go on and complete the contracts, either on his own discretion or under an order of the court, as the case may be." *Headly, Assignments*, citing *Robbins v. Butcher*, 104 N. Y. 575, 11 N. E. 272; *Van Dine v. Willett*, 38 Barb. 319; *Collins v. Colmey*, 14 N. Y. S. R. 444. In *Burrill on Assignments* (§ 396) it is said: "Independently, however, of any authority contained in the assignment, the assignee may, in certain cases, continue the business as it has been conducted by the debtor. Thus where an assignor is conducting a manufac-

turing business when he makes an assignment, and he has a large amount of material on hand for the purpose of being manufactured, the assignee can conduct the business in his own name, for the purpose of working up the material thus ready for manufacture, where it is manifestly for the benefit of the estate." In *Woodward v. Marshall*, 22 Pick. 468, 474, it is said: "They [the assignees] of necessity have some discretion in the administration of the trust property. If it be perishable, they are bound to resort to the proper means for its preservation until it can be advantageously disposed of. . . . So, if it be unsalable, by reason of the unfinished state of its manufacture, we can see no reason why it should not be completed and prepared for market. And, in our opinion, the authority here expressly conferred [which authorized the assignees to work up the stock in process of manufacture] would have been implied by law, as necessarily incident to the principal powers granted. Where the estates of insolvent men are liable to be transferred, and that, too, generally, without much discretion in the selection of a propitious opportunity, it will necessarily happen that property of all kinds, and in every stage of preparation for market, will come into the hands of assignees; and, unless they exercise the power of preparing it for market, it will often perish or be sacrificed. Of the propriety and expediency of the measures to be adopted, they must judge in the first instance. Whether they abuse their trust or not may be inquired into in a proper form of action." In *Miller v. Mulford*, 31 N. J. Eq. 661, it was held that such an assignee might, for the benefit of the estate, complete unfinished contracts of the debtor, provided he exercises reasonable discretion. In *Watson v. Butcher*, 37 Hun, 391, there was a general assignment for the benefit of creditors, which contained a clause providing that, should it be necessary to the better performance of the trust, the assignee should have full power and authority to finish such work as was unfinished, to complete such buildings as were incomplete, and to pay all necessary charges and expenses for such completion prior to the debts and liabilities of the assignor; and it was there held that this clause gave to the assignee no additional right beyond that which the law gave and imposed, and hence that its insertion in the assignment did not render it fraudulent as to creditors, or require it to be set aside. In *Re Carter*, 21 App. Div. 118, 47 N. Y. Supp. 383, which was an accounting, to which the plaintiff in the present action, his assignor, and the defendant assignee were parties, this agreement was under consideration. It was there held (1) that the general assignment by the defendant company did not *per se* constitute a rescission or breach of the agreement now under consideration; (2) that there was no breach of the contract by reason of the failure of the defendant company to complete the boat; (3) that the damages were not liquidated; and (4) that, there having been an omission for four years to present a claim

against the assignee, no recovery upon the bond or upon the contract should be allowed on his final accounting. The decision in that case was affirmed by this court without opinion. 155 N. Y. 627, 49 N. E. 1094.

The discretion vested in the assignee in respect to the completion of unfinished contracts is, however, limited and temporary in its nature, and is strictly confined to the time necessary to close out the stock or finish the incomplete business. In the case at bar it evidently would have been to the interest of the estate for the assignee to complete the work, thus becoming entitled to the remainder of the contract price, and at the same time obviating any claim by the plaintiff's assignor for the money paid thereon. Therefore, presumptively, he would have done so but for the interference of the plaintiff's assignor, by which he was prevented from completing the boat. Again, it is obvious that no one, other than creditors, could interfere with the assignee in the disposition of the affairs of the assigned estate; and, if he had the consent of the creditors to complete the boat, his doing so would clearly have been proper, and the plaintiff's assignor would have had no right to prevent its completion by him, if finished within the time provided in the contract. *Headley, Assignments*, 76. There is no evidence that he did not have that consent, nor that he did not possess the right to perform the contract in behalf of the defendant company and its creditors. Under these circumstances, we are of the opinion that the principle of the case of *New England Iron Co. v. Gilbert (Metropolitan) Elev. R. Co.* is applicable, and that the assignment did not abrogate the contract between the plaintiff's assignor and the defendant company, or constitute a breach of it. Therefore it was while the contract was executory, and before the time for its completion had expired, that the plaintiff's assignor took possession of the vessel, and subsequently procured its completion. While it may be that the assignee of the defendant company would have been justified in treating such taking as a trespass, he was not required to do so, but might disregard the tort, and regard the taking as an acceptance under the provisions of the contract. It was taken before the period when the plaintiff's assignor had a right to reject it, and there was no proof of any rejection. Therefore, in view of the situation at that time, the taking might well be regarded as an acceptance under the contract. It having paid \$42,500, and the defendant company being insolvent, it doubtless regarded it more to its advantage to accept the property in its incomplete condition as a compliance with the contract, than to rely upon the responsibility of the defendant company for the money paid thereon. Having thus taken possession of the vessel, as it could rightfully do only in case it was accepted under the contract, presumptively it was so accepted; and the plaintiff's assignor, after having elected to thus accept the boat, is estopped from insisting to the contrary, and thereby imposing upon the defendant

company a liability which might not otherwise have arisen.

The appellants also contend that there was no proof that the plaintiff sustained any damage by reason of a breach of the contract of which he complains. The only proof in the case bearing upon this question was the execution of the contract; the payments made under it by the plaintiff's assignor; that the boat was not fully completed by the defendant company on August 22; that the latter made an assignment for the benefit of creditors on the 30th of August; that the plaintiff's assignor almost immediately took possession of the boat; and that she was subsequently completed under the directions of that company. From this proof, it is difficult to perceive that damages to any amount were established. The plaintiff's assignor having taken the boat with no proof that it was not of a value equal to the amount paid on the contract, or even of greater value, we do not find any evidence which would have justified the court in submitting the question of damages to the jury, even if we were to assume that there had been a breach of the contract upon the part of the defendant company or its assignee, which is by no means permissible, as we have already seen.

If it be said that the proof disclosed a covenant upon the part of the defendant company to forfeit to the plaintiff's assignor \$100 for each day's delay after the 22d of August, the answer is that, if it was a provision for a penalty, the plaintiff could recover only the actual damages sustained; but be that as it may, inasmuch as it was not to be paid by the defendant company, except by a deduction of the amount from the bonds of the plaintiff's assignor, which were to be delivered on the final payment of the consideration for the vessel, it is plain that under the evidence the plaintiff could not recover any portion of the penalty prescribed by the contract under the proof in this case.

For the reasons stated, we are of the opinion that the trial court was justified in dismissing the plaintiff's complaint, and that the learned appellate division erred in reversing its determination.

The order of the Appellate Division should be reversed, and judgment of the trial court affirmed, with costs in all the courts.

Parker, Ch. J., and Haight and Vann, JJ., concur.

Bartlett, J., dissenting:

The important chronology of this case is 48 L. R. A.

confined to the year 1893. The Cowles Engineering Company agreed in writing to construct a steamer for the Interstate Steamboat Company for \$50,000, to be completed by August 22d. The contract further provided that, if the steamer should not be completed within two months after August 22d, the Interstate Company might accept or reject her upon completion; receiving \$100 a day as damages if accepted, and the money paid on contract if rejected. The Cowles Company did not complete the steamer by August 22, and on August 30 made a general assignment for the benefit of its creditors. On or about the 15th of October the Interstate Company took possession of the steamer, towed her into another jurisdiction, and completed the work of construction. The Interstate Company received a bond from the Cowles Company for the faithful performance of the contract, and now seeks, by its assignee of the cause of action, to recover damages. The record discloses that the Interstate Company had paid \$42,500 on the contract prior to the general assignment of the Cowles Company, and the question is whether it was damaged after completing the boat. As the complaint was dismissed, the plaintiff is entitled to the benefit of every fact that the jury could have found from the evidence, and to all inferences warranted thereby. The plaintiff's proofs show that the Cowles Company never completed the steamer, and that the Interstate Company did; that the Interstate Company did not take possession until about a week before October 22d; that the steamer was not launched until August, but her boilers were not on board, and there was nothing above the hull; that there were parts of the boat in the shops of the Cowles Company,—brass works, portions of the rudder, the tiller wheel, the brass fittings; that the boilers, brass fittings, and other things were sold by the sheriff of Kings county, and the Cowles Company did not buy them. The fair inference from all this proof, in addition to other facts, is that the steamer was not completed by the Cowles Company or its assignee, and that neither intended to do so; that it would have been impossible to complete the contract during the time between the Interstate Company taking possession and October 22,—about a week. I think the Interstate Company, through the plaintiff, should have been allowed to prove such damages as it had suffered, if any, subject to the defenses the Cowles Company or its assignee might interpose and establish. I favor affirmance.

Gray and O'Brien, JJ., concur.

CONNECTICUT SUPREME COURT OF ERRORS.

PLATT BROTHERS & COMPANY

v.

City of WATERBURY, Appt.

(72 Conn. 531.)

1. A city is responsible for the acts of a board of sewer commissioners within the scope of their authority under a charter which gives the board authority to execute certain powers vested in the city.
2. Sustaining a demurrer to special defenses is not prejudicial error, when defendant has had the benefit on the trial of all evidence that could have been introduced under those defenses.
3. The use of a stream for drainage is unreasonable, when it results in the concentration of filth, and it discharge into the stream in such quantities that it is necessarily carried to the premises of another, where it produces a nuisance dangerous to health and destructive of the value of the property.
4. A prescriptive right to pollute a river in a certain manner does not justify pollution thereof by an additional and different use.
5. There can be no right by prescription to maintain a nuisance by the pollution of a river so as to carry filth and noxious substances to the premises of a lower proprietor, thereby endangering his health and destroying the value of his property.
6. Merely granting to a city authority to construct sewers for the convenience and benefit of its inhabitants does not necessarily make their use a governmental use in the sense that there can be no remedy, unless given by statute, for consequential injuries resulting therefrom.
7. Damage to a riparian owner by noxious and filthy substances deposited on his premises in consequence of the pollution of the river by sewers emptying into it above his land is not a mere consequential damage, but a direct appropriation of his well-recognized property rights which are within the guaranty of the Constitution.
8. Lack of charter authority to condemn the property rights of a riparian owner

- will not relieve a city from liability to make compensation for damage to such rights by the unlawful pollution of a river by sewers.
9. The right of surface drainage into a river does not include the right to discharge into it from sewers such noxious substances and in such quantities that the river cannot dilute them or safely carry them off without injury to the property of lower proprietors.
 10. The pollution of a river by city sewers, though it may become justifiable when done for a public purpose, is subject to payment of compensation for the invasion of the property rights of riparian owners.
 11. The use of city sewers by connecting property therewith does not preclude the owner from recovering damages to his riparian property rights in premises further down the river on account of the pollution of the waters by the sewers, where it does not appear that the damage was due in part to his fault.
 12. An injunction to protect riparian proprietors against the pollution of a river by city sewers cannot be refused because of the possibility of future legislative action respecting a plan of sewerage.
 13. The grant of an injunction will not be disturbed on appeal, unless the discretion of the court was abused.
 14. Evidence that a foreman refused to take charge of premises because of a stench is admissible to prove that fact, though not to prove the fact of the stench.
 15. Evidence that a person refused to work on certain premises because of a stench is not inadmissible because the refusal was made pending an action, although that fact might affect its weight.
 16. Evidence that a city at a special meeting voted not to accept a certain act which provided for its acceptance at a meeting held for that purpose is inadmissible for the purpose of proving the construction of the act.
 17. Evidence of the acts of a city with respect to the construction of sewers is inadmissible for the purpose of showing that it was compelled to build a sewer.

(January 4, 1900.)

NOTE.—*Right of municipal corporation to drain sewage into waters.*

- I. Introduction.
- II. Statutory authority.
- III. Taking or damaging property.
- IV. Miscellaneous.

I. Introduction.

Whatever may be the rule with respect to surface water, there seem to be no authoritative decisions asserting the right of municipal corporations, merely as riparian owners and without legislative authority, either express or implied, to drain sewage into waters to the injury of others, although there is an intimation to that effect in *VALPARAISO V. HAGEN*.

The rule that exempts municipal corporations from liability for consequential damages to private property from public improvements does not apply when the act which causes the damages is in excess of the authority of the municipality, or when, although the act is expressly or impliedly within its authority, the

infliction of the damages amounts to a taking of property within the constitutional prohibition against taking private property for public use without compensation. Hence, the first question reached in determining the right of a municipality to drain sewage into waters to the injury of others is whether or not the authority to do so has been conferred, either expressly or impliedly, upon the municipality. In England, of course, the inquiry stops here, and if a statute is construed to confer the authority the individual must submit to the injuries necessarily resulting, unless, indeed, the statute itself gives him a remedy; but in the United States, if a statute is construed to confer the authority, the inquiry goes further, and touches the question whether or not the infliction of the injuries amounts to a taking of property in the constitutional sense. If the answer is in the affirmative, the statute affords no protection to the municipality unless it has also been authorized to acquire, upon payment of compensation, the right to inflict such injuries, and has duly pursued such authority.

APPPEAL by defendant from a judgment of the Superior Court for New Haven County in favor of plaintiff in an action brought to restrain defendant from casting sewage into a stream on which plaintiff was a riparian owner and to recover damages for injury already inflicted. *Affirmed.*

Statement by **Hamersley, J.:**

The amended complaint alleges that the plaintiff is the owner of land and a water privilege on the Naugatuck river, 2 miles south of Waterbury, with manufacturing establishments, dwelling houses, and other buildings thereon, and that the water is conducted in a canal to the manufacturing establishments for the purpose of supplying power; that the plaintiff is entitled to a natural flow of said river in a pure condition; that from about July 12, 1884, to the present time, the defendant has discharged into the waters of said river, above the property of the plaintiff, large quantities of sewage and other noxious substances, which contaminated the waters in the river, and rendered the same noxious and filthy, producing noxious and unhealthy gases, permeating the plaintiff's said buildings; that, by said action of the defendant, the plaintiff has been deprived of all use of the water in said river, except for the purpose of furnishing power, and its manufacturing establishments have been injuriously affected by reason of said noxious and unhealthy gases, and that the value of said land, buildings, and water privilege has been largely diminished; that the plaintiff has duly notified the defendant, and requested it to desist from such defilement of the river, but the defendant has, notwithstanding, continued the nuisance to the present time; that the plaintiff has already been damaged to the extent of \$25,000, and the continuance of said nuisance will still more injure and damage its property. The plaintiff claims \$25,000 damages, and an injunction against the continuance of said nuisance. The answer of the defendant admits the plaintiff's ownership of the

property as alleged, and denies all other allegations. It contained, also, a special defense, setting up certain statutes, and action in pursuance of the same, and alleging that the action complained of is the action of the board of sewer commissioners of the city of Waterbury, and not of the defendant. The plaintiff demurred to this special defense. The court (G. W. Wheeler, Judge) sustained the demurrer, because the statutes referred to show that the board of sewer commissioners was created to act for the city, and had no power except to act for the city, and because the statement of the defense was too inadequate and indefinite to present any other claims. The defendant by leave of court then filed three special defenses, setting up substantially the claims appearing below in the statement of the defendant's claims in the finding of the court. Upon demurrer the court (G. W. Wheeler, Judge) held the defenses insufficient on the ground that the facts which could not be proved under the denials of the answer did not constitute a defense. The case was then tried on the issues formed by the denials of the plaintiff's allegations, and judgment rendered that the plaintiff recover \$500 damages, and that the defendant be enjoined against discharging the sewage from its sewers into the Naugatuck river above the premises of the plaintiff, whereby such sewage shall be carried down the river to said premises, during the months of June, July, August, September, and October in each year, from and after the 1st day of December, 1902. The defendant asked that this injunction be modified so as not to prejudice its rights under possible future legislation in respect to a state sewerage commission, and also to include a provision that the injunction should become inoperative whenever the defendant might acquire the plaintiff's property by condemnation. The modification was denied, as unnecessary.

The court (Shumway, J.) made the following findings:

"(1) At the time of the institution of the

II. Statutory authority.

The first question—whether the municipality has authority to inflict the injuries, or rather to do the act which necessarily causes them—is not always easily determined, since the authority may be implied by statutes which do not expressly, or in terms, confer it.

Thus, *Richmond v. Test*, 18 Ind. App. 482, 48 N. E. 610, and *Valparaiso v. Hagen*, which uphold the right of municipal corporations to drain sewage into streams, and deny the right of riparian owners whose property is injured thereby either to enjoin the nuisance or recover damages therefor, infer the authority from the general power of municipalities to construct sewers and outlets in connection with the fact that the stream affords the only practicable outlet or is the natural drainage way.

In *Joplin Consol. Min. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406, *infra*, the court held that the power conferred upon a city by a statute to establish public sewers along the principal courses of drainage authorized it to so construct a sewer as to discharge into a creek. The court said, however, that it would not pass upon the question whether the city could so

exercise such power as to create a public nuisance.

Attwood v. Bangor, 83 Me. 582, 22 Atl. 466, and *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592, *infra*, hold that city authorities act in a judicial or quasi-judicial capacity in determining where sewers shall discharge, and that when, in the exercise of their discretion, the sewers are made to discharge into waters, the city is under no common-law liability for the incidental damages.

On the other hand, *Valparaiso v. Moffitt*, 12 Ind. App. 250, 39 N. E. 909, held a city liable for damages to a riparian owner from the discharge of sewage into a stream, thereby polluting it, upon the ground that the pollution of the stream was declared by statute to be a nuisance, and that a municipal corporation is liable in a civil action for erecting and maintaining a nuisance, the same as a natural person.

When the legislature authorizes a city or town to construct sewers, or to use a natural stream as a sewer, it is not to be assumed that it intends to authorize the city or town to construct the sewers, or to use the stream,

suit, and for many years before, the plaintiff, as admitted in the answer to the first paragraph of the complaint, was the owner of the tract of land situated in the town of Waterbury, about 2 miles southerly from the city of Waterbury, with manufacturing establishments, dwelling houses, and other buildings thereon, through which said land flowed the Naugatuck river. On the said lands of the plaintiff there was a valuable water privilege, from which water was conducted in an artificial canal to the several manufacturing establishments of the plaintiff for the purpose of supplying water therein.

"(2) Under an amendment to the charter of the city of Waterbury (9 Spec. Laws, pp. 233-237), and in accordance with the provisions thereof, the city of Waterbury, by the board of sewer commissioners, began the construction of sewers in said city in 1883, according to a sewerage system by which the contents of the sewers were all discharged into the Naugatuck river at points about 2 miles above the manufacturing establishments of the plaintiff.

"(3) The place where said manufacturing establishments were carried on always has been, and is now, known as 'Platt's Mills.' At that place there has been a mill site for about a hundred years, at least; the dam across the Naugatuck river being at the same place, and substantially of the same height, as it was in 1811. It was raised 1 foot about twenty-five years ago. From a pond made by the dam the water has always been taken out by means of an artificial canal, the property of the plaintiff, which carried it down to the said manufacturing establishments, a distance of about $\frac{1}{2}$ mile. About \$150,000, in all, has been invested in the plaintiff's manufacturing establishments at Platt's Mills.

"(4) Prior to the construction of said sewers in accordance with the said sewerage system by the city of Waterbury, the waters of the Naugatuck river at Platt's Mills had

contained no substances in sufficient quantity to be annoying to the plaintiff, or injurious to its business or property.

"(5) The defendant commenced to discharge into the Naugatuck river the sewage from said sewers about July, 1884, but it was several years before the plaintiff experienced any special difficulty therefrom.

"(6) No attempt had or ever has been made by the city of Waterbury to agree with the plaintiff as to any compensation to be paid it for any injury to any 'estate, property, right, privilege, or franchise' which might be incurred by it by said use of the Naugatuck river for the discharge therein of the contents of said sewers, nor has any such compensation been made.

"(7) For a considerable period prior to the institution of this suit the plaintiff was very much and specially annoyed and injured, as hereafter stated, in the use and enjoyment of its property, by reason of the sewage discharged from said sewers into the Naugatuck river. It also appeared in evidence that there were other sources of pollution by which the water of the said river was also affected.

"(8) In the early part of the year 1891, and before this suit was brought, the plaintiff requested said city, both through its board of sewer commissioners, whose authority is described in said amendment to the charter of the city of Waterbury hereinbefore referred to, and through its court of common council, to desist from continuing to discharge the contents of such sewers into the Naugatuck river; or, if the city should persist in so doing, that the city should take steps under said amendment to assess damages and compensation to the plaintiff for any injury to their estate, property, right, privilege, or franchise which might or would be incurred by the use of Naugatuck river as an outlet for the discharge of said sewers. Said city of Waterbury neglected to comply with said request in either particular, and has taken no steps

as to create a nuisance, unless this is the necessary result of the powers granted. On the contrary, if it is practicable to do the work authorized without creating a nuisance, it is to be presumed that the legislature intends it shall be so done. *Morse v. Worcester*, 139 Mass. 389, 2 N. E. 604.

Edmondson v. Moberly, 98 Mo. 526, 11 S. W. 990, held that an action would lie against a city for the impairment of the value of private property near a stream, caused by the pollution of the stream by city sewage discharged into it. This decision rests upon the ground that the authority conferred by the city charter to establish a sewer system was general, and did not expressly indicate and sanction the particular arrangement of drains adopted, and that the power must be regarded as subject to the just limitation forbidding its exercise in such a manner as to create a nuisance injurious to private rights or property, where such consequence is not a necessary result of exerting the power.

Nolan v. New Britain, 69 Conn. 668, 38 Atl. 708, held that the pollution of a stream to the damage of riparian property outside the city was not authorized by a statute which empowers the common council, "whenever in their

opinion the public health or sewerage shall require such action, to take, occupy, and appropriate . . . any stream or part of a stream, natural or artificial, running in or through said city." This decision was, in a great measure, induced by the failure of the statute to provide for compensating the owner of such property, the court expressing its opinion that the pollution of a stream to the injury of riparian proprietors amounts to a taking of their property.

So, also, *Cator v. Lewisham Bd. of Works*, 5 Best & S. 115, 34 L. J. Q. B. N. S. 74, 11 Jur. N. S. 340, 13 L. T. N. S. 212, 13 Week. Rep. 254, denied the right of a district board of works to pollute a private stream flowing through another's land by the discharge of sewage therein. The decision rests upon the ground that the statute did not expressly give the power, and that it would not be inferred by reason of the supposed necessity for discharging the sewage into the stream.

Public works ordered by act of Parliament must be so executed as not to interfere with the private rights of individuals; and in deciding on the right of a single proprietor to an injunction to restrain such interference, the circumstance that a vast population will suffer

to prevent the pollution of the waters of Naugatuck river by the sewage discharged into it from said sewers, or to assess such damages.

"(9) In 1854 the population of the city of Waterbury was about 10,000. It was agreed on the trial that its present population is about 42,500. Of late years the population has rapidly increased.

"(10) There are about 32 miles of highways in said city, which it is the duty of said city to maintain in a condition safe and convenient for public travel. For this purpose these highways are drained into the sewers of said city by means of gutters and catch-basins, and thereby a quantity of filth from the streets finds its way into the Naugatuck river, and a further quantity of surface water flows over said highways into Great brook and Little brook, and this is carried into said Naugatuck river.

"(11) The contents of the discharges of said sewers have been, and are, the same as are continually discharged from city sewers containing organic matter capable of decomposition and putrefaction, and, if not further diluted or purified, will putrefy.

"(12) The sewerage system of the city of Waterbury has continually been extended since 1884, and is now being extended as the growth and wants of the city require. The number of sewer connections in January, 1885, was 359; on the 1st of January, 1893, 1,748; on the 1st of January, 1898, 3,046,—extending through about 31 miles of streets. These connections are with manufactories,—some employing 2,000 operatives,—stores, hotels, dwelling houses, etc.

"(13) In consequence of the discharge of the contents of these sewers into the Naugatuck river, the waters of the river in the season of the year when the water was or is low were for a considerable period prior to the commencement of this suit, have been, and are inadequate to properly dilute the sewage, so that the pollution of the waters of the river from such sewage from said city

of Waterbury had before the bringing of this suit passed, and ever since has passed, the limits of safe tolerance.

"(14) The accepted rule of safe tolerance is one part of sewage to twenty parts of pure river water. It is found that during the months of July, August, September, and October of the years 1894, 1895, 1896, and 1897 the average ratio of sewage in the waters of Naugatuck river a short distance below Platt's Mills to pure river water has been substantially one part of sewage to about eleven parts of pure river water; and during the months of August and September during said period the average ratio of sewage to pure river water in the waters of Naugatuck river at the same place below Platt's Mills has been on the basis of one part of sewage to about eight parts of river water.

"(15) The flow of water in the Naugatuck river in the dry season of the year varies greatly in different years. The rainfall at Waterbury for a period of years between 1887 and 1897, inclusive, is shown by a table kept by Nelson J. Welton, president of the board of water commissioners for the city of Waterbury for many years, and a civil engineer, which table was offered in evidence by the defendants. While the rainfall of a watershed may not be the most reliable means of ascertaining the volume of water in a river receiving the rainfall of such watershed, yet the varying amounts of the rainfall in different seasons do represent with approximate accuracy the comparative flow of the river, measuring one season with another; and the table of Mr. Welton shows how the flow of water in the Naugatuck river has varied between 1887 and 1897.

"(16) For a considerable period of time before the commencement of this suit, and to an increasing amount ever since, the sewage from said sewers of the city of Waterbury has been carried down the Naugatuck river, has settled in the waters of the pond made by the plaintiff's dam, and in the said

(*e. g.*, by remaining undrained), unless his rights are invaded, is one which the court cannot take into consideration. *Atty. Gen. v. Birmingham*, 4 Kay & J. 528.

In *Lillywhite v. Trimmer*, 36 L. J. Ch. N. S. 530, the court denied an application for an injunction to restrain a local board of health from discharging sewage into a river, upon the ground that the plaintiff sustained no material injury; but the court said that it was well settled that, however desirable public improvements may be, if they cannot be effected without interfering with private rights, private rights must prevail, and those who desire public improvements must effect them as best they can without interfering with those private rights.

The disposition of the English courts, shown by the two preceding cases, to deny the statutory authority of municipal authorities to drain into streams so as to create a nuisance, is further illustrated by *Atty. Gen. ex rel. Trustees of River Lee v. Metropolitan Bd. of Works*, 11 Week. Rep. 820, 1 Hem. & M. 298, 9 L. T. N. S. 139; *Atty. Gen. v. Leeds*, L. R. 5 Ch. 583, 39 L. J. Ch. N. S. 711, 19 Week. Rep. 19; *Atty. Gen. v. Hackney Local Board*, L. R. 20 Eq. 626, 44 L. J. Ch. N. S. 545, 33 L. T. N. S. 244; 48 L. R. A.

Atty. Gen. v. Luton Local Bd. of Health, 2 Jur. N. S. 180; *Atty. Gen. ex rel. Conservators of River Thames v. Kingston-on-Thames*, 13 Week. Rep. 888, 34 L. J. Ch. N. S. 481, 11 Jur. N. S. 596, 12 L. T. N. S. 685; *Goldsmid v. Tunbridge Wells Improv. Comrs.* 12 Jur. N. S. 308, L. R. 1 Ch. 349, 35 L. J. Ch. N. S. 382, 14 L. T. N. S. 154, 14 Week. Rep. 562; *Oldaker v. Hunt*, 19 Beav. 485, Affirmed in 6 DeG. M. & G. 388, 1 Jur. N. S. 785; *Atty. Gen. v. Cockermouth Local Board*, L. R. 18 Eq. 172, 44 L. J. Ch. N. S. 118, 30 L. T. N. S. 590, 22 Week. Rep. 619.

Some of the decisions, while apparently upholding the right of the municipality to drain into waters, make it conditional upon protection of others from damages incident to its exercise. Thus, *Bloomington v. Costello*, 65 Ll. App. 407, holds that while it is within the power of a city to establish a system of sewerage discharging into a natural watercourse, it is liable, regardless of the question of negligence, for damages caused to a riparian owner, by reason of the pollution and overflow of the water due to the discharge of the sewage into the watercourse.

A city has the right to construct a sewer which discharges into a creek; but if the substances discharged are injurious to the rest-

canal leading from the dam to the manufacturing establishments; and in the warm seasons of the years it has putrefied, causing large and numerous patches of foul and offensive stuff to come to the surface of the pond and canal, giving forth offensive odors, and fouling the water to such an extent as that the hands of the plaintiff's operatives, after being in the water for any purpose, would carry away an offensive smell. The deposits from such sewage during all said period both before and since the suit at the bottom of the pond and in the canal, have been deep, and have been a great annoyance to the plaintiff in repairing its dam, in clearing out its canal, especially at its head, and in repairing its wheel pit. The odors from this putrefying sewage in the warm and low-water seasons of the years, both before and since the institution of the suit, have been so strong and offensive as to compel the shutting of the windows of the plaintiff's manufactories, and to make some of the plaintiff's operatives sick with nausea and consequent vomiting, and all uncomfortable; and said odors are likely to cause serious and protracted sickness. Some of the plaintiff's operatives have been unwilling to work at Platt's Mills, because of conditions just described; and, by reason of said conditions, plaintiff has not been able to improve a very large portion of its water power at Platt's Mills, or to improve a large portion of a manufacturing building erected there since the suit, to take the place of one damaged by fire.

"(17) In the conduct of the plaintiff's business at Platt's Mills, a large quantity of pure water for dipping and cleansing its manufactured product is essential. Prior to the introduction of the sewerage system of the city of Waterbury, the plaintiff had been able to use the waters of the Naugatuck river for that purpose. Since said date, both before and after the institution of the suit, the waters of the river have become so foul that they cannot be used for the pur-

pose; and the plaintiff is compelled to take this part of its manufactured product to a branch of its works in the city of Waterbury for the purpose of dipping and cleansing, and return the same to Platt's Mills for finishing.

"(18) The plaintiff has used two different devices for carrying off the accumulation upon the surface of the water: A log or beam was placed at the entrance of the canal, so inclined as to throw the floating substances away from the canal towards the dam. It also constructed in the canal, near the raceway, a box sunk in the water, with an outlet in the bottom. When the canal was full of water, it would flow over the sides of the box, and carry into the box the floating material, and this was conducted in an underground drain into the river. It did not appear from the evidence that any other means could reasonably be adopted, and preserve the full efficiency of the water power.

"(19) The noxious and offensive odors created by said sewage in the manner above stated, and the pollution of the waters of the river by said sewage, are likely to increase with the growth and development of business and population in the city of Waterbury; and, unless such conditions are restrained and prevented, the value of the plaintiff's said premises at Platt's Mills will be diminished, if not substantially destroyed.

"(20) In the year 1808, and from time to time down to the year 1895, by authority of its charter and amendments thereto, the city of Waterbury procured its water supplies from certain streams which are tributaries of the Naugatuck river. Some of these streams flow into the Naugatuck river within the limits of the city, and some without. Two other streams, known as 'Great Brook' and 'Little Brook,' flow through and near the center of the city into said river.

"(21) This water supply has been used by the inhabitants of said city in their residences, stores, offices, factories, hotels, res-

dence of a citizen he has his remedy for such damages as he has sustained. *Jacksonville v. Doan*, 145 Ill. 23, 83 N. E. 878.

Franklin Wharf Co. v. Portland, 67 Me. 46, 24 Am. Rep. 1, held that a city which unreasonably neglected or refused to remove deposits coming from a sewer discharging into a public dock, after they had accumulated in such quantities as to obstruct navigation, was guilty of creating a public nuisance and liable to indictment, and was also liable to an action of tort at the suit of a wharf owner suffering special damages, notwithstanding that the city had a statutory right to construct its sewer so as to discharge into the public dock below low-water mark. This decision rests upon the ground that the statute did not contemplate or include the right to create a nuisance, public or private, which would interfere with the right of navigation, but that the purpose was to enable the city to collect and deposit refuse matter in the public dock, where it would ordinarily be so distributed and dissipated by the elements as not to create a nuisance.

A city authorized by statute to lay out common sewers "through any streets or private lands" may construct them so as to discharge into tide waters, but has no right to discharge

mud and filth through the same in such quantities as to create a nuisance, and it may be restrained by injunction from continuing the nuisance, at the instance of the owner of a private dock, the use of which is interfered with thereby. *Haskell v. New Bedford*, 108 Mass. 208.

A village is liable to the owner of premises near a creek for injuries resulting from the pollution of air and water by the sewage discharged by it into the creek. The decision rests upon the ground that, assuming the lawfulness of the construction and the right to the use of the sewer, such use must not be to the injury of any lawful rights of another. *Moody v. Saratoga Springs*, 17 App. Div. 207, 45 N. Y. Supp. 365.

Mansfield v. Hunt, 19 Ohio C. C. 488, held, upon the theory that a city had the right to construct its system of sewers with an outlet into a stream or creek, and that there was no fault in the construction either as to plan or in the execution of the work, that it was liable in an action for damages for maintaining a nuisance, to a riparian owner, whose property was injured by the corruption and pollution of the water of the stream.

Where a municipality adopts a stream as an

taurants, and for public buildings, and for flushing gutters and watering streets, and for all the various purposes for which city water is ordinarily used, and after so being used has been discharged mostly into the said sewers, and to a limited extent into the natural streams within the city, and thus has found its way into Naugatuck river. The quantity of water so used is about 4,000,000 gallons per day.

"(22) The sewers were constructed under the advice of a skilful and competent sanitary engineer, and of skilful and competent civil engineers. The sanitary engineer was Rudolph Herring. He advised the city of Waterbury, in writing, through its board of sewer commissioners and through the court of common council, when the sewerage system of said city was first established, in 1883, that the time would come when the waters of the Naugatuck river would no longer be able to properly dilute the sewerage from the sewers, and that when such time should arrive it would be necessary for the city of Waterbury to take steps to remove the sewage out of the river or to take some other proper measure by which the waters of the river would not be polluted beyond the point of safe tolerance.

"(23) The plaintiff, so far as appears, took no part, one way or the other, concerning the institution of the sewerage system of the city of Waterbury. The officers and directors of the plaintiff company are residents of Waterbury. For more than twenty years it has also owned and occupied a factory located on Great brook, in the city of Waterbury, in which it now employs from 160 to 200 hands. Before the introduction of said sewerage system the refuse from such factory, including the water from water-closets and urinals therein, went into Great brook, directly or indirectly, and thence into the Naugatuck river. Within a year or two after said introduction of said sewerage system, and as soon as the sewer was built in the street on which was the city

factory, the plaintiff, in compliance with the ordinances of the city, connected its city manufactory with the sewer, and thereafter no foul water of any kind left said factory except through said sewer.

"(24) Upon trial of the case the following question of evidence arose: Lewis A. Platt, the manager of the plaintiff, testified that, after the burning of a rolling mill at Platt's Mills, the plaintiff was obliged to have a rolling mill at once, and there was no place on the property in the city to put it; and he proceeded as follows: 'And afterwards we put up a building about 150 feet long by 50 feet wide, with the intention of moving various departments from the city mills to Platt's Mills. We did move one department there at first, with some difficulty. Q. What do you mean by 'some difficulty'? A. Well, I mean there was some objection on the part of the people who had charge of it,—the foreman. Q. That is, he worked in that department here in the city? A. Yes. Q. You say some objection. What objection? (Objected to as being hearsay statements.) Court: What he said, you don't care for. Q. There was some objection on their part. I want to know what the objection consisted of, not what they said,—whether it was because of the going out of the city, or what the objection was, or whether it was attributable to this nuisance. That is all. Mr. Harrison: What the gentleman seeks is, apparently, to avoid the rule against hearsay. Then he cannot tell what the party said, but he is going to ask him to tell your honor the substance of what they said. There isn't any difference in the principle. Mr. Alling: Sometimes the very hearsay is admissible. The objection a person gives to doing a certain thing is that he said so and so. If he said so, it doesn't prove that the thing exists, but it shows the objection. It isn't hearsay in the objectionable sense. It is the very thing we want,—what reason did he assign, if any, for not going? It isn't offered to prove that there was a stench

open sewer, it is bound to keep open the channel and to remove accumulations of filth, ashes, or other material that obstruct the flow of the water, and throw it out of its banks upon the land of adjoining owners. *Blissard v. Danville*, 175 Pa. 479, 84 Atl. 846.

Owens v. Lancaster, 182 Pa. 257, 37 Atl. 858, applied the doctrine of the preceding case to the injury inflicted by allowing offensive and injurious odors and smells to issue from the polluting substances discharged into a stream from city sewers.

Clark v. Peckham, 9 R. I. 455, held that a city had an implied power, arising from the duties imposed upon it in relation to its streets and highways, to construct drains or sewers beneath the surface for the purpose of carrying off the water coming on the streets, but also held that if a drain, either from its improper construction or improper use, creates a public nuisance, the city is liable for damages to one specially injured. In this case the injury to plaintiff was by filling up and pollution of the water of his dock by sewage.

The Lea Conservancy Board v. Hertford, 1 Cababe & El. 299, 48 J. P. 628, held that so long as a public body complied with the requirements of a statute permitting the discharge of 48 L. R. A.

sewage into a stream with reference to purification, it was not liable to an action for a nuisance at the instance of a conservancy board intrusted with the management of the river.

O'Brien v. St. Paul, 18 Minn. 176, Gil. 163, holds that a city which by discharging its sewer into a stream conduits to, and empties upon the property of a lower riparian proprietor a greater body of water than the natural flow, to the injury of such owner, is prima facie guilty of creating a nuisance, and if the circumstances exist which would rebut the prima facie character of the act, the city must allege and prove it as a justification in an action against it for damages.

It is not entirely clear whether the cases next cited proceed upon the theory that there was no legislative sanction for the act of the municipality, or upon the theory that the legislative sanction, if there were such, did not protect the municipality because the constitutional guaranty as to property rights had been infringed. Where the constitutional provision prohibits the damaging as well as the taking of private property for public use without compensation, or where the court, as in the principal case, takes the view that the infliction of the damages in question amounts to a taking

down there, but it is offered to prove that the foreman wouldn't take charge because of the stench, and that he set up that as a reason. This evidence is in no sense evidence as to condition of the stench. It is evidence as to the reason,—the difficulties that he assigned, and the reasons which other people assigned, for not going to work; the difficulty of establishing a branch of industry where the stench is so severe that the men refuse to go there. Mr. Harrison: If it was a controversy between this company and the men themselves over some issue or other, and this was a material fact, then what the men said would be admissible, because they would be parties. These men are not parties to these proceedings. This evidence is introduced for the purpose of asking your honor to find damages for them in a large amount, and your honor is asked to find and hear what some men said about the stench there, as a reason. Mr. Terry: No, no. Mr. Harrison: The substance of what they said,—the objection they made to going there is necessarily the substance of what they said on the subject. The proper way to prove that is to call the men themselves, and see what they have to say about it, not what they said to this employer; *non constat* but what they said something else. Perhaps they were trying to push up their wages. Mr. O'Neill: There is another objection. This objection on the part of the man going down there was all after this controversy arose. These new mills were set up here within the last two or three years, and it would be very easy for a person to make out a case,—for a person to make evidence for himself. Mr. Alling: All that is simply to the weight of the testimony. If he can't get workmen to go there on account of the stench, he can't carry on his work, and that depreciates the value of his property. The Court: I am inclined to think you are entitled to the fact, if it is a fact, that you can't get workmen to go there on account of the stench. Mr. O'Neill: It doesn't give us

any opportunity to cross-examine the man who made the statement. The Court: I think I will allow the witness to answer the question. Mr. Harrison: I think this fact ought to appear in the record, as to the time when this took place, so that it may appear whether it was after this suit was brought. Mr. Terry: Yes; it was after this suit was brought. But that don't affect the question whether it has injured our property, and prevented us from developing,—whether it has occurred before or after. (Exception by the defense.) Q. You say some objection. What objection? A. The foreman was afraid his health would be injured, and he anticipated difficulty in keeping his workmen together. Q. Well, for what reason? A. On account of the sewage in the river. Q. Whether or not, in fact, you have been prevented by that cause from increasing your plant down there by filling up the unoccupied portion, which you testified to yesterday, of this new factory which you have built? A. Yes; I have attempted to move three departments to that building, and I have met with the same objection. Q. So, if I understand you correctly, substantially half of this new building remains unused at the present time? A. Just about half. Afterwards the plaintiff introduced sundry operatives of the plaintiff in its city factory, who testified that they objected to go down to Platt's Mills to work on account of the offensive nuisance there.

"(25) Franklin G. Newbert was called as a witness by the plaintiff, and testified he was in the employ of Platt Bros. & Company, and had charge of the short-eyelet department. The following question was asked on the direct examination: 'Q. Whether or not Mr. Platt has been to you with reference to moving your department or works down to Platt's Mills? A. Yes; he did. Q. Whether you made any objection to going down, to Mr. Platt? A. I did object. Q. For what reason? A. Because of the smell down there,—in regard to my

of property in the constitutional sense, it is not important to determine the question as to legislative sanction, since, even if there be such sanction, it is ineffectual, unless the constitutional provision has been complied with.

A riparian owner has the right to have the water of a stream flow over her land in its natural purity, and such a pollution of the stream by a municipal corporation as substantially impairs its value for the ordinary purposes of life, and renders it measurably unfit for domestic purposes, is an actionable nuisance. *Peterson v. Santa Rosa*, 119 Cal. 387, 51 Pac. 557.

Equity will enjoin the pollution of a stream by the discharge of city sewage therein, rendering the water unfit for domestic use or for the drink of domestic animals. *Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218.

A municipal corporation cannot empty its sewage into a stream of water where the result is the pollution of the stream, and a bill in equity to restrain the nuisance will lie on behalf of any person injured. *Robb v. LaGrange*, 158 Ill. 21, 42 N. E. 77.

A city is liable for damages caused by the flooding of plaintiff's lot and the deposit of filth thereon, caused by the discharge of surface

water and sewage by the city into a water-course which has not sufficient capacity to carry away the increased amount of water. *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540.

A city which by artificial drainage causes sewage to pollute a stream, rendering its water unfit for use, and covering its banks with filth and unwholesome sediment, creates a nuisance for which it is liable in damages to a riparian owner who is specially injured. *Chapman v. Rochester*, 110 N. Y. 273, 1 L. R. A. 296, 18 N. E. 88.

A city is liable in damages to the operator of a ferry where it causes a new sewer to be constructed by which it diverts an old water-course from its former channel, and discharges the same together with surface water and drainage just about a ferry slip, which the plaintiff is entitled to enter, whereby the same is filled up and obstructed by sand and dirt. *Sleight v. Kingston*, 11 Hun. 594.

Bolton v. New Rochelle, 84 Hun. 281, 32 N. Y. Supp. 442, upheld a decree enjoining a city from permitting the outflowing material of a city sewer to discharge into Long Island sound where it would become offensive or injurious to the health or property of, or in any manner

health.' It appeared that this was since the bringing of this action, and that the witness had not left the Waterbury factory. The defendant objected to this evidence because it appeared that the witness had not made any objection to going to Platt's Mills until after this action was brought. To the ruling of the court admitting the question, the defendant excepted.

"(26) In March, 1877, the general assembly passed an act concerning the city of Waterbury (8 Spec. Laws, pp. 121-127). By § 11 of said act, it was to take effect when accepted by said city at a special meeting to be duly warned and held for that purpose. The defendant offered to show that, at a special meeting of the citizens of Waterbury held in pursuance of said act, the city voted not to accept the act. The court excluded the evidence, and the defendant duly excepted.

"(27) On the trial of the case the defendant offered to show, from the records of the board of sewer commissioners of the city of Waterbury, the warning of the first meeting of the board of sewer commissioners, for the purpose of organization, signed by the mayor of the city April 17, 1882, for the purpose of showing that the board was organized under the act of 1881, and proceeded to employ engineers, to adopt a plan, and to construct these sewers, acting independently, under authority of the act of 1881. Upon this offer the court said: 'Is it for the purpose of showing that they were compelled to build the sewer? Mr. Burpee: Yes. The Court: It is ruled out. Mr. Burpee: There are a number of other records for that same purpose. I think this is sufficient for that point.' The defendant duly excepted to said ruling.

"(28) The court found the damages to the plaintiffs to the commencement of the suit to be \$500, and rendered judgment for that amount and costs, together with an order and injunction.

"(29) On the trial of the case the plaintiff

claimed that the defendant was bound to take its sewage out of the river, so as to prevent its becoming a nuisance to the plaintiff's property, or to assess and pay the plaintiff its damages under the said act of 1881.

"(30) The defendant offered testimony from which I find that the expense to the city of Waterbury in removing said sewage from the Naugatuck river, or of preventing the unreasonable pollution of its waters by reason of such sewage, will be very great, and that such work will take considerable time, and asked that, if an order of injunction was issued, that it be so drawn as not to take effect immediately, nor within a period of three years from date. It is found that a reasonable period for the defendant to remove said sewage from the river, or to otherwise prevent the waters of the river from being unreasonably polluted, would be the 1st of December, 1902.

"(31) The defendant now further objecting that the injunction order should not be so drawn as to prevent the use of the waters of said Naugatuck river for said sewage during the seasons of the year when the flow of the river is full and sufficient for the safe dilution of the said sewage, it is found upon the evidence that such use of said river at the present time is safe, and not injurious to the plaintiff, during the months of the year, except June, July, August, September, and October, and for those months it is unsafe and injurious to the plaintiff, as heretofore stated and described.

"(32) The plaintiff's attorney, to prove the allegations of the fifth paragraph of the complaint, offered to show that he had at one time given verbal notice to the sewer commissioners of the city of Waterbury that they should cease to pollute the waters of the Naugatuck river. The defendant objected on the ground that nothing in the charter of the defendant city authorized the board of sewer commissioners to stop sewerage into the Naugatuck river, or to do any-

be a nuisance to, plaintiff, who was the owner of a lot bordering on the sound, it appearing that the sewage flowing from the sewer had been deposited upon the flats in front of his property, and that the odors arising therefrom were so offensive that his house became uninhabitable.

A city is not justified in discharging the contents of its sewer into a stream of water belonging to the class designated as "private watercourses," in which the general public have no interest, and the title to the bed of which, together with the use of the water, belongs to the riparian owners. *Hooker v. Rochester*, 37 Hun, 181.

A city has no right to destroy a natural watercourse by collecting impure drainage and casting the same into it. *Butler v. Edgewater*, 2 Silv. Sup. Ct. 3, 6 N. Y. Supp. 174.

A perpetual injunction, with at least nominal damages, is justified where a city by a permanent system of sewers collects sewage and empties it into a natural non-navigable stream, whereby the water of plaintiff's millpond is polluted and rendered unfit for use. *Schrivver v. Johnston*, 71 Hun, 232, 24 N. Y. Supp. 1083.

The discharge of sewage into a pond by a city, resulting, not only in pollution of the 48 L. R. A.

water, but also in the depositing of offensive matter upon the plaintiff's premises, is a nuisance which will be enjoined. *Ibid.*

An action may be maintained for damages for discharging the sewage of a city through creeks of adjacent towns to the detriment of lands along such creeks, and an injunction may be granted restraining such use. *Hooker v. Rochester*, 35 N. Y. S. R. 408, 12 N. Y. Supp. 671.

A city is liable in damages for the pollution of a stream by the drainage of sewage into it, whereby the water of the stream and of springs fed by it is rendered unfit for use, and deposits of filth are left on the banks of the stream at times of overflow. *Good v. Altoona*, 162 Pa. 493, 29 Atl. 741.

In *Albertson v. Philadelphia*, 12 W. N. C. 158, and in *Martin v. Philadelphia*, 26 W. N. C. 120, the court, without writing an opinion, granted injunctions at the instance of property owners restraining a city from draining sewage into streams flowing through their land.

III. Taking or damaging property.

It will be observed that the point of departure of the principal case (which held that a

thing else with the sewage except to empty it into such river, and they were not the agents of the city to receive protests or notices, or for any other purpose, except to manage the sewer system of the city in the manner prescribed by the charter of the city. The court admitted the evidence, and the defendant duly excepted to the ruling.

"(33) The defendant claimed (a) that the construction of said sewers was a public, governmental work; (b) that the use of said sewers was a public, governmental use; (c) that the use of said sewers as above described was a reasonable use thereof; (d) that the defendant had the legal right to use its water supply for the purposes and in the manner above described; (e) that the use of said water supply in the manner and for the purposes above described was a reasonable use thereof; (f) that inasmuch as the plaintiff itself had been for a long time, and was still, contributing to the pollution of the Naugatuck river in the same manner as other inhabitants of the city, it was not entitled to either damages or relief by injunction; (g) that the plaintiff, by obstructing the free flow of the water in the Naugatuck river by its dam as above described, caused or contributed to its own injuries, and that it was not, therefore, entitled to any damages, or to injunctive relief; (h) that the injuries complained of and found to exist were and are not direct, but consequential merely; (i) that the charter of the defendant and its amendments do not provide for compensation for merely consequential injuries resulting from the construction or use of said sewers; (j) that the injuries to the plaintiff are not so great as to require the expenditure by the defendant of \$1,000,000 or more for relief from plaintiff's present injuries; (k) that the plaintiff is not entitled to damages and to injunctive relief also; (l) that the defendant is not liable for consequential injuries resulting from the construction of its sewers, or the reasonable use thereof; (m) that the construction

and maintenance of said sewers by the defendant were authorized by express legislative authority, and that therefore the plaintiff was not entitled to injunctive relief; (n) that, if the plaintiff was entitled to injunctive relief, it is entitled to have the defendant restrained only until the plaintiff's damages have been ascertained and paid; (o) that inasmuch as no evidence has shown that the water in the Naugatuck river was contaminated to a noxious or offensive degree at any time except during the months of July, August, and September in each year, the defendant ought not to be enjoined from the use of the river except during those months. The attention of the court was not called to the claim numbered 'o' until judgment had been rendered in the cause."

The appeal assigns for error the action of the court (1) in respect to certain preliminary motions and the demurrers; (2) in the rulings on the admission of testimony as stated in the finding; (3) in overruling the defendant's claims set forth in paragraph 33 of the finding; (4) in finding the fact stated in paragraph 16 of the finding,—that sewage from said sewers had settled in the waters of the pond made by the plaintiff's dam and the canal leading therefrom, because there is no allegation in the complaint to that effect, and no such issue of fact is raised by the pleadings.

Messrs. Lynde Harrison, John O'Neill, Lucien F. Burpee, and John P. Kellogg, for appellant:

Plaintiffs do not claim that any estate, right, etc., of theirs was taken for the construction of those sewers. They have been injured only by the subsequent use of them. Such injuries are indirect and consequential, and neither the special, nor any other law, makes this defendant responsible for such injuries, if the use of the sewers has been without negligence, unskillfulness, or malice.

Bradley v. New York & N. H. R. Co. 21 Conn. 294; *Pennsylvania R. Co. v. Lippin-*

city was liable to a riparian owner for damages to his property by noxious and filthy substances deposited thereon in consequence of the pollution of the river by city sewers discharging into the same, and enjoined it from continuing the nuisance) from *VALPARAISO V. HAGEN* (which denied an injunction under similar circumstances) is where the question as to the constitutional provision against taking private property for public use without compensation is reached. The principal case, upon the assumption that the act of the municipality had legislative sanction, held that such sanction was ineffectual because the damages inflicted amounted to a taking of property in the constitutional sense, while *VALPARAISO V. HAGEN* held, with reference to substantially similar damages, that they did not amount to a taking of property, and, therefore, since the act of the municipality had legislative sanction it was within the protection of the rule exonerating municipal corporations from liability for consequential damages.

The latter decision has the support of a prior decision in the same state. *Richmond v. Test*, 18 Ind. App. 482, 48 N. E. 610, *supra*, which held that the destruction of the value of a riparian owner's manufacturing plant by

the discharge of city sewage into a stream did not constitute a taking of property within the constitutional provision.

The court in *Merrifield v. Worcester*, 110 Mass. 210, 14 Am. Rep. 592, which denied the right of a riparian owner to recover from a city damages caused by the pollution of a stream by city sewage, rendering the water unfit for manufacturing purposes, so far as the pollution was attributable to the plan of sewerage adopted by the city, remarked that the right of which plaintiff alleged a violation was not that of acquired property in possession, and was not an absolute right, but a natural one qualified and limited by the existence of like rights in others, and was incident merely to his ownership of land through which the stream had its course. Again it remarked that the detriment consisted in the unfitness of the stream for certain uses in the plaintiff's works, whereby he was deprived of a capacity, incident to the ownership of his land, to make such use of its waters as they passed, and that there was no allegation of damage to his property otherwise than by such depredation; no allegation that a nuisance was created which injuriously affected his land or the occupation thereof. These remarks indicate that there may have

cott, 116 Pa. 472, 9 Atl. 871; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, 13 Atl. 690.

This act was imposing upon a municipal corporation a great burden in order to protect the public health. Such corporations are created solely for the public good, and are the appropriate agencies to protect the public interests.

Central R. & Electric Co.'s Appeal, 67 Conn. 219, 35 Atl. 32.

By reason of the terms of the act this was a work of which it had no control, but which was in charge of the sewer commissioners, who were public officers, independent of the defendant, and not its servants or agents.

If a workman had been injured by the negligence of these commissioners in the performance of the work, the city would not have been liable.

Jewett v. New Haven, 38 Conn. 389, 9 Am. Rep. 382; *Mead v. New Haven*, 40 Conn. 74, 16 Am. Rep. 14; *Mahoney v. Boston*, 171 Mass. 427, 50 N. E. 939.

If evidence of refusal to accept the plan of the legislature had been admitted, the argument would have been very strong, after the passage of the act of 1881, that the legislature had determined to take the matter into its own hands and to force this system upon the city, with all its details. These facts would have put defendant within the reasoning of *Jones v. New Haven*, 34 Conn. 11.

The carrying power of running water, in streams large enough to be of public use, belongs to the public for all beneficial public purposes, and private ownership is subject to public rights or public use.

The public have a right or easement in such rivers, as common highways, for passing and repassing with vessels, boats, or any water craft.

2 Rolle, Abr. 107; *Royal Fishery of the Banne*, Davies' Rep. 56, 155, Dub. ed. 1762; *Adams v. Pease*, 2 Conn. 481; *Com. v. Chapin*, 5 Pick. 202, 16 Am. Dec. 386; *Haskell v. New Bedford*, 108 Mass. 214; *Brown v. Chadbourne*, 31 Me. 18, 50 Am. Dec. 641; *Know*

v. Chaloner, 42 Me. 150; *Carter v. Thurston*, 58 N. H. 106, 42 Am. Rep. 684; *St. Louis, I. M. & S. R. Co. v. Ramsey*, 53 Ark. 314, 8 L. R. A. 559, 13 S. W. 931; *Weise v. Smith*, 3 Or. 445, 8 Am. Rep. 621; *Felger v. Robinson*, 3 Or. 455; *Moore v. Sanborne*, 2 Mich. 523, 59 Am. Dec. 209; *Stuart v. Clark*, 2 Swan, 16, 58 Am. Dec. 49; *Lamprey v. State*, 52 Minn. 181, 18 L. R. A. 670, 53 N. W. 1139; *Barnard v. Sherley*, 135 Ind. 547, 24 L. R. A. 568, 34 N. E. 600, 35 N. E. 117.

The Naugatuck river must be classed as a public stream, subject to public rights and public uses.

Public rights in a stream cannot be affected by the enlargement and assertion of private rights in running water.

Brooks v. Cedar Brook & S. C. River Improv. Co. 82 Me. 17, 7 L. R. A. 460, 19 Atl. 87; *Hollister v. Union Co.* 9 Conn. 443, 25 Am. Dec. 36.

If defendant itself constructed these sewers, it was performing a governmental work, imposed upon it for the public good.

For any damage caused by the performance of such work, or by the manner in which it is performed, there is no remedy unless it be given by statute.

Jones v. New Haven, 34 Conn. 13; *Hevison v. New Haven*, 37 Conn. 475, 9 Am. Rep. 342; *Jewett v. New Haven*, 38 Conn. 376, 9 Am. Rep. 382; *Bronson v. Wallingford*, 54 Conn. 513, 9 Atl. 393; *Cone v. Hartford*, 28 Conn. 372; *Mead v. New Haven*, 40 Conn. 72, 16 Am. Rep. 14; *Diamond Match Co. v. New Haven*, 55 Conn. 510, 13 Atl. 409; 1 Beach, Mun. Corp. § 259; *Hooker v. New Haven & N. Co.* 15 Conn. 312; *Boulton v. Crowther*, 2 Barn. & C. 711.

Defendant has made only a reasonable use of its sewers and the waters of the Naugatuck river. For the consequences of such use, the law is now well established that one riparian proprietor is not liable to another.

Merrifield v. Worcester, 110 Mass. 216, 14 Am. Rep. 592; *Barnard v. Sherley*, 135 Ind. 547, 24 L. R. A. 568, 34 N. E. 600, 35 N.

been in the mind of the court a distinction between a mere injury to the water right and an injury to the land. If the court intended to make such distinction, the decision, though it supports the decision in *Richmond v. Test*, 18 Ind. App. 482, 48 N. E. 610, *supra*, does not support *VALPARAISO v. HAGEN*.

Malone v. Philadelphia, 2 Pennyp. 370, denied the right of the owner of a wharf to recover damages from a city caused by the filling up of the dock at the side of the wharf by sewage from a sewer, which under the authority of statute a city had constructed to the low-water mark of the river. The decision rests upon the ground that a municipal corporation is not liable in an action for consequential damages to private property unless it be given by statute, where the act complained of is done under a valid act of the legislature, and there has been no want of reasonable care or reasonable skill in the execution of the power, although the same act if done without legislative sanction would be questionable.

Among the cases heretofore cited with reference to which it was said that it was not apparent whether the court proceeded upon the theory of a want of legislative sanction or upon the theory of a violation of the constitu-

tional guaranty are several New York cases. The position of the New York courts, which obviated the necessity, in those cases, of choosing between the two alternatives, is well illustrated by *Seifert v. Brooklyn*, 101 N. Y. 139, 54 Am. Rep. 664, 4 N. E. 321, which held that a city was liable to a property owner whose land was inundated by the overflow from city sewers which were of insufficient capacity. The court said: "It is a principle of the fundamental law of the state that the property of individuals cannot be taken for public use except upon the condition that just compensation be made therefor, and any statute conferring power upon a municipal body, the exercise of which results in the appropriation, destruction, or physical injury of private property by such body, is inoperative and ineffectual to protect it from liability for the resultant damages, unless some adequate provision is contained in the statute for making such compensation. The immunity which extends to the consequences, following the exercise of judicial or discretionary power by a municipal body, . . . presupposes that such consequences are lawful in their character, and that the act performed might in some manner be lawfully authorized. When such power can be exercised so as not

E. 117; *Hazeltine v. Case*, 46 Wis. 394, 32 Am. Rep. 715, 1 N. W. 66; *Middlesex Co. v. McCue*, 149 Mass. 104, 21 N. E. 230; *Wheeler v. Worcester*, 10 Allen, 591; *Bainard v. Newton*, 154 Mass. 255, 27 N. E. 995; *Beach v. Sterling Iron & Zinc Co.* 54 N. J. Eq. 65, 33 Atl. 286; *Keeney & W. Mfg. Co. v. Union Mfg. Co.* 39 Conn. 576; *West Cumberland Iron & Steel Co. v. Kenyon*, L. R. 11 Ch. Div. 783; *People ex rel. Ricks Water Co. v. Elk River Mill & Lumber Co.* 107 Cal. 214, 40 Pac. 486; *Richmond v. Test*, 18 Ind. App. 482, 48 N. E. 610; *Valparaiso v. Hagen (Ind.) post*, 707, 54 N. E. 1062; *Gilbert v. Showerman*, 23 Mich. 448.

The plaintiffs are not entitled to an injunction, because they directly and indirectly cause the nuisance of which they complain.

Shepaug Voting Trust Cases, 60 Conn. 537, 24 Atl. 32; *Enfield Toll Bridge Co. v. Connecticut River Co.* 7 Conn. 49; *Bigelow v. Hartford Bridge Co.* 14 Conn. 565, 36 Am. Dec. 502; *Norwich Gaslight Co. v. Norwich City Gas Co.* 25 Conn. 19; *Falls Village Water Power Co. v. Tibbetts*, 31 Conn. 168; *Hawley v. Beardsley*, 47 Conn. 571; *New York, N. H. & H. R. Co. v. Long*, 72 Conn. 10, 43 Atl. 559; *Irvine v. Division*, 9 How. 29, 13 L. ed. 34; *Curtis v. Winslow*, 38 Vt. 692; *Cassady v. Cavenor*, 37 Iowa, 300.

No injunction should be decreed in this case while the state of Connecticut, in its sovereign capacity, acting through and by its general assembly, is taking affirmative action to regulate and control the disposal of sewage matter throughout the state.

The courts will recognize the public institutions of the country, and what they are doing.

Oxford Poor-Rate, 8 El. & Bl. 185; *United States v. Williams*, 6 Mont. 379, 12 Pac. 851.

If a nuisance has been alleged and proved to exist, it is a public nuisance, from which the plaintiff suffered no distinct damage.

O'Brien v. Norwich & W. R. Co. 17 Conn. 375; *Seeley v. Bishop*, 19 Conn. 135; *Blood*

v. Nashua & L. R. Corp. 2 Gray, 137, 61 Am. Dec. 444; *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470; *Haskell v. New Bedford*, 108 Mass. 208; *Emery v. Lowell*, 104 Mass. 13; *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 680; *Richardson v. Boston*, 19 How. 263, 15 L. ed. 639; *Gerrish v. Brown*, 51 Me. 256, 81 Am. Dec. 569; *Atty. Gen. v. Birmingham*, 4 Kay & J. 528; *Lansing v. Smith*, 8 Cow. 140; *State ex rel. Board of Health v. Bergen County Chosen Freeholders*, 46 N. J. Eq. 173, 18 Atl. 465.

The city has expended large sums of money for the construction of its system of sewers, which was done with the knowledge of the plaintiff, and with no protest on its part until the money was expended. It was therefore guilty of laches, and to enjoin the defendant would inflict great injuries upon it. Under such circumstances the plaintiffs should be left to their remedy at law.

Fisk v. Hartford, 70 Conn. 720, 40 Atl. 906; *Barnard v. Sherley*, 135 Ind. 547, 24 L. R. A. 568, 34 N. E. 600, 35 N. E. 117.

Messrs. John W. Alling and George E. Terry, for appellee:

Kellogg v. New Britain, 62 Conn. 232, 24 Atl. 996; *Morgan v. Danbury*, 67 Conn. 484, 35 Atl. 499; *Fisk v. Hartford*, 69 Conn. 375, 38 L. R. A. 474, 37 Atl. 983; *Nolan v. New Britain*, 69 Conn. 668, 38 Atl. 703; *Fisk v. Hartford*, 70 Conn. 720, 40 Atl. 906; and *Watson v. New Milford Water Co.* 71 Conn. 442, 42 Atl. 265,—are decisive of the right of the plaintiff to obtain a judgment for damages and a decree of injunction as awarded by the superior court.

See also *Wood, Nuisances*, chap. 13, §§ 427, 429, 434, 435, p. 500; *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321; *Cogswell v. New York, N. H. & H. R. Co.* 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537; *Atty. Gen. v. Leeds*, L. R. 5 Ch. 583.

The rights of riparian proprietors in a natural watercourse are not inereally an "ease-

to create a nuisance, and does not require the appropriation of private property to effectuate it, the power to make such an appropriation or create such nuisance will not be inferred from the grant. Where, however, the acts done are of such a nature as to constitute a positive invasion of the individual rights guaranteed by the Constitution, legislative sanction is ineffectual as a protection to the persons or corporation performing such acts from responsibility for their consequences."

Huffman v. Brooklyn, 22 App. Div. 406, 48 N. Y. Supp. 182, which held a city liable for ruining oyster beds by the discharge of sewage into public waters under statutory authority, expressly held, upon the authority of *Selfert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321, *supra*, that such damages amounted to a taking of property.

The fact that sewers are necessary to a city, and that a statute directs that they shall follow as nearly as practicable the natural drainage of the country, does not justify the city in discharging sewers into a stream to the damage of a landowner, without just compensation to him, as required by the constitutional provision against taking or damaging private prop-

erty without just compensation. SMITH v. SEDALIA.

When the constitutional provision in terms includes the damaging, as well as the taking, of property, it is clear that legislative sanction affords no protection to a city against liability for discharging sewage into a stream to the damage of the property rights of others, unless provision is made for compensation, and it has been so held.

The discharge of city sewage into a creek decreasing the value of land through which the creek runs amounts to a damaging of property within the constitutional provision against taking or damaging private property for public use without compensation; and a statute authorizing the discharge of sewage into the stream affords no protection to the city, unless provision is made for compensation. *Joplin Consol. Min. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406.

Butchers' Ice & Coal Co. v. Philadelphia, 156 Pa. 54, 27 Atl. 376, makes a similar decision under a similar constitutional provision, distinguishing the case from *Malone v. Philadelphia*, 2 Pennyp. 370, upon the ground that in that case the sewer was constructed prior to the Constitution of 1874, which introduced

ment or appurtenance, but are inseparably annexed to the soil as parcel of the land itself."

Wadsworth v. Tillotson, 15 Conn. 373, 39 Am. Dec. 391.

It is against all reason and principle to say that a substantial wrong can be done to the property of an individual, and the wrongdoer, no matter how rich and strong he may be, may be justified because it costs more to avoid wrongdoing, than the property of the sufferer is worth. Such a doctrine is abominable, and leads to the destruction of all notions of justice.

Williams v. New Haven, 68 Conn. 263, 36 Atl. 61; *New Milford v. Litchfield County*, 70 Conn. 435, 39 Atl. 796; *Wood, Nuisances*, § 435; *Suffolk Gold Min. & Mill. Co. v. San Miguel Consol. Min. & Mill. Co.* 9 Colo. App. 407, 48 Pac. 828.

Hamersley, J., delivered the opinion of the court:

There is no error in the disposition of the preliminary motions.

The demurrer to the special defense was properly sustained. Under the charter of the city of Waterbury, the board of sewer commissioners is established to execute certain powers vested in the city, and the municipal corporation is responsible for the acts of the commissioners within the scope of their authority. The action complained of in the complaint was the action of the city. *West Hartford v. Hartford Water Comrs.* 44 Conn. 360, 369.

Sustaining the demurrer to the three special defenses subsequently filed is not ground for a new trial. These defenses contained certain allegations of facts that may be admissible under the issues formed by the denials of the several paragraphs of the complaint. Possibly some of these allegations might have been retained in the answer as explaining the nature of the denials, but, if so, the defendant has not been injured. It has gone to trial on the denial of the facts

stated in the complaint, and it has had the benefit of all evidence that it could have introduced under the special defenses. All claims of law arising on these defenses are also fully presented in the record by the action of the court in overruling the claims of the defendant as to the legal effect of the facts found, and will be considered in disposing of those claims.

The court did not err in overruling the defendant's claims set forth in paragraph 33 of the finding. To understand the precise nature of the questions of law involved, it is convenient to briefly restate the material facts. The plaintiff owned an ancient water privilege on the Naugatuck river, below the defendant city, and also the land on the river, and large manufacturing establishments run by the water power. The river drains a section somewhat thickly populated, and largely used for manufacturing. By this use of the river, reaching back to the early settlement of the Naugatuck valley, its water prior to 1884 had become polluted to a considerable extent, rendering it unfit for the primary use of water. About 1884 the defendant constructed, under authority from the legislature, certain main and lateral sewers, by means of which filthy and noxious substances accumulated by inhabitants of the city were collected and discharged into the river in such quantities that the water was inadequate to dilute such sewage, and the same was carried to the premises of the plaintiff, producing the injuries complained of. Before the construction of the sewers the pollution of the river was not of such a nature as to produce such injuries.

The defendant claims that its use of the river is a reasonable use, and is justified by the fact that the water of the river has been for an indefinite period given up to secondary uses. This claim is substantially disposed of by the court as a question of fact. Whether or not the use of a river by a riparian proprietor is a reasonable use, in view

the words "injured or destroyed" into the constitutional provision.

Tide waters.

SAYRE v. NEWARK, holds that the owner of a dock in a tidal river at a point where the tide ebbs and flows is not entitled to an injunction restraining a city from completing and using a public sewer in process of construction and designed to empty into the river below low-water mark, although such a use of the river will so pollute the water and air in the neighborhood of the dock as to impair its value.

This decision rests upon the ground that the state is the absolute owner of the bed of the stream within the limits of the ebb and flow of the tide, and that the damages to the dock are merely incidental. This case is not opposed to the doctrine of the principal case and other cases heretofore cited, which hold that the damages inflicted upon riparian property by the discharge of sewage into a stream constitute a taking of the property in a constitutional sense. In those cases the bed of the stream was owned by the riparian proprietors, and, thus, there was

a direct invasion of their property, and not a mere incidental injury when the stream was polluted by sewage, even when there was no noxious matter deposited upon the banks of the stream.

This distinction becomes apparent when the case of **SAYRE v. NEWARK** is compared with a later decision by the same court in **GREY vs. SEXTON v. PATTERSON**. The latter case holds that the pollution of a tidal river by the discharge of city sewage therein pursuant to statutory authority, to the damage of riparian property above the limits of the ebb and flow of the tide, constitutes a taking of private property which the legislature cannot authorize except upon just compensation to the parties injured.

Attwood v. Bangor, 83 Me. 583, 22 Atl. 468, denied the right of the owner of a dock in a tidal river to recover damages from a city which discharged its sewage into the river below low-water mark. The decision rests upon the ground that the state had a right to extend its sewer into the river, and that the plaintiff had no remedy growing out of the location of the sewer. The opinion does not discuss the rights of the plaintiff under the constitutional provision, but the distinguish-

of the rights of other riparian proprietors, depends largely on the circumstances of each case, and is essentially a question of fact. *Keeney & W. Mfg. Co. v. Union Mfg. Co.* 39 Conn. 576, 581. The inference of the trial court, from the special facts found, that the city's use of the river is an unreasonable one, is the only inference that can legally be drawn from those facts. The use of a stream for drainage may under some circumstances be reasonable, although the water is thereby rendered unfit for its primary use; but the concentration of the filth accumulated by one proprietor, whether an individual or a municipal corporation, and its discharge into the river in such quantities that it is necessarily carried to the premises of another, where it produces a nuisance dangerous to his health and destructive of the value of his property, must be unreasonable. *Morgan v. Danbury*, 67 Conn. 484, 493, 35 Atl. 499. If the defendant has, as claimed, a prescriptive right to pollute the river in the manner used prior to 1884, that right does not justify it in further polluting the river by an additional and different use; and the defendant cannot acquire by any prescription a right to maintain a nuisance like that described in the finding. *Nolan v. New Britain*, 69 Conn. 668, 683, 38 Atl. 703. Its defense therefore must rest wholly on legislative authority.

The main contention of the defendant may be stated in this way: The use of the sewers under authority of the legislature in the manner described is a public, governmental use. The injuries to the plaintiff result from this governmental use, and are not direct, but merely consequential. The victim of consequential injuries resulting from a governmental use is entitled to no remedy unless one is given by statute. The defendant's charter provides no remedy for consequential injuries resulting from the use of said sewers. *Ergo* the plaintiff has no remedy, and its damage is *damnum absque injuria*. The premises essential to this conclu-

sion are untrue. A governmental use may include any act which the state may lawfully perform or authorize. There are, however, governmental acts to which certain immunities attach, and it is with this restricted meaning that the phrase is used by the defendant. In this sense a governmental act is one done in pursuance of some duty imposed by the state on a person, individual or corporate, which duty is one pertaining to the administration of government, and is imposed as an absolute obligation on a person who receives no profit or advantage peculiar to himself from its execution. It is the state exercising its governmental power through an agent, who in this matter is the agent of the state, and nothing more. It is to be distinguished from a large class of governmental acts which the state, by way of grant or special privilege, authorizes persons to perform in part for their personal benefit. The principal immunities belonging to a governmental act, in this restricted sense, are: (1) Freedom from personal responsibility for the consequences of the act done. So long as a lawful mandate of the state is faithfully executed, the agent acting within the scope of that authority enjoys the exemption from suit which belongs to the state. (2) Freedom from personal responsibility for the negligence of his servants. The rule of *respondere superior* does not apply because the agent of the state is not the superior. The real superior is the state itself. The defendant claims these immunities. It may be doubted whether the use of sewers under the charter of the defendant for the collection and disposition of refuse belonging to its citizens is a governmental act, within the definition given. The charter authorized the construction of sewers for that purpose, but no absolute duty was imposed upon the city. Action in pursuance of the authority was at its option, and could not have been enforced by any process of law without further legislation. While sewers or drains for the disposition of surface wa-

ing element in *SAYRE v. NEWARK*, *supra*, *viz.*, the absence of a direct invasion of, as distinguished from an incidental injury to, the plaintiff's property, also characterizes this case.

Haskell v. New Bedford, 108 Mass. 208, held that a city was liable to the owner of a private dock in tide waters for damages caused by the discharge of sewage into the river. The decision, however, does not rest upon the ground that there was a taking of property in the constitutional sense, but upon the ground that though the right conferred upon the city to lay out sewers "through any streets or private lands" authorized it to discharge sewage into tide waters, it did not authorize it to create a nuisance, public or private, upon the property of the commonwealth, or of an individual, within tide waters.

Bolton v. New Rochelle, 84 Hun, 281, 32 N. Y. Supp. 442, held that a municipal corporation should be enjoined from discharging sewage into tide water; but in this case sewage was deposited upon the plaintiff's property, and thus there was a direct invasion of his property.

Huffmire v. Brooklyn, 22 App. Div. 406, 48 N. Y. Supp. 132, *supra*, held that a city was liable for ruining oyster beds by the discharge 48 L. R. A.

of sewage into tide waters under statutory authority, but here, too, there was a direct invasion of the plaintiff's property.

Butchers' Ice & Coal Co. v. Philadelphia, 156 Pa. 54, 27 Atl. 376, *supra*, also held that a city was liable for damages to a wharf in tide water caused by deposits from a city sewer; but this decision was under a constitutional provision requiring municipal corporations to make just compensation for property "taken, injured, or destroyed" by the construction and enlargement of their works; and, as already shown, *Malone v. Philadelphia*, 2 Pennyp. 370, decided when the constitutional provision merely prohibited the taking of property without compensation, denied the right of the owner of a wharf to recover damages from a city caused by the filling up of the dock at the side of the wharf by sewage deposits from a city sewer discharging into the river at low-water mark.

Clark v. Peckham, 9 R. I. 455, *supra*, held that the owner of a dock could recover damages from a city for the pollution of his dock by sewage from a city sewer discharging into the tide water, but the ground of the decision in this case was the improper construction or improper use of the sewer.

ters collecting in highways may be considered as mere adjuncts of a highway, partaking of its nature as a governmental use (*Cone v. Hartford*, 28 Conn. 363, 372), it is different with sewers for the disposition of refuse and filth accumulated on private property. The disposition of such stuff is in part for the benefit of the property holder. The city represents in such respects the interests of its inhabitants, and is granted certain special powers, in part for the promotion of their interests. *Bronson v. Wallingford*, 54 Conn. 513, 519, 9 Atl. 393. It is well settled that there is a clear distinction between those governmental duties imposed upon a city as a mere agent of government, and those governmental powers granted as a privilege primarily for the personal benefit of its inhabitants. But the tests for the demarkation of the two classes of power are not so well settled. When the terms of the statute are clear, they furnish the most reliable test; and some weight, perhaps, may be given to the nature of the power as commonly regarded (*Jewett v. New Haven*, 38 Conn. 368, 377, 379, 387, 389, 9 Am. Rep. 382; *Jones v. New Haven*, 34 Conn. 1, 11, 13, 14), care being taken not to clothe an individual with the immunity of the state beyond the necessity of his agency. The distinction must always be in some cases a difficult one to draw. We think it evident that the mere granting authority to a city to construct, for the convenience and benefit of its inhabitants, sewers adapted to carry off their refuse matter to some neighboring stream, does not necessarily make such use of the sewers a governmental use, in the sense indicated. On the other hand, it is also evident that the legislature may impose the duty of constructing sewers in such manner as to make the performance of that duty strictly a governmental act. But if, for the purpose of this case, we concede the defendant's claim that the use is a governmental use, it is nevertheless liable to the plaintiffs. The injury described by the complaint is not a mere con-

sequential damage, like that resulting wholly from the lawful use of one's own property or the lawful exercise of governmental power. It is a direct appropriation of well-recognized property rights within the guaranty of the Constitution. "The property of no person shall be taken for public use without just compensation therefor." *Nolan v. New Britain*, 69 Conn. 681, 38 Atl. 707. And so the defendant's claim that its charter does not authorize the condemnation of the plaintiffs' property rights is immaterial. Upon a careful examination of the charter as enacted in 1871 (7 Spec. Acts, p. 206), and amended in 1881 (9 Spec. Acts, pp. 233 *et seq.*), in 1883 (Id. p. 830), and in 1884 (Id. p. 954), and applying the rule which requires a law to be so construed, if reasonably possible, as to give it validity, we think the city is authorized to make compensation, by agreement, or after appraisal, for any private property taken for the purpose of the maintenance and use of the sewers authorized. But, if it were otherwise, the defendant would not be benefited. Its whole defense of acting under lawful state authority would then fail, and the mere finding of the facts alleged in the complaint would clearly support the judgment.

The defendant's brief presents its claim in a form somewhat different from that stated in the finding, and certainly novel in this state. It is substantially this: (1) A riparian city has a right to use the river for surface drainage, and such surface drainage necessarily pollutes the water to some extent, increasing with the growth of the city. (2) The use of these legitimate drains to carry off the noxious refuse accumulated by its inhabitants becomes in time an absolute necessity. (3) The right of surface drainage is thereby enlarged so as to include the right to discharge into the river, by means of these drains, such noxious refuse. Therefore the necessities of municipal growth give to the city a right to convey these noxious substances to the property of down-stream

IV. Miscellaneous.

A city which fails to pay the damages to a lower riparian proprietor from the discharge of sewage into a stream pursuant to a statute authorizing such use of the stream, but making the payment of such damages a condition precedent to the exercise of the right, is liable for any damage it may have caused as if the act had not been passed. *Kellogg v. New Britain*, 62 Conn. 232, 24 Atl. 996.

Washburn & M. Mfg. Co. v. Worcester, 118 Mass. 458, held that in the absence of any allegation of negligence on the part of the city, either in the mode of discharging the sewage or in omitting to take proper precautions to purify it, a bill for an injunction will not lie in favor of a riparian owner whose property is damaged by the discharge of city sewage into a stream, but that his remedy is under the provisions of the statute for the assessment of damages to parties whose estates are injured.

Cities and towns located upon the shores of lakes or banks of rivers are not absolutely prohibited from emptying their sewage into such lakes or rivers by Ill. Crim. Code, § 277, making it a public nuisance to throw or deposit any offal or other offensive matter into

any watercourse or lake, or to corrupt or render unwholesome the water of any stream or lake to the injury or prejudice of others. The opinion, however, makes the right of a city under this section to discharge sewage dependent upon its being rendered innocuous. *Walker v. Aurora*, 140 Ill. 402, 29 N. E. 741.

A city has no right to discharge sewage into a private canal in such manner as to impede navigation or to create a nuisance, without acquiring the property. *Boston Rolling Mills v. Cambridge*, 117 Mass. 896.

Watson v. New Milford (Conn.) 45 Atl. 167, held that a town was liable to a riparian owner for the pollution of a stream by the discharge of sewage from school buildings into it creating a nuisance upon such owner's land by the deposit of sewage and sediment thereon.

The act of the municipality in this case is clearly referable to its private, as distinguished from its governmental, functions, and therefore does not come within the rule protecting municipal corporations from consequential damages, since that rule only applies to acts referable to the governmental functions of the municipalities. The principal case suggests a doubt whether the collection and disposition of sewage belonging to its citizens is a govern-

proprietors, and so to appropriate that property for public use without compensation. It is unnecessary now to discuss the limitations to the right of surface drainage, for the second and third propositions are clearly wrong. The right to pour into the river surface drainage does not include the right to mix with that drainage noxious substances in such quantities that the river cannot dilute them, nor safely carry them off without injury to the property of others. The latter act is in effect an appropriation of the bed of the river as an open sewer, and the proposition that it may become lawful by reason of necessity is inconsistent with undoubted axioms of jurisprudence. The appropriation of the river to carry such substances to the property of another is an invasion of his right of property. When done for a private purpose, it is an unjustifiable wrong. When done for a public purpose, it may become justifiable, but only upon payment of compensation for the property thus taken. Public necessity may justify the taking, but cannot justify the taking without compensation. It may be necessary for a city to thus mix with its drainage such substances, but it is not necessary to pour such mixture into the river without purification. Indeed, the purification is coming to be recognized as a necessity. But, however great the necessity may be, it can have no effect on the right to compensation for property taken. The mandate of the Constitution is intended to express a universally accepted principle of justice, and should receive a construction in accordance with that principle, broad enough to enable the court to protect every person in the rights of property thus secured by fundamental law. There are certain apparent, but not real, exceptions to this protection. Emergencies may be such as to justify the taking of property without waiting to provide for compensation. Property may be destroyed without compensation in certain cases, when used unlawfully, or when it has become a thing

of danger. But this is not a case of war or conflagration. The plaintiff has not so used its property as to subject it to the harsh police power of confiscation. The plaintiff has certain rights as riparian landowner. These rights are property, within the meaning of our constitutional guaranty, and an invasion of these rights such as the defendant has made is a taking of that property. The legislature has no power to authorize such taking, except for public use, and then only upon providing for just compensation. *Kellogg v. New Britain*, 62 Conn. 232, 239, 24 Atl. 996; *Wadsworth v. Tillotson*, 15 Conn. 366, 373, 39 Am. Dec. 391; *Harding v. Stamford Water Co.* 41 Conn. 87, 93; *Nolan v. New Britain*, 69 Conn. 668, 681, 38 Atl. 703; *Fisk v. Hartford*, 70 Conn. 720, 731, 40 Atl. 906; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321; *Chapman v. Rochester*, 110 N. Y. 273, 277, 1 L. R. A. 296, 18 N. E. 88. In England the protection of property from appropriation for public use without compensation does not depend on any fundamental law, but upon inherent justice, and the principle is carefully recognized in all legislation authorizing an infringement of private rights. So the legislative authority for emptying the sewage of cities into watercourses and rivers is coupled with the provision that no nuisance is thereby authorized. Such legislation protects private rights in a manner similar to our constitutional legislation. The city of Leeds, having obtained an act of Parliament for emptying its sewage into the river Aire, claimed that the usual protection was not included in the act, and therefore the city was not responsible for nuisances maintained under an act of Parliament, urging the same plea of necessity pressed in this case. James, V. C., held that the act would not bear the construction claimed, and said he would be bound to put any construction on the act "which would prevent such a monstrous injustice." This decision was affirmed by the

mental act, but there are no cases holding municipal corporations liable upon that ground.

Prescriptive rights; licenses.

The right of a village to pollute the waters of a creek by discharging sewage therein is in the nature of an easement which can be created only by grant or prescription, and a mere oral consent to such pollution vests in the village no right which it is not within the power of the landowner at any time to recall. *Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218.

A prescriptive right to discharge sewers into a stream will not arise from the mere fact that they are so discharged for more than the statutory period of prescription, "without objection or hindrance," unless it is shown that the user was under claim of right and exercised adversely, and not with permission. *SMITH v. SEDALIA*.

The maintenance of private sewers discharging into a stream, causing some pollution, will not be sufficient to create an easement by prescription for the discharge into the stream of a substituted public sewer system which causes much greater pollution of the stream, and thereby creates a nuisance. *SMITH v. SEDALIA*.

In *Bloomington v. Costello*, 65 Ill. App. 407, 48 L. R. A.

It was urged that a city had acquired a prescriptive right to maintain the nuisance caused by the discharge of its sewage into a natural watercourse, thereby injuring the plaintiff's property, but the court held that no prescriptive right to maintain a nuisance of a public nature could be acquired.

In *Atty. Gen. v. Leeds*, L. R. 5 Ch. 583, 39 L. J. Ch. N. S. 711, 19 Week. Rep. 19, the court granted an injunction at the suit of landowners restraining the corporation of Leeds from polluting the river Aire by pouring into it the sewage of her town in an unpurified and undeodorized state, although the sewer had been completed and in operation for sixteen years before the application was made.

There can be no prescriptive right to pollute a stream by the discharge of sewage in such a manner and to such an extent as to be injurious to public health. Even assuming that a prescriptive right to foul a stream with sewage can be acquired, such right must be restricted to the limits of it when the period of prescription commenced; and if the pollution be substantially increased, whether gradually or suddenly, the court will interfere by injunction to prevent the wrongful excess; and if it be impossible to separate the illegal excess from the

appellate court, Giffard, L. J., saying: "In construing the act one must always consider that, if it had a different meaning, it would be against common sense." *Atty. Gen. v. Leeds*, L. R. 5 Ch. 583, 588, 596. The theory of the defendant that the necessities of a city may not only justify the taking of riparian rights, but the taking without compensation, seems to find support in some Indiana cases. *Richmond v. Test*, 18 Ind. App. 482, 48 N. E. 610; *Barnard v. Sherley*, 135 Ind. 547, 24 L. R. A. 568, 34 N. E. 600, and 35 N. E. 117; *Valparaiso v. Hagen* (Ind.) *post*, 707, 54 N. E. 1062. We do not find other cases that take this extreme ground. The right to compensation cannot be questioned in this state.

The defendant claims that the plaintiff is not entitled to equitable relief, because it contributed to its own injury: (1) By not arranging its dam and canal so as to effectually prevent the accumulation of noxious substances brought down by the river; (2) by using the sewers in the same manner as other inhabitants of the city. The court finds that devices were used by the plaintiff to mitigate the evil, and that "it did not appear from the evidence that any other means could reasonably be adopted, and preserve the full efficiency of the water power," and also finds that the plaintiff owned property in Waterbury which prior to 1884 drained into the Naugatuck river, and that after that date, in compliance with the city ordinances, the plaintiff connected this property with the sewer. These facts fall far short of proving that the nuisance complained of was due in part to the fault of the plaintiff, so that it does not come into court with clean hands.

It appears that some steps have been taken by the legislature looking towards the adoption of a plan of sewerage for the whole Naugatuck valley. The present rights of the plaintiff are not contingent on the future action of the legislature, and there is no public policy which forbids the issue of

an injunction to protect its rights because of such possible legislative action. It was plainly unnecessary to incorporate in the order of injunction a provision that it is made subject to the authority of future legislation, or that it should become inoperative if the defendant should hereafter acquire the plaintiff's premises by condemnation.

The claim is made that the court abused its discretion in granting an injunction, under all the circumstances of the case. "The granting or refusal of an injunction rests . . . in the sound discretion of the court, exercised according to the recognized principles of equity." *Fisk v. Hartford*, 70 Conn. 732, 40 Atl. 910. We think the trial court has acted within the limits of this discretion. The plaintiff cannot initiate proceedings of condemnation, and it is difficult to see how it can obtain adequate remedy except by injunction. We fail to see how any great public mischief will be produced by compelling the city, within the time limited, either to make compensation for the property taken, or to provide proper means for the disposition of its sewage. Under the practice act, the plaintiff was entitled to claim damages for the injury already done, and an injunction against its continuance.

There is no error in the rulings upon evidence. The testimony of Mr. Platt (stated in paragraph 24 of the finding) that his foreman refused to take charge of the premises because of the stench, was not admissible to prove the fact of the stench, but was admissible to prove the fact that the foreman refused to act on that ground. It was offered for no other purpose. Moreover, the fact of the stench was fully established by direct and proper testimony. The testimony of Franklin G. Newbert, that he had refused to work on the plaintiff's premises for a similar reason was not inadmissible because the refusal was made after the action was brought, although that fact might affect its weight. The court properly refused to admit the evidence referred to in para-

legal user, the wrongdoer must bear the consequences of any restrictions necessary to prevent the excess, even if it unavoidably extends to a total prohibition of the user. *Blackburne v. Somers*, L. R. Ir. 5 Eq. 1.

Liability when others contribute to injury.

A city has no right to discharge sewage into a stream when in flowing down the stream it may be brought in contact with other substances, for the presence of which the city is not responsible, in such a way as to work a nuisance, although the sewage before being deposited in the stream was rendered innocuous. *Morgan v. Danbury*, 67 Conn. 484, 35 Atl. 490.

Mansfield v. Hunt, 19 Ohio C. C. 488, held that it was no defense to an action against a city for a nuisance resulting from the pollution of the water of a stream by the discharge of sewage into it, that other persons also contributed to the injury in the same way as the city.

A landowner is not deprived of his right of action against a city for the pollution of a stream by sewage discharged into it by the city because of the existence of obstructions for which neither he nor the city is responsible, 48 L. R. A.

preventing the escape of the objectionable matter. *Jacksonville v. Doan*, 145 Ill. 23, 33 N. E. 878.

Atty. Gen. v. Leeds, L. R. 5 Ch. 583, 39 L. J. Ch. N. S. 711, 19 Week. Rep. 19, held that riparian owners were entitled to restrain the further pollution of a stream by the discharge of city sewage into it, although it was polluted before it received the drainage from the city.

Negligence

If the damages are not the necessary result of the act which the municipality is authorized to perform, but are attributable to its negligence, the rule that would otherwise protect it against consequential damages does not apply.

Thus, *Peck v. Michigan City*, 140 Ind. 670, 49 N. E. 800, while recognizing the immunity of the municipality from liability for consequential damages from the construction of sewers in the absence of negligence, upheld a paragraph of a complaint in an action by a dock owner against a city for damages from sewage discharged into the harbor, which proceeded upon the theory that the damages were caused by the negligence of the city.

graph 26. It was offered for the purpose of proving the construction of the act of 1881, and for that purpose was an irrelevant fact. For similar reasons, the evidence referred to in paragraph 27 was properly excluded. The defendant was not injured by the admission of evidence of a verbal notice given to the sewer commissioners (paragraph 32) as notice to the city was duly proved. The complaint charged that the noxious substances committed to the river by the defendant produced certain deleterious effects upon the premises of the plain-

tiff. It was competent for the plaintiff, certainly in the absence of all objection, to show that this effect was accomplished by the current of the river depositing these substances in the plaintiff's pond and the canal leading to its manufacturing establishment, and the court did not err in finding that fact.

There is no error in the judgment of the Superior Court.

The other Judges concur.

INDIANA SUPREME COURT.

City of VALPARAISO, *Appt.*,

v.

Herman HAGEN *et al.*

(.....Ind.....)

1. A city cannot be enjoined from discharging sewage into a stream, when it acts skilfully and in conformity to statute, and the stream constitutes the only natural and reasonably possible line of drainage.
2. Damages resulting to the property of riparian owners by the discharge of city sewage into a stream in a skilful manner, and in conformity to statute, are merely consequential, and give them no right to compensation.
3. The lessening of the value of an estate by destruction of the grass and the creation of some personal discomfort to the owner by the discharge of sewage therein is not such a taking of his property as entitles him to compensation, where the damage results from the discharge of sewage into a stream by a city in a skilful manner and in conformity to statute, since the damage is merely consequential.
4. What the law grants cannot constitute a nuisance *per se*, either public or private, and, if the law is obeyed, no actionable wrong can result.

(October 25, 1899.)

In *Morse v. Worcester*, 139 Mass. 389, 2 N. E. 694, the court upheld a bill by a millowner to abate a nuisance caused by the discharge of city sewage into a stream. The decision rests upon the averment of the bill that a city "carelessly, negligently, and unnecessarily so constructed said sewers and drains, and carelessly, negligently, and unnecessarily so discharged the waters therefrom, and so negligently omitted to take reasonable and proper precautions and methods in the construction of said sewers and drains and purification of said waters" that the nuisance complained of was created.

Bidder v. Croydon Local Bd. of Health, 6 L. T. N. S. 778, held that a riparian owner on a river was entitled to an injunction restraining a local board of health from causing or permitting to pass any sewage into the stream to the plaintiff's injury. The decision rests upon the ground that a case of negligence had been established against the board, it appearing that they had failed to deodorize sewage discharged into the river and which polluted the stream, killing fish therein and otherwise causing a nuisance; it further appearing that if 48 L. R. A.

APPEAL by defendant from a judgment of the Circuit Court for Porter County in favor of plaintiffs in an action brought to recover damages for the alleged wrongful pollution of a stream of water flowing through plaintiff's premises. *Reversed.*

The facts are stated in the opinion.

Mr. A. D. Bartholomew, for appellant:

It does not appear from the complaint or the evidence that the appellant failed to construct its sewer system with due skill or care, or that the sewers were negligently operated and maintained, or that there was any malice on part of the appellant in constructing and operating the sewers.

If any damage or inconvenience has resulted, or may result, from the construction and operation of the sewers or the proposed extension, it is only such as is consequential, and must necessarily result from the construction and maintenance of a system to get rid of the sewage of a city.

The law has authorized cities to construct sewers and sewer outlets; the work then is lawful.

For consequential injuries resulting from the construction, maintenance, or operation of sewers, streets, or other public works, in the absence of negligence or of want of due

care were taken in the combined preparation and filtration of the sewage matter no damage would be occasioned to the river.

When injunction justified; contempt.

To justify an Injunction restraining drainage by a city of its sewage into a stream, evidence that a nuisance is created must be clear and satisfactory, where the nuisance has not been judicially established. *Robb v. La Grange*, 158 Ill. 21, 42 N. E. 77.

Hutchinson v. Delano, 46 Kan. 345, 26 Pac. 740, merely holds that the apprehended fouling or pollution of a stream in the future by the sewage of a part of a city from sewers which have been legally, scientifically, and properly constructed, but which has not yet taken place, and of which there is no immediate or imminent danger, and which depends upon a contingency that may not happen, does not present a case for an Injunction.

Newark Aqueduct Board v. Passaic, 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55, held that a preliminary Injunction to restrain a city from constructing public sewers discharging into a

care and skill a municipal corporation is not liable.

Richmond v. Test, 18 Ind. App. 482, 48 N. E. 610.

In cities and towns with their numerous inhabitants and diversified business, it would be impossible that the pure streams that flow in from the farm sides should remain uncontaminated; and those that live upon the lower banks of such streams must, for the general good, abide the necessary results of such causes.

Barnard v. Sherley, 135 Ind. 559, 24 L. R. A. 568, 34 N. E. 600, 35 N. E. 117.

The city can only be amenable to the law in case of carelessness, negligence, or malice in the manner of the construction and operation of its outlet, and the court will not indulge the presumption that the city is or will be so guilty.

Elkhart v. Wickwire, 121 Ind. 331, 22 N. E. 342.

There is a presumption in favor of all persons that they will exercise care in the performance of their duties.

Whittaker's Smith, Neg. p. 419; *Pennsylvania Co. v. Marion*, 104 Ind. 241, 3 N. E. 874.

The case at bar is not to be treated strictly as an action for an abatable nuisance. More accurately, it is an action against the defendant for the construction of a public work under its charter in such a manner as to cause unnecessary damage by the want of reasonable care and skill in its construction. For such an injury the remedy is at common law.

North Vernon v. Voegler, 103 Ind. 325, 2 N. E. 821.

The good of the community forbids that one who occupies such a position as the appellant does should be permitted to arrest the work.

Kincaid v. Indianapolis Natural Gas Co. 124 Ind. 532, 8 L. R. A. 602, 24 N. E. 1066; *Peck v. Michigan City*, 149 Ind. 670, 49 N. E. 800; *Merrifield v. Worcester*, 110 Mass.

216, 14 Am. Rep. 592; *Washburn & M. Mfg. Co. v. Worcester*, 116 Mass. 458; *Stein v. Lafayette*, 6 Ind. App. 414, 33 N. E. 912; *Haag v. Vanderburgh County Comrs.* 60 Ind. 511, 28 Am. Rep. 654.

Messrs. Agnew & Kelly, for appellees: If the complaint states that an act is done, which in itself is unlawful, wrongful, or negligent, then it need not be characterized by the word "negligence."

Weis v. Madison, 75 Ind. 241, 39 Am. Rep. 135; *Knox County Comrs. v. Montgomery*, 109 Ind. 69, 9 N. E. 590.

The city has no right to cast even surface water upon the servient lands in materially increased quantities by collecting it and carrying it in a sewer or channel, unless it provides an adequate outlet.

Evansville v. Decker, 84 Ind. 326, 43 Am. Rep. 80; *Indianapolis v. Lawyer*, 38 Ind. 348.

The same thing is true of sewage conducted through sewers constructed by the city and deposited at a point where it is cast into the waters of the creek, if thereby it creates a nuisance.

The act of the city in collecting its sewage, and depositing it at a point where it invades the rights of riparian proprietors below, so that not only their property in the waters of the creek are destroyed, but by reason of the nuisance their adjoining property, to wit, their lands and their homes, are injured or destroyed, amounts to such a taking of property as the city must condemn and compensate for in damages before it can cast its sewage into the waters of the stream.

Wood, Nuisances, 2d ed. § 782.

The city has no more right to commit a wrong than an individual. A public necessity would not allow a municipal corporation to take private property without compensation, nor to do an act which a private individual might not do.

Putoka Twp. v. Hopkins, 131 Ind. 142, 30 N. E. 890.

river, upon the ground that the water supply of another city would be polluted, was properly refused upon the ground that the apprehended pollution had not yet taken place, and was not immediately threatened, and it was doubtful under the proofs whether pollution would be caused in any degree deleterious to the latter city.

In *Atty. Gen. v. Gee*, L. R. 10 Eq. 131, 23 L. T. N. S. 299, a bill and information filed to restrain a local board of health from discharging sewage into a river was dismissed on the ground that the injury proved was trifling.

In *Atty. Gen. v. Halifax*, 39 L. J. Ch. N. S. 120, the court granted an immediate injunction restraining a city from increasing the discharge of sewage into a brook, and an injunction to take effect after the expiration of a year restraining the existing discharge unless the sewage should be purified and deodorized, it appearing that the nuisance from the discharge was gradually increasing.

Atty. Gen. v. Richmond, L. R. 2 Eq. 306, 12 Jur. N. S. 544, 33 L. J. Ch. N. S. 597, 14 Week. Rep. 686, 14 L. T. N. S. 398, held that the court would restrain local authorities from allowing any fresh communications to be made with a sewer constructed by their predecessors

in office which occasion a nuisance to the inhabitants of the adjoining parish by draining into a stream flowing from such parish, although from the limited nature of their powers no order could be made against them which would have the effect of compelling them to abate the nuisance altogether by stopping up the sewer and ceasing to drain into the stream.

Spokes v. Banbury Bd. of Health, L. R. 1 Eq. 42, held that a local board of health was guilty of a gross contempt in failing to stop the discharge of sewage from a large municipality into a stream, it appearing that that was the only means of compliance with an injunction restraining the board from causing or permitting sewage or water polluted with sewage to pass from the drains under their control into the river in such a manner as to render the water of the river at or near plaintiff's mill unfit for use by the plaintiffs or otherwise injurious to the health of the persons resident at the mill. The defendants claim that compliance with the injunction was practically impossible without stopping the drainage of the town, and that that would cause great public inconvenience, but the court held that it could not regard such circumstances

G. H. P.

Hadley, J., delivered the opinion of the court:

Valparaiso is a city of 8,000 inhabitants. Salt creek is a natural watercourse flowing from south to north through the western part of the city, and thence west and north to its confluence with the Calumet river. Its fall is 15 feet per mile, and its minimum volume 227 cubic feet of water per minute. Within the city limits on the southwest is a low-lying marsh that naturally drains into Salt creek. The natural and only practicable drainage for all the territory within the city limits is Salt creek. Prior to 1896 the city had constructed, according to law, a general and complete system of sewerage for the city, at a cost of \$50,000, and 200 closets and 500 kitchens had been connected therewith; and the outfall from the entire system was into the marsh at the southwest, at a point about 64 rods from Salt creek. About 47,000 gallons of sewage are being daily discharged into the marsh. The marsh is heavily overgrown with grass and other vegetation, but sewage in some form finds its way into Salt creek, and pollutes its waters. Above the point of sewage contact there are three slaughter houses that drain directly into Salt creek, and one rendering establishment and one gas works drain into near-by tributaries. Nine-tenths of 1 per cent of the water in Salt creek below the sewer discharge in time of low water is sewage coming from the city, and slaughter houses, and other polluting agencies above. Appellant is threatening and has arranged for an extension of the outlet directly through the marsh to Salt creek. The plaintiffs, nineteen in number, are the owners and occupants of lower lands abutting on Salt creek at distances from 2 to 10 miles from and below Valparaiso. The action is for an injunction precluding the city from discharging sewage into Salt creek. The complaint sets forth the several interests of the plaintiffs in the subject-matter: That Salt creek, before the grievances mentioned, was a natural watercourse and a perpetually running stream of pure water flowing by and through the lands of the plaintiffs, and was used by them for domestic, agricultural, and dairy purposes; that defendant city has 8,000 inhabitants, and is situate upon Salt creek at a point higher and up stream from the lands of the plaintiffs; that the city had theretofore constructed and put into use a large and complicated system of sewers, and had permitted 500 houses and closets to be connected therewith; that the sewers were so constructed that they emptied all the sewage of the city into the marsh on the southwest, a short distance from Salt creek, and that the sewage, being discharged in great quantities into the marsh, overflowed and ran into Salt creek, whereby the waters of the creek became polluted, filthy, and unwholesome, and the banks of the creek became lined and overflowed with sewage, slops, excremental filth, and garbage, and the lands of the plaintiffs contiguous thereto, and which were used for pasture, have been and are being overflowed by said substances,

48 L. R. A.

and the grass so befouled that the plaintiffs' stock would not eat it, nor drink the water in the stream; that noxious odors arise from the stream and permeate the air for half a mile, and injuriously affect the health and happiness of the plaintiffs and their families; that the city is threatening to and will accomplish an extension of the sewer through the marsh to Salt creek, and there and thereby empty all the sewage of the city directly into Salt creek above the plaintiffs' lands, and there and thereby greatly increase the pollution of the water, and render it unfit for any purpose, to the irreparable damage of the plaintiffs. Prayer, "that the city be enjoined forever from constructing said sewer outlet, or emptying the sewage of the city in the said stream, or upon the said land at the place where it is now emptying, and from depositing the same into said creek at any point." A demurrer to the complaint was overruled and sustained to the second paragraph of answer. A trial was had upon the general issue, and finding and judgment perpetually enjoining the appellant from polluting or increasing the pollution of the waters of the creek by permitting its sewage to run into the waters of the stream.

Error is assigned upon the action of the court upon the demurrers and upon the overruling of appellant's motion to modify the finding and for a new trial. But, as suggested by the appellant, each assignment raises but a single and the same question, and they will therefore be considered together. That question is: May a municipality, acting in conformity to the statutes, skillfully and without negligence or malice, pursuing the only natural and reasonably possible line of drainage, be enjoined from discharging its sewage into a natural watercourse, thereby polluting its waters, to the injury of the lower riparian proprietors? It is a familiar principle that injunctive relief will not be granted if there exists a complete remedy at law, and, if the case falls within the class of *damnum absque injuria*, the denial is equally imperative. It is equally well established that every owner of land through which a stream of water flows is entitled to the reasonable use and enjoyment of the stream. His right to do so is not an acquired property right, but a natural right appurtenant to his freehold, and is in common and equal with all others owning land upon the stream. He may dam it and divert it for mechanical purposes and fish ponds, if he will return it to its channel before leaving his premises; he may use it for purposes of agriculture; his animals may take water from it at will; he may clear away the forests, plant crops, fertilize his field, feed his animals in lots, and permit the storm water from his fields and feed yards to flow by natural ways into the stream; or he may collect the surface water upon his premises, if all upon the water shed, into ditches, covered or uncovered, and, clean or unclean, may direct them into the stream, even though such drainage corrupts the waters of the stream and sends them on to the

owners of the servient estates less pure than he received them. His enjoyment is, according to his position, superior to those below him and inferior to those above him. The right to improve and beautify property, and to employ all the reasonable methods afforded by the estate and its appurtenances, to protect the health and promote the comfort and happiness of self and family, is inseparably connected with the right to own and control property; and, though its exercise may sometimes injuriously affect others, the law affords no remedy. In acquiring estates and in erecting homes along watercourses, notice must be taken of the conformation of the territory, the natural lines of drainage that farms, cities, and villages may gather along its banks, and that the impurities incident to the trades, to agriculture and population, that fall upon the surface, will find their way into the stream, and that the enjoyment of the stream is liable to be modified and abridged, if not altogether suspended, in many uses to which it might originally have been fitted, by those above, in the exercise of their own equal rights. A municipality, in a large sense, is a riparian proprietor. Its officers stand for the corporation. They are empowered by the state to provide and enforce sanitary measures for the preservation of the health and welfare of the public. The corporation has the same right to exist as an aggregation, and to enjoy its possessions as a natural person. It may, under the law, establish public halls, libraries, and market places, and it may lay out parks and embellish them with flowers and fountains for the comfort and happiness of the corporate body. It may open and improve streets, construct gutters, sluices, and waterways; and if storm water carries into these latter the multifarious filth and garbage incident to populous places, and bears the same away by natural channels to the general watercourse of the basin, the right of the municipality to permit it will not be doubted, even though the waters of the stream are thereby so polluted as to render them unfit for ordinary uses. And wherein have the dwellers below ground of complaint? They have suffered only that which they should have reasonably expected and estimated in acquiring their property. The question is rooted in the natural law of self-preservation. And, if cities are permitted to adulterate streams by allowing all accumulating surface impurities to flow into them by natural channels, we do not perceive why the underlying principle will not allow them to deepen these natural storm channels and transform them into covered sewers, nor why the right to protect the health and welfare of the public against one class of noxious matter should not be extended to all classes of equal virulence. And, while action must be taken with a cautious regard for the rights of those below, it has come to be a scientific fact generally accepted that the minimum of mischief resulting from closet contents may be attained by an early despatch through the medium of flowing water, wherein solids are dissolved and chemi-

cal action for purification speedily takes place. But, however this may be, there is back of the question sovereign power, resting upon reasons satisfactory to the legislature, conferred upon cities to construct sewers and outlets, and, by necessary implication, authority to discharge the sewage into the usual and naturally adapted conduits. The grant of such powers imposes the duty to exercise them in all needful cases. The record shows that appellant is a city of 8,000 inhabitants; that between the years 1891 and 1896 the proper authority projected and constructed a complete system of sewers at a cost of more than \$40,000, adopting for the outlet of the system the line of natural drainage for the district. It further appears that all parts of the city were ultimately drained into Salt creek within the city limits. And there is no pretense that there is any other possible outlet or practical means of disposing of sewage, or that the sewer was unskillfully or negligently constructed. Hence, then, to forbid a discharge of sewage into Salt creek is to deny to the city the right to discharge it anywhere, and thus leave it without the ordinary means of sanitation. Surely it is not the law that a salutary statute, essential to the health and welfare of the public, may be thus nullified by exhibiting a damage to private right. The sewage must be despatched or the city abandoned. The place adopted for the outpour is that provided by nature, and cannot be had elsewhere. The facts present a case wherein the principle of the greatest good to the greatest number must be permitted to operate, and private interest yield to the public good; and if the erection has been skillfully performed, and without negligence, as is shown to be the fact by the record, and in a way to do the least mischief, it must be held to be a lawful exercise of power that equity will not restrain. *Barnard v. Sherley*, 135 Ind. 547, 24 L. R. A. 568, 34 N. E. 600, 35 N. E. 117; *Richmond v. Test*, 18 Ind. App. 482, 501, 48 N. E. 610; *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 392.

That cities are not liable for consequential damages to private property, resulting from the construction of streets, sewers, and other public improvements, when the work is skillfully executed and free from negligence, is no longer an open question in this state. *Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. 686, and cases there cited; *Vincennes v. Richards*, 23 Ind. 381. But appellees' counsel argues on behalf of one of the appellees that the waters of the stream in flood time carry the sewer filth out upon his pasture, whereby the grass is rendered worthless, and noxious odors are emitted, to the annoyance and harm of appellee and his family, and that this is a consequential damage, not to his natural rights in the stream, but to his acquired property rights; and that it is a taking of his private property for public use without compensation first being rendered. The lessening of the value of an estate by a destruction of the grass and the creation of some personal discomfort has only the same

protection of the law that is accorded to other forms of injury to property by municipal improvements, and it has been uniformly held in this state that such consequential damage is not such a taking of private property as must be preceded by just compensation. *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Macy v. Indianapolis*, 17 Ind. 267; *Lafayette v. Spencer*, 14 Ind. 399; *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Lafayette v. Bush*, 19 Ind. 326. See also *Com. v. Alger*, 7 Cush. 33, 85. It will not do to say that the stream and appellees lands lying along the margins of Salt creek should have been condemned by the city to the right to despatch sewage along the stream before proceeding to do so. According to the statement of appellant's counsel, the premises of appellees alleged to be affected are situate from 2 to 10 miles by the stream from the corporate limits of the city; and, if the city is required to go so far to recompense sewage effect, where may it stop short of the sea? Appellant had lawful authority to exercise the right of eminent domain in securing an outlet for its sewage, but no such authority exists as will permit it to seize upon the stream and its margins to relieve consequential damages. *Richmond v. Test*, 18 Ind. App. 482, 500, 48 N. E. 610, and authorities cited. Furthermore, the construction of sewers and outlets is sanctioned by the law, and what the law grants will not constitute a nuisance *per se*, public or private. And, if the law is obeyed, no actionable wrong will result. In any instance, however, an action may arise from want of due care in construction or repairs. But it must be presumed that all ministerial officers will perform their official duty, and cause no offense in their execution of the law. *Elkhart v. Wickwire*, 121 Ind. 331, 337, 22 N. E. 342. Hence injunction will not lie to re-

strain the exercise of a power lawfully conferred until the power has been abused to the injury of public or private right.

By the judgment appealed from appellant is "permitted to extend its sewer system from its present outlet to Salt creek, but is perpetually enjoined and restrained from polluting or increasing the pollution of the waters of the creek." The judgment is anomalous in that it expressly authorizes appellant to construct the proposed extension through the marsh to Salt creek, but forbids forever the pollution of the waters of the stream. Ordinarily the right to extend the active, operating sewer to Salt creek would carry with it the right to discharge the sewage usually and necessarily carried by it into the stream, which implies pollution of its waters; but the express prohibition must be held to preclude the emptying of any corrupting substances into the creek. Whether the judgment is intended to operate against the situation as it now exists, and against the voiding of sewage into the marsh, whence it escapes into Salt creek, or to conditions that may exist if and after appellant extends the sewer to the creek, is not clear; but if it relates to future conditions, as we have seen, injunction will not lie, and if to present conditions, the facts averred in the complaint and established by the evidence do not warrant it.

The complaint fails to aver the absence of skill or the want of due care, or that some other outlet could more reasonably be had, or that some other reasonable method of disposing of the city sewage is available; and, for reasons stated, it is insufficient to entitle appellees to the relief prayed. The demurrer to the complaint should therefore have been sustained.

Judgment reversed, with instructions to sustain the demurrer to the complaint.

MISSOURI SUPREME COURT (Division 1).

D. H. SMITH, *Respt.*,
v.

City of SEDALIA, *Appt.*

(152 Mo. 293.)

1. The failure to specify in the order of record granting a new trial the ground on which it was granted, as required by Rev. Stat. 1889, § 2241, is not reversible error.
2. A prescriptive right to discharge sewers into a stream will not arise from the mere fact that they are so discharged for more than the statutory period of prescription, "without objection or hindrance," unless it is shown that the user was under claim of right, and exercised adversely and not with permission.
3. The maintenance of private sewers discharged into a stream, causing some pollution, will not be sufficient to create an

easement by prescription for the discharge into the stream of a substituted public sewer system which causes much greater pollution of the stream, and thereby creates a nuisance.

4. The rule that the right of action for trespass to real estate accrues to the one owning the property at the time the trespass is committed, does not apply to the emptying of a sewer system into a stream to the injury of a riparian owner, where the extent of the injury cannot then be for all time estimated, while subsequent change of the outlet and enlargement of the system materially increase the injury after the change in the ownership of the riparian property.
5. It is erroneous to instruct the jury as to what their verdict shall be if they find certain facts, when there is no evidence on which those facts can be found.
6. A nuisance caused by the pollution of a stream to the damage of riparian owners whose injuries are similar in kind, though different in degree, is not a

See note to *Platt Brothers & Co. v. Waterbury*, ante, 691.

public, but is a private, nuisance, such that a single landowner may maintain a private action for damages.

7. The facts that sewers are necessary to a city, and that a statute directs that they shall follow as near as practicable the natural drainage of the country, does not justify the city in discharging sewers into a stream to the damage of a landowner, without just compensation to him, as required by a constitutional provision against taking or damaging private property without just compensation.

(November 14, 1899.)

APPEAL by defendant from a judgment of the Circuit Court for Pettis County in favor of plaintiff in an action brought to recover damages for the alleged wrongful pollution of a stream flowing through plaintiff's property. *Affirmed.*

Statement by **Valliant, J.:**

This is a suit for damages against the city of Sedalia for the alleged wrongful pollution of the water of a natural stream which flows through the plaintiff's farm. The petition alleges that the plaintiff owns a farm adjoining the city, through which flows Cedar creek, a stream affording an abundant supply of water for stock and other farm purposes, which, until the injury complained of, was fresh, pure, and wholesome, and greatly enhanced the value of the land and the enjoyment of its use and occupancy; but that the defendant city had constructed a system of sewers, which collected and carried the sewage of the city, and discharged it into the creek a short distance from where it enters plaintiff's land, and by that means so polluted the water of the stream, as it came down on plaintiff's land, that it was foul, unwholesome, and unfit for use by man or beast, and in its turn polluted the atmosphere, so that it was rendered offensive and injurious to the health of the occupants of the farm. Damages are sought for the depreciation of the value of the farm and of its rental value. The answer pleads the several acts of the general assembly under which the defendant was incorporated, and its charter from time to time amended, beginning with the act of 1861, down to the act of 1873, and the final organization as a city of the third class under the General Statutes, in 1886; that during the period of its existence it had so grown that at the date of the suit it was a city of 20,000 inhabitants; that Cedar creek was the natural drain for the water falling on a large part of the area of the city, and the sewers, as constructed, do not carry into Cedar creek sewage or water from any territory other than that which naturally drains into the creek; that for more than twenty years prior to the institution of this suit there were sewers constructed in the city by its authority and consent, such as are complained of in the petition, which gathered the sewage and surface water, and discharged the same into the creek, and down on and across the land now owned by plaintiff, and from time to time those sewers and sewer

systems were enlarged and extended, and new sewers were constructed and added to the others, until the present system now in use was brought into existence. So defendant says it has, by long usage, acquired the right to use Cedar creek for the purpose of carrying its sewage, and the plaintiff's right is barred by the statute of limitations of ten years, and that, if a right of action to anyone ever accrued, it was to the person who owned the land when the city began to so use the creek, and not to the plaintiff. The answer denies that the water is polluted, or that plaintiff's property is injured. The petition concludes, not only with a prayer for judgment for damages, but also for an injunction to restrain defendant from further committing the alleged nuisance complained of. But the petition contains but one count, and that is shaped as an action at law for damages, and the cause was tried as such. An injunction issues out of a suit in equity, and, if plaintiff had really intended to ask equitable relief, he should have framed a count substantially as a bill in equity. We will treat the case as the parties and the trial court treated it; that is, as an action at law only.

The evidence on the part of plaintiff tended to prove: That he bought the land mentioned in the petition in 1889. That it is a highly-improved and valuable farm, of about 400 acres, to the north of and adjoining the city of Sedalia, a small part of the southern end being within the city limits. That Cedar creek runs through the farm for a distance, following its meanderings, of about a mile, affording a sufficient supply of water for a stock farm, to which use it was principally devoted, and for other farm purposes. The residence is about 200 yards from the creek. That in 1887 the city passed an ordinance establishing a general sewer system, under which the main sewer now complained of was constructed, which then emptied at the Missouri Pacific Railway track, about a mile south of its present terminus, and that was the situation when the plaintiff bought, in 1889. At that time the water was clear, and there was no odor from the creek, but it could be detected that some foreign element was in the water. In 1889 the main sewer was enlarged, and in 1891 extended in the direction of plaintiff's farm, and again in 1893, until it reached the main channel of Cedar creek about 200 yards from plaintiff's land. That beginning in 1889, and continuing to 1895, the city constructed district sewers, eleven in number, emptying into the main sewer above mentioned. That until 1891, when the first extension of the main sewer in the direction of plaintiff's farm was made, much of the offensive character of the sewage was dissipated in the open air before it reached the plaintiff's land, although even then an examination of the water in the creek showed contamination; but that after the extension of 1891, and the second extension of 1893, with the addition of the several district sewers above mentioned, the water became entirely unfit for use, and dangerous, not only to the cat-

tle, but also the health and comfort of the tenants of the farm. That in 1893 plaintiff made oral complaint, and in 1894 written complaint, to the city officers, of the same, but without avail. There was also testimony for the plaintiff tending to show the depreciation of the rentals and value of the land within the periods complained of. This suit was begun in 1895.

It was admitted that Cedar creek was the natural drain for all that district in the city which now drains and empties its sewage into it through the sewerage complained of. On the part of the defendant, the testimony tended to prove that as early as 1873 the city built a sewer for surface drainage which emptied about a mile from plaintiff's land, but the output of which, following natural course, reached Cedar creek; and the city, in 1874, authorized private persons to build private sewers for surface drainage, emptying into that sewer. In 1877 the city authorized certain persons to build a sewer for drainage from Lamine street to Moniteau avenue, with which persons so desiring were allowed to make connection for their private drains upon payment of a stipulated amount. In 1882 a similar authority was granted another person to construct a sewer on Broadway. In 1886 the gas company built a sewer which emptied on the open ground near its works. In 1875 and 1876 there was a soap factory in the city just north of the railroad tracks, whose offensive offcast washed, in the course of natural drainage, into Cedar creek, but the city interfered, and put a stop to this, in a year or two. There were also, about this time, several slaughter houses in the city limits, on a branch of Cedar creek, about a mile from the land now owned by plaintiff, but these were all closed in 1884 by injunctions from the circuit court, at the suit of citizens. The testimony of defendant also tended to prove that the water on the plaintiff's farm was not polluted to the offensive or dangerous degree that plaintiff's testimony tended to show it to be.

The theory of the instructions given by the court at the request of the plaintiff was that by the construction of private sewers by permission of the city, which emptied into natural drains that carried the output into Cedar creek, the city did not acquire the right to construct its system of sewers to discharge their offensive contents into the creek, to the plaintiff's injury; nor did the fact that plaintiff bought the land after the city had adopted the sewer system, and constructed it in part, preclude the plaintiff from recovery for damages he has sustained after his purchase; and that the fact that the sewer system may have been in operation, with offensive consequences, for five years before the bringing of this suit, did not preclude recovery, within the scope of other instructions; nor did the fact that a system of sewers was necessary to the city, and that there was no other natural or convenient channel than the one in question, and that it would be troublesome or expensive to dispose of the sewage without cre-

ating a nuisance, justify the collecting and emptying of the sewage on or near the plaintiff's premises. The instructions placed the plaintiff's measure of damages at the depreciation of rental value within five years before the commencement of the suit and permanent injury to the value of the farm.

At the request of the defendant, the court gave the following instructions:

"(A) If the stream in question was used for more than ten years before the bringing of this action, continuously, by the defendant city, for the purpose of drainage or carrying off the sewage from the part of said city which naturally drained into the same without objection or hindrance from those owning the farm now owned by the plaintiff, then the city, and the inhabitants of the same, have acquired a right to the use of said stream for carrying off the drainage and sewage from said part of defendant city, and the verdict will be for the defendant, unless the jury find that defendant has, within ten years before the bringing of this suit, caused the sewage and drainage from other territory than that naturally drained into said stream to be carried into the same, and this to the damage of the plaintiff.

"(B) Although the jury may believe from the evidence that the use of the watercourse in question, as it has been and is being used, was a nuisance when first begun, yet, if said use has continued uninterrupted [by the city of Sedalia] for more than ten years next before the bringing of this action, the plaintiff cannot now complain of the same, and the verdict will be for the defendant." This was asked without the words in brackets, 'by the city of Sedalia,' but the court inserted said words, and gave it of his own motion, to which change defendant excepted at the time.

"(C) Although the jury may believe from the evidence that the use of the watercourse in question was or is injurious to the land now owned by plaintiff or to the owner thereof, yet if the jury further believed from the evidence that, before the plaintiff became the owner of said land, said use had become permanent,—that is, so fixed that without human labor it would continue,—and that there was then no present intention of changing or abandoning said use, so as to avoid further injury to said land and its owner, then said injury is to be regarded as permanent and an injury to the land itself, and only to be compensated for once, and that compensation was due to the one who owned the land before the plaintiff, and not to the plaintiff, and the plaintiff cannot recover therefor.

"(D) If the jury believe from the evidence that the sewage discharged into the watercourse in question comes only from the part of the city of Sedalia which naturally drains into said stream, and if the jury further believe from the evidence that, without the construction of sewers by the defendant city, the natural drainage into said stream would constitute a nuisance to the extent proved to exist at the time of bringing this suit, then

public, but is a private, nuisance, such that a single landowner may maintain a private action for damages.

7. The facts that sewers are necessary to a city, and that a statute directs that they shall follow as near as practicable the natural drainage of the country, does not justify the city in discharging sewers into a stream to the damage of a landowner, without just compensation to him, as required by a constitutional provision against taking or damaging private property without just compensation.

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"(B) Although the jury may believe from the evidence that the use of the watercourse in question, as it has been and is being used, was a nuisance when first begun, yet, if said use has continued uninterrupted [by the city of Sedalia] for more than ten years next before the bringing of this action, the plaintiff cannot now complain of the same, and the verdict will be for the defendant." This was asked without the words in brackets, 'by the city of Sedalia,' but the court inserted said words, and gave it of his own motion, to which change defendant excepted at the time.

"(C) Although the jury may believe from the evidence that the use of the watercourse in question was or is injurious to the land now owned by plaintiff or to the owner thereof, yet if the jury further believed from the evidence that, before the plaintiff became the owner of said land, said use had become permanent,—that is, so fixed that without human labor it would continue,—and that there was then no present intention of changing or abandoning said use, so as to avoid further injury to said land and its owner, then said injury is to be regarded as permanent and an injury to the land itself, and only to be compensated for once, and that compensation was due to the one who owned the land before the plaintiff, and not to the plaintiff, and the plaintiff cannot recover therefor.

"(D) If the jury believe from the evidence that the sewage discharged into the watercourse in question comes only from the part of the city of Sedalia which naturally drains into said stream, and if the jury further believe from the evidence that, without the construction of sewers by the defendant city, the natural drainage into said stream would constitute a nuisance to the extent proved to exist at the time of bringing this suit, then

the plaintiff cannot recover, and the verdict will be for the defendant.

"(E) Although the jury may believe that the discharge of sewage into the stream in question amounts to a nuisance, yet the plaintiff cannot recover unless the jury further find that the damage, if any, suffered by plaintiff, is peculiar to him; being such as is different in kind, and not simply in degree, from that sustained by other persons owning land in the same general locality."

And of its own motion the court gave the following:

"(F) The court instructs the jury that if they find from the evidence that the natural drainage into the watercourse in question, together with the drainage from the sewers built or constructed by individuals, prior to the construction of the sewer by the city, constitute a nuisance in kind and extent with that existing at the time of bringing this suit by plaintiff, then your verdict should be for the defendant; and, if you find from the evidence that this drainage did not constitute such nuisance, then, in estimating the damages plaintiff has sustained, if you find he has sustained any, you must take into consideration the natural drainage, and the drainage from the sewers built as aforesaid by individuals prior to the building of the sewer by the city, and give him only such damages as is in excess of the damages already sustained by reason of said natural drainage and drainage from said individual sewers."

Exceptions were preserved on both sides. There was a verdict for defendant and a motion for a new trial by plaintiff, which was sustained by the court, and from that order defendant appeals.

Mr. John Cashman for appellant.

Messrs. Montgomery & Montgomery, for respondent:

It is not the extent of the claim of the right, but the extent of its actual exercise, which controls; a claim of right to do more than that which has been done affects nothing on the question of prescription.

16 Am. & Eng. Enc. Law, p. 999; Wood, Nuisances, 1st ed. §§ 705, 706; Wood, Limitations of Actions, § 182; *Holsman v. Boiling Spring Bleaching Co.* 14 N. J. Eq. 345; *Postlethwaite v. Payne*, 8 Ind. 104; *Janssen v. Lammers*, 29 Wis. 89; *Russell v. Scott*, 9 Cow. 279; *Roundtree v. Brantley*, 34 Ala. 544, 73 Am. Dec. 470; *Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731; *Odiome v. Lyford*, 9 N. H. 502, 32 Am. Dec. 387; *Baldwin v. Calkins*, 10 Wend. 169; *Carlisle v. Cooper*, 21 N. J. Eq. 576.

No right became vested in defendant by the mere silent acquiescence of the owner of the premises in permitting, at the first, the drainage to be carried on to the premises, and afterwards the continuance of the nuisance. At best it was only a license revocable at the pleasure of the owner of the land.

Pitzman v. Boyce, 111 Mo. 387, 19 S. W. 1104; *Bunten v. Chicago, R. I. & P. R. Co.* 50 Mo. App. 426; *House v. Montgomery*, 19 Mo. App. 170; *Cobb v. Smith*, 38 Wis. 21, 48 L. R. A.

The drainage provided by the city, as it existed prior to plaintiff's purchase, was not injurious, or very slightly so; but after plaintiff's purchase the sewer system was put in force, and the use extended, enlarged, and changed every year.

The structure or work causing the injury must be a completed and finished work, and the damage occasioned thereby such as that the plaintiff could have sued for and recovered entire damages, or damages in the future from the ordinary use of such a structure; otherwise plaintiff would not be precluded from recovering for such damages.

Wood, Limitations of Actions, §§ 180-182, and note; Wood, Nuisances, §§ 705, 706; *James v. Kansas*, 83 Mo. 570; *Holsman v. Boiling Spring Bleaching Co.* 14 N. J. Eq. 345; *Rogers v. Stoever*, 24 Pa. 186; *Paddock v. Somes*, 102 Mo. 238, 10 L. R. A. 254, 14 S. W. 746; *Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218.

The instruction that plaintiff cannot recover except for such injury as is peculiar to him, "being such as is different in kind, and not simply in degree, from that sustained by other persons owning lands in the same general locality," is not the law since the adoption of our present Constitution.

Joplin Consol. Min. Co. v. Joplin, 124 Mo. 137, 27 S. W. 406; *Van De Vere v. Kansas City*, 107 Mo. 91, 17 S. W. 695; *Paddock v. Somes*, 102 Mo. 238, 10 L. R. A. 254, 14 S. W. 746; *Seifert v. Brooklyn*, 101 N. Y. 139, 54 Am. Rep. 604, 4 N. E. 321; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719.

If it is a public nuisance the defendant could never gain prescriptive immunity, and the other instructions for defendant are upon the right acquired by limitation.

16 Am. & Eng. Enc. Law, p. 995; Wood, Nuisances, 1st ed. § 724; Cooley, Torts, 2d ed. p. 731.

People owning land in the same general locality are entirely different from the community at large, which is the legal expression applicable to such cases.

Funke v. St. Louis, 122 Mo. 139, 26 S. W. 1034; *Givens v. Van Studdiford*, 86 Mo. 158, 56 Am. Rep. 421; Wood, Nuisances, 2d ed. §§ 736, 737; *Glaessner v. Anheuser-Busch Brewing Assn.* 100 Mo. 516, 13 S. W. 707; *Edmondson v. Moberly*, 98 Mo. 526, 11 S. W. 990.

These damages are those actually sustained by plaintiff, including any diminution of rentals down to the time of the institution of this suit.

Carson v. Springfield, 53 Mo. App. 297; *Pinney v. Berry*, 61 Mo. 360; *Brown v. Chicago & A. R. Co.* 80 Mo. 457.

Valliant, J., delivered the opinion of the court:

1. The order of record granting the new trial fails to specify the ground on which it was granted, as required by § 2241, Rev. Stat. 1880, and that is the first assignment of error upon which appellant asks a reversal of the judgment. The specifying in the record of the ground on which a new

trial is granted was first required by the act of 1887 (Laws 1887, p. 230), amending § 3705, Rev. Stat. 1879, which in other respects is the same as § 2241, Rev. Stat. 1889. The original purpose of that section was to limit the power of the court in granting new trials for errors in a matter of fact. But, unless the record shows upon what ground a first new trial is granted, the ground for the action of the trial court in granting a new trial a second or third time would be difficult, if not impossible, to ascertain, when the propriety of the action is questioned in an appellate court. It was doubtless to overcome this difficulty that the amendment of 1887 was enacted. This is not the first case that has come before this court since the adoption of the amendment in which its requirement has been disregarded; that is, in which a new trial has been granted without specifying the ground for the same. *Hewitt v. Steele*, 118 Mo. 463, 24 S. W. 440; *First Nat. Bank v. Wood*, 124 Mo. 72, 27 S. W. 554. But we have never treated a failure to observe this direction as reversible error. The omission is liable to arise through the carelessness of the clerk and oversight of the judge, and of the attorneys in the case on both sides. The statute itself does not render the order granting the new trial invalid for failure to observe this requirement, and we cannot so adjudge it.

2. The propriety of the action of the trial court in granting a new trial is the only subject for our consideration on the review of this record. The instructions given on the request of the plaintiff, as briefly summarized in the foregoing statement, present, in the main, the correct theory of the law, but the instructions given at the request of the defendant afford ground for affirming the action of the circuit court in granting a new trial. The theory of the defense, advanced both in the answer and instructions, is that the city has acquired, by long use, a prescriptive right to empty its sewage into Cedar creek. That a prescriptive right to maintain a nuisance of the kind complained of by the plaintiff in this case may be acquired, is a well-established principle of law. The period requisite to establish such right is that which, under the statute of limitations, bars a right of entry, which in this state is ten years. *James v. Kansas*, 83 Mo. 567; *Howard County v. Chicago & A. R. Co.* 130 Mo. 652, 32 S. W. 651. The user, however, upon which the prescriptive right is founded, must be adverse in its character: mere permissive user cannot create such a right. The burden is upon him who asserts the right to show, not only the user, but that it was exercised adversely and under a claim of right. *Pitzman v. Boyce*, 111 Mo. 393, 19 S. W. 1104. And the user relied upon must not only be of the same general character, but must have been exercised substantially in as offensive a degree and to as great an extent as at the time the suit is brought. *Wood*, Limitations of Actions, § 182; *Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731; *Carlisle v. Cooper*, 21 N. J. Eq. 576. Neither the answer which attempts to set up

this prescriptive right, nor the instructions given at the request of the defendant bearing upon it, comprehend all the essentials or such a right. The answer avers that Cedar creek is the natural drain for the water falling on a large district in the city, and that, from the beginning of the incorporation, the surface water, drainage, and sewage of that district have drained into the creek; and that for more than twenty years there were sewers in the city, by its permission, which gathered surface water and sewage, and sent it down the creek; and that from time to time those sewers have been enlarged and extended, until the present sewer system was brought into existence. There is no averment in the answer that the sewers complained of in the petition had existed twenty years, or ten years before the commencement of the suit, and the evidence shows that there would have been no justification for such an averment. The instruction marked "A," given at the instance of the defendant, is to the effect that if for more than ten years prior to the suit the creek had been used by the city for drainage or carrying off the sewage from the district which it naturally drained, without objection from the owners of the land, the verdict must be for the defendant, unless it appeared that defendant, by its present system, was draining sewage from other territory into it. That is to say, if there were sewers in the city which collected offensive matter, without regard to the degree or quantity, and sent it down a natural course, which carried it into the creek, and this condition existed for ten years without complaint, then the city had a right to construct its present system of sewers, enlarge and extend the same, from 1887 to 1893, with continued additional district sewers, down to 1895, and empty the whole sewage from that area, which compasses the chief part of a city now grown to 20,000 inhabitants, into the creek within 200 yards of plaintiff's land, and render the water unfit for use, and the atmosphere offensive and unwholesome to the occupants of the farm. We cannot give that proposition our approval. The instruction literally goes even further, and confirms the city's prescriptive right if only the drainage of that district was wont to go that way; but that is so palpable an error that it was doubtless an inadvertence. The term, "without objection or hindrance," used in the instruction, does not sufficiently express the adverse character that is necessary to give a prescriptive right. "Without objection or hindrance" is not inconsistent with permission. A prescriptive right cannot be acquired by user under permission, howsoever long it may continue. It must be under claim of right, and adversely exercised. This instruction, also, in the light of the evidence, would confer on the city the prescriptive right to pollute the watercourse with its sewage, because individuals and private concerns had, for the period of ten years, committed nuisances which produced more or less pollution in the stream. But one man cannot build his edifice on another's foundation. The pe-

riod of user by one cannot establish a prescriptive right in another, unless he is successor to the rights of the other by privity of estate. Evidence that the gas company and the owners of the slaughter houses had for years cast offensive matter into a natural tributary of this stream had nothing to do with this case, except as bearing on the question of damages, as their drains were no part of the city's sewers, now complained of. If we have rightly comprehended the evidence in this case, this instruction marked "A" should have been refused, even if it had correctly set forth the essentials of a prescriptive right, upon the ground that there was no evidence on which to base it. With no knowledge of the situation except that afforded by descriptions in the evidence in the record, we get the impression that the only sewers built by the city prior to those built under the ordinances of 1887 were for surface drainage, and that all the other sewers before that date were private, and some, if not all, of them were limited to surface drainage, and that the sewer system inaugurated in 1887 was not a mere enlargement of those formerly existing, but a new and different creation. If that is the case, then there was no foundation in the evidence for an hypothesis on which to base a finding that the present system had existed for ten years before this suit was brought. But we recognize the fact that the court and jury which tried the case, and the counsel too, being familiar with the locality, were better able to comprehend the situation and apply the evidence than a mere reader of the record. Therefore we do not now say that the defendant was not entitled to an instruction properly presenting the law on the subject of a prescriptive right; but, in view of the fact that the case is to be retried, we call the trial court's attention to that feature of the evidence, for its enlightened consideration on the retrial, and we only now hold that the instruction marked "A" should not have been given because it failed to present the essentials of the law of prescriptive right in the particulars above discussed. And for the same reasons the instruction marked "B" should also have been refused.

3. The instruction marked "C" undertakes to apply to the facts of this case the proposition of law that where the trespass committed is in itself permanent, and the injury complete, the right of action accrues then, and to him who was then injured, not to a subsequent purchaser. But that is not applicable to a case of this kind. That principle is illustrated in the facts in *James v. Kansas*, 83 Mo. 567. The injury there complained of was the structure—the sewer itself—which the city had thirteen years before built on plaintiff's land, and which, when plaintiff, after that lapse of time, came to build a house, was found to interfere with the economical building of the foundation. It was held that that injury was a permanent one, manifest from the beginning, and susceptible of being measured in damages once for all, and suit on it was barred in five years. But the nature of this injury is very

different. True, it was manifest in 1887 that the natural result of the sewerage then being constructed would be to cast sewage into a drain that would bring it to the land now owned by plaintiff, and, when plaintiff bought the land in 1889, that result had to some degree been accomplished, but the extent of the injury, even with the sewers as then constructed, could not have been for all time estimated. Besides, the sewage was then discharged at a very much greater distance from the plaintiff's land, and was exposed in its flow to the open air before it entered the plaintiff's premises. And, in addition to this, the main sewer was enlarged in 1888, extended in 1891, and again in 1893, and from July, 1889, to August, 1895, eleven district sewers were constructed and turned into the main sewer. That instruction should not have been given.

4. It was error to have given the instruction marked "D," because there was no evidence on which to base it. There was no evidence upon which the jury could have based a finding that, if there had been no sewers, the natural drainage into the creek would have been a nuisance to the extent shown by the evidence to exist at the time of bringing this suit.

5. The instruction marked "E" was inapplicable to this case. The principle intended to be expressed there, to wit, that plaintiff could recover only for damage peculiar to himself, differing in kind, not simply in degree, from that suffered by others, is applicable where complaint is made of a public nuisance, as, for instance, when a public street is obstructed. If the plaintiff, in such case, is inconvenienced only in the same way that other citizens suffer, though perhaps to a greater degree than some others, he cannot recover. Examples of this doctrine are shown in *Rude v. St. Louis*, 93 Mo. 408, 6 S. W. 257; *Edmonson v. Moberly*, 98 Mo. 523, 11 S. W. 990; and other cases cited by the learned counsel for the city. But even in such cases, if the plaintiff has an interest in the matter that the public in general has not,—for example, if the obstruction hinders his access to his lot abutting the street,—he may recover for that injury. But it is a misconception to treat the case made in the petition as one of a public nuisance. Though there be several landowners through whose possessions the polluted stream may flow, and all suffer damage of the same character, but each of different degree, that does not convert the injurious act into a public nuisance, for it is only those individuals, and not the public in general, who suffer; and therefore each may recover the damage he suffers, though it differ only in degree from that that others in the same class suffer. Indeed, if we should find the injury of which the plaintiff here complains to be a public nuisance, the whole foundation must fall out of the defense, because no one can acquire a prescriptive right to maintain a public nuisance. *Cooley, Torts*, 2d ed. pp. 730, 731; *Wood, Nuisances*, 3d ed. § 711.

6. The only criticism that the instruction given by the court of its own motion, marked

"E," suggests, is that in its first clause it presents an hypothesis for which there is no justification in the evidence. If there was any evidence on which to base a finding that the natural drainage and the private sewers created a nuisance in extent equal to that existing at the time of bringing this suit, it has escaped our notice. At all events, if there was a scintilla of such evidence, it was so overcome that the trial court would have been justified in granting a new trial on that account.

7. The facts that sewers are necessary to a city, and that the statute directs that they shall follow as near as practicable the natural drainage of the country, afford no justification to the action of a city in emptying its sewers on the land of an individual, to his damage. Our Constitution declares that private property shall not be taken or damaged without payment of just compensation. The legislature, therefore, could not, if it so intended, confer authority on a city to injure private property for the public good, without first paying the damage. But, subject to this qualification, private interest must yield to the public good. If it is a

public necessity that the plaintiff's land be taken or damaged in order to dispose of the sewage of the defendant city, it may be so condemned according to law, but the city must first pay him the just compensation. Such condemnation can only be made in conformity to a proceeding prescribed by statute. The issues in this case do not call for an examination of the statute to ascertain whether or not provision has already been made for the condemnation of land outside the city limits for such purpose, but it is sufficient to say that until such provision is made, if it has not been, and until condemnation has been adjudged in accordance with such provision, or the city has, by contract or prescription, acquired the right to do so, it is liable for the damage caused by emptying its sewers into a natural stream flowing through private property. *Cooley, Torts*, 2d ed. 693; *Joplin Consol. Min. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406.

For the reasons above given, the judgment of the Circuit Court in sustaining the motion for a new trial is affirmed.

All concur.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Samuel H. GREY, Attorney General, *ex rel.*

Henry P. SIMMONS *et al.*, *Respts.*,
v.

Mayor, etc., of PATERSON, *Appts.*

(.....N. J.....)

*1. The city of Paterson had legislative authority to construct its system of sewers, discharging their contents into the Passaic river, and is not, therefore, subject to the charge of maintaining a public nuisance.

2. The title of riparian owners along the Passaic river, where the tide ebbs and flows, extends only to high-water mark. The state is the absolute owner of the bed of the stream. Such riparian owners, having no title to the bed of the stream, are not entitled to an injunction against the city on account of the pollution of the stream.

3. The title of riparian owners above the ebb and flow of tide extends to the middle of the stream, subject only to a servitude to the public for purposes of navigation. The pollution of the river by sewage constituted the taking of the property of such owners, which the legislature cannot authorize except upon just compensation.

4. Jersey City has no rights in the waters of the Passaic river distinct from the rights of the general public, either by reason of the location of its waterworks, or in virtue of act 1852, p. 419.

5. By reason of the great injury which would fall upon the city by restraining the continuous use of its sewerage system, and the acquiescence of these riparian owners above where the tide flows, their in-

jury being comparatively small, it would be inequitable to grant them an injunction.

6. They may obtain redress by amending their bill, or by filing a new bill, praying for an injunction, unless the city of Paterson will consent to make such compensation to them as shall be ascertained to be just, or they may, if they elect, sue at law for their damages.

(March 5, 1900.)

APPEAL by defendants from an order of the Chancery Court granting an injunction to restrain defendants from depositing sewage in the Passaic River. *Reversed.*

The facts are stated in the opinion.

Messrs. Thomas C. Simonton, Jr., and Eugene Stevenson for appellants.

Messrs. George McEwan, James B. Vredenburg, and John P. Stockton, for respondents:

A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction at the suit of the attorney general.

Atty. Gen. v. Chicago & N. W. R. Co. 35 Wis. 532; *Delaware & R. Canal Co. v. Camden & A. R. Co.* 16 N. J. Eq. 321, 18 N. J. Eq. 546; *Bonaparte v. Camden & A. R. Co.* Baldw. 227, Fed. Cas. No. 1,617; *Newark Pl. Road & Ferry Co. v. Elmer ex rel. Van Wagenen*, 9 N. J. Eq. 754; *Thompson v. Paterson & H. River R. Co.* 9 N. J. Eq. 527.

As to the sea, in which all his subjects have the right of navigation and of fishing, the King can make no modern grants in derogation of the rights of his subjects.

Blundell v. Catterall, 5 Barn. & Ald. 268; *Browne v. Kennedy*, 5 Harr. & J. 203, 9 Am. Dec. 503.

*Headnotes by VAN SYCKEL, J.

See note to *Platt Brothers & Co. v. Watterbury*, ante, 691.
48 L. R. A.

The corruption of a stream of water utilized as a source for the supply of water to a town, for the ordinary domestic use of its inhabitants and for drinking, constitutes a public nuisance affecting the health and comfort of an entire community, and calls for the interposition of the attorney general in a suit to enjoin the wrongful act.

Com. ex rel. McCormick v. Russell, 172 Pa. 506, 33 Atl. 709; *Westcott v. Middleton*, 43 N. J. Eq. 478, 11 Atl. 490.

It would be a public nuisance to render the water of a stream so impure that it could not be used for domestic purposes or for the watering of cattle, and so that it gave off noxious and unhealthy odors.

Chapman v. Rochester, 110 N. Y. 273, 1 L. R. A. 296, 18 N. E. 88; *Townsend v. Bell*, 62 Hun. 306, 17 N. Y. Supp. 210; *Chipman v. Palmer*, 77 N. Y. 56, 33 Am. Rep. 566; *Bullard v. Saratoga Victory Mfg. Co.* 77 N. Y. 525; *Prentice v. Geiger*, 9 Hun. 350. Affirmed in 74 N. Y. 341; *Bucceleugh v. Cowan*, 5 Macph. 214; *Crossley v. Lightowler*, L. R. 3 Eq. 279; *Pennington v. Brinsop Hall Coal Co.* L. R. 5 Ch. Div. 769; *Bickett v. Morris*, L. R. 1 H. L. Sc. App. Cas. 47; *Clinton v. Myers*, 46 N. Y. 520, 7 Am. Rep. 373; *Crooker v. Bragg*, 10 Wend. 260, 25 Am. Dec. 555; *Harrop v. Hirst*, L. R. 4 Exch. 43; *Busch v. New York, L. & W. R. Co.* 34 N. Y. S. R. 7, 12 N. Y. Supp. 85; *Smith v. Rochester*, 38 Hun. 612, Affirmed in 104 N. Y. 674; *Webb v. Portland Mfg. Co.* 3 Sumn. 189, Fed. Cas. No. 17,322; *Allaire v. Whitney*, 1 Hill. 484; *Honsee v. Hammond*, 39 Barb. 95; *Merrifield v. Worcester*, 110 Mass. 219, 14 Am. Rep. 592; *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 220; *Drake v. Hudson River R. Co.* 7 Barb. 508; *MacLaury v. Hart*, 121 N. Y. 636, 24 N. E. 1013; *Morgan v. Binghamton*, 102 N. Y. 500, 7 N. E. 424; *Purdy v. Manhattan Elev. R. Co.* 36 N. Y. S. R. 43, 13 N. Y. Supp. 295; *Wright v. Howard*, 1 Sim. & Stu. 202.

Public navigable rivers are held by the state in trust for the public; the water is subject to diversion for public purposes, either by the state directly, or by delegated authority.

Rundle v. Delaware & R. Canal Co. 14 How. 80, 14 L. ed. 335; *St. Anthony Falls Water-Power Co. v. St. Paul Water Comrs.* 56 Minn. 485, 58 N. W. 33.

The corruption of the water of a public river is a wrongful act, when persons are injured thereby, and calls for the interference of the courts by injunction.

Hargreaves' Law Tracts, p. 12. Hale, De Jure Maris; *Atty. Gen. v. Kingston-on-Thames*, 34 L. J. Ch. N. S. 481; *Acquackanonk Water Co. v. Watson*, 29 N. J. Eq. 370; *Kcency & W. Mfg. Co. v. Union Mfg. Co.* 39 Conn. 581.

The common-law rights, appurtenant to the ownership of the bank, are property as much entitled to protection as the rights of the owner of the bed of the river to the use of the water which flows over it.

Lyon v. Fishmongers' Co. L. R. 1 App. Cas. 662.

Rights of a riparian owner are in the nature of L. R. A.

ture of easements attached to the upland, and extend over the soil in the bed of the stream to the navigable portion thereof, which may not be taken or interfered with to his injury by the public authorities without compensation, and any injury thereto by private persons is restrainable in equity or to be compensated for in damages.

Bucceleugh v. Metropolitan Bd. of Works, L. R. 5 H. L. 418; *Metropolitan Bd. of Works v. McCarthy*, L. R. 7 H. L. 243; *Lyon v. Fishmongers' Co.* L. R. 1 App. Cas. 662; *Atty. Gen. v. Wemyss*, L. R. 13 App. Cas. 192; *North Shore R. Co. v. Pion*, L. R. 14 App. Cas. 612; *Miner v. Gilmour*, 12 Moore P. C. C. 131; *Rose v. Groves*, 5 Mann. & G. 613; *Lord v. Sydney Comrs.* 12 Moore P. C. C. 473; *Eastern Counties R. Co. v. Dordling*, 5 C. B. N. S. 821; *Kearns v. Cordwainers' Co.* 6 C. B. N. S. 388; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; *Rumsey v. New York & N. E. R. Co.* 133 N. Y. 79, 15 L. R. A. 618, 30 N. E. 654; *Van Dolsen v. New York*, 21 Blatchf. 454, 17 Fed. Rep. 817; *New York C. & H. R. Co. v. Aldridge*, 135 N. Y. 83, 17 L. R. A. 516, 32 N. E. 50; *Saunders v. New York C. & H. R. Co.* 144 N. Y. 75, 26 L. R. A. 378, 38 N. E. 992; *Hedges v. West Shore R. Co.* 150 N. Y. 150, 44 N. E. 691; *Sage v. New York*, 10 App. Div. 294, 41 N. Y. Supp. 938; *Gould, Waters*, §§ 149, 206, 208.

A riparian proprietor on a natural stream has a right to the flow of the stream through or by his land in its natural state as an incident of the land through or by which it flows, and if the water be polluted so as to occasion damage in law, though not in fact, it gives him a good cause of action.

Coulson & Forbes, Waters, p. 150.

There can be no prescription for the right to commit a public nuisance, nor for the confiscation of private property; prescription being founded on the presumption of a grant.

Atty. Gen. v. Daugars, 33 Beav. 621; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L. R. A. 145, 30 N. E. 291; *Sooy v. State*, 39 N. J. L. 149; *Weber v. State Harbor*, 18 Wall. 70, 21 L. ed. 803.

Any person through whose land runs a watercourse, which is perceptibly polluted by the sewage of a town, and is thereby rendered unfit for drinking or domestic use, is entitled to equitable relief.

Goldsmid v. Tunbridge Wells Improv. Comrs. L. R. 1 Eq. 161; on appeal L. R. 1 Ch. 349.

Use of the stream for the discharge of sewage to the material injury of other riparian owners, without compensation (in the absence of grant or prescription), is illegal, notwithstanding the sewers have been built under authority of law for a public purpose.

Kellogg v. New Britain, 62 Conn. 233, 24 Atl. 996; *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520; *New York C. & H. R. R. Co. v. Rochester*, 127 N. Y. 591, 28 N. E. 416; *Scifert v. Brooklyn*, 101 N. Y. 136, 54 Am.

Rep. 604, 4 N. E. 321; *Morse v. Worcester*, 139 Mass. 389, 2 N. E. 694; *Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218; *Carmichael v. Terarkana*, 94 Fed. Rep. 561.

The plea that the injury done by the encroachment upon private rights would be small in comparison with the advantage to the public, and that therefore some little sacrifice ought to be made by private individuals, is erroneous; no one can be deprived of his property without his consent and without compensation.

Goldsmid v. Tunbridge Wells Improv. Comrs. L. R. 1 Eq. 161; *Indianapolis Water Co. v. American Strawboard Co.* 57 Fed. Rep. 1003; *Gardner v. Nieburgh Trustees*, 2 Johns. Ch. 162, 7 Am. Dec. 526; *Nolan v. New Britain*, 69 Conn. 668, 38 Atl. 707; *Wadsworth v. Tillotson*, 15 Conn. 366; *East Jersey Water Co. v. Bigelow*, 60 N. J. L. 201, 38 Atl. 633.

The rights of the individual proprietor are protected by law, however much it may be to the advantage of the community to invade them.

Atty. Gen. v. Colney Hatch Lunatic Asylum, L. R. 4 Ch. 154; *Atty. Gen. v. Leeds*, L. R. 5 Ch. 589; *Wood, Nuisances*, § 434.

It is no justification for creating and maintaining a nuisance that others, however many, are committing similar acts, as by draining filth and refuse matter into a river.

Newark Aqueduct Board v. Passaic, 45 N. J. Eq. 393, 18 Atl. 106; *Indianapolis Water Co. v. American Strawboard Co.* 57 Fed. Rep. 1003; *Baltimore v. Warren Mfg. Co.* 59 Md. 105; *Morgan v. Danbury*, 67 Conn. 484, 35 Atl. 499.

Van Syckel, J., delivered the opinion of the court:

The information and bill of complaint in this case was filed by the attorney general on behalf of the state, at the relation of owners and possessors of lands along the banks of the Passaic river, to restrain the city of Paterson from depositing or discharging its sewage through its drains or sewers into the Passaic river, and from constructing new sewers to discharge into said river, and from enlarging or increasing its present sewage system with outlets into said river. Thereupon a rule to show cause was granted why an injunction should not issue as prayed for in said information and bill. Upon the hearing of this rule, affidavits were presented by the defendants. To the information and bill the city interposed a demurrer. Upon the 28th day of March, 1899, the chancellor overruled the demurrer, and ordered an injunction, in which order it is recited that upon reading the information and bill of complaint and the affidavits annexed thereto, and upon reading the demurrer of the defendants to the said information and bill, and the affidavits presented by the defendants upon said order to show cause, the chancellor being of opinion that the defendants' acts in discharging sewage into the Passaic river in the manner set forth in said information and affidavits constituted a public nuisance, it is ordered that an injunction

do issue enjoining and restraining the mayor and aldermen of the city of Paterson, until the further order of said court, from discharging sewage, or permitting sewage to be discharged, directly or indirectly, into the Passaic river, above tide water, through any public sewer or sewers of said defendant, constructed or to be constructed, which do not now discharge directly or indirectly into said river. From the order overruling the demurrer, and also from the order for injunction, an appeal was taken to this court. The affidavits therefore, which were considered by the chancellor in making the order for injunction, are part of the case, as presented by the appeal to this court.

In 1867, the legislature passed a supplement to the charter of the city of Paterson, by the 17th section of which it is provided "that the mayor and aldermen of the city of Paterson are hereby authorized to cause such surveys, maps, and returns to be made, as may be necessary to enable them to prescribe and adopt, either for the whole or any part of said city, the location of streets and sewers or either, and the width thereof, hereafter to be opened or constructed therein, and when such location, width, and grade shall be adopted, the surveys, maps, and returns, prescribing and defining the same, shall be recorded in the clerk's office of the county of Passaic, and thereupon no street or sewer shall thereafter within the district comprised in any such survey, map, or return be opened or constructed, except in conformity therewith as to location, width, and grade, and, fully to accomplish the purposes contemplated by this section, the said mayor and aldermen may employ such engineers, surveyors, and other persons, and provide for their compensation, and pass such ordinances as they may deem to be proper, and may enter upon any land for making surveys and examinations." Pub. Laws 1867, p. 653, § 17. It appears by the affidavits that in January, 1868, Gen. Viele presented a map and report of the city for a general system of sewerage. The map and report were referred to a joint committee of streets and finance, to ascertain what legislation would be necessary to enable the city to proceed with the work. Thereupon, under the direction of the public authorities, an act was drafted to enable the city to construct its sewers. On the 26th of February, 1868, an act of the legislature was passed entitled "An Act to Authorize the Construction of Sewers and Drains in the City of Paterson." The second section of this act provides "that all such sewers and drains shall be constructed in conformity with the plans thereof adopted, or which shall be adopted, by said mayor and aldermen, pursuant to the 17th section of the act approved April 4, 1867, entitled 'A Further Supplement to the Act Entitled 'An Act Amending and Revising the Act to Incorporate the City of Paterson.''" By the said act the city was authorized to enter upon any lands for the purpose of making surveys and examinations, and to use the ground and soil under any street, highway, railroad, land,

alley, or court within the city for the purpose of constructing the works contemplated by the said act. By the last section of the said act, it was declared that it should take effect immediately, and be deemed to be a public act. Laws 1868, p. 126. Under the sanction of this legislation, a number of sewers which are now part of the sewer system of the city were constructed. By an act passed in 1871 (Pub. Laws 1871, p. 808), the city charter was revised, and therein the power to construct sewers was continued. By the said affidavits it appears that all the sewers constructed under this legislation discharged into the Passaic river, and that at least up to the year 1872 the only system of constructing sewers which had been adopted in this country was by building them underground, with the outlet into the natural watercourse on the banks of which the city was built.

From this recital, I think it sufficiently appears that the city of Paterson had legislative authority to construct the system of sewers the use of which the complainants seek by their information and bill to restrain. Full power was conferred by this legislation upon the city of Paterson to adopt and execute its own plan of sewerage, so far as the rights of the state were concerned. If the power inhered in the legislature to bestow such authority upon the city, it is the settled law of this state that the municipal corporation is not responsible for those incidental damages that result from the proper exercise of its functions, and such exercise will not subject it to the charge of maintaining a public nuisance. *Beseman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 164, Affirmed in 52 N. J. L. 221, 20 Atl. 169. So far as the authority of the state can avail for that purpose, the legislative consent furnishes ample protection to the city for the appropriate exercise of granted power.

Since the decision of *Stevens v. Paterson & N. R. Co.* in this court, reported in 34 N. J. L. 532, 3 Am. Rep. 269, it has been the conceded law that the title of the riparian owner on the navigable waters of the state, where the tide ebbs and flows, extends only to high-water mark, and that the state is the absolute owner of the bed of the waters beyond high-water mark. This adjudication leaves the riparian owners of lands on the Passaic river where the tide ebbs and flows without the right to relief. This question is discussed and settled in the opinion of this court in the case of *Sayre v. Newark* (N. J.) post, 722, 45 Atl. 985, and it is therefore unnecessary to refer to other authorities. But in that case the alleged injury affected only owners on tide water. The rights of those above the flow of the tide are in no wise involved in the decision of the *Sayre Case*. In *Cobb v. Davenport*, in our supreme court (32 N. J. L. 369). Mr. Justice Depue says "that by the common law all waters are divided into public waters and private waters. In the former, the proprietorship is in the sovereign; in the latter, in the individual proprietor. . . . The title of the indi-

vidual, being personal in him, is exclusive,—subject only to servitude to the public for purposes of navigation, if the waters are navigable in fact. The test by which to determine whether waters are public or private is the ebb and flow of the tide. Waters in which the tide ebbs and flows, so far only as the sea flows and reflows, are public waters, and those in which there is no ebb and flow of the tide are private waters." In the case of *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 631, the case of *Cobb v. Davenport* is cited with approbation. In pronouncing the opinion of this court, Mr. Justice Dixon said that the bed of the Delaware river above tide water is private property, subject to the paramount public right to use the river as a common highway, in which is included the right to preserve and improve the navigability of the water. No other qualification or restriction of the private ownership was intimated. The English cases sustaining the right to sewer into fresh-water streams under license from Parliament are not authority here. Our legislature has not like unlimited power to legalize a grant which is hostile to the interest of the riparian owner without providing compensation, as enjoined by our state Constitution. There is no such limitation upon the power of the British Parliament. The learned justice who delivered the opinion in the case of *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 631, is too accurate in his statement of legal principles to have omitted to mention the right of a city above tide water to make the river an outlet for its sewers, if such a right in his judgment existed. It would be a barren title, if the owner could not invoke the aid of the law to preserve it from destruction.

It must therefore be concluded that the riparian owners of the Passaic river, above the point where the tide ebbs and flows, have title to the bed of the stream to the middle thereof, subject only to the right of the state to regulate navigation, so far as the water may be navigable. The relators, in the information of the attorney general, who are riparian owners above the flow of the tide, have a right of property in the river, and in that respect the legal rule applicable to them differs essentially from that which pertains to those below them, where the tide ebbs and flows. In *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592, and in the more recent case of *Valparaiso v. Hagen* (Ind.) ante, 707, 54 N. E. 1062, in an opinion of much force, it is held that where sewers emptying into fresh-water streams are constructed under legislative authority, the riparian proprietor cannot recover for the pollution of the stream, so far as it is attributable to the authorized plan of sewerage adopted by the city, but only in case the injury resulted from improper construction or unreasonable use of sewers, or negligence of the city in the case of them. Assent cannot be given to the correctness of these decisions, as they are not in harmony with the adjudications of our own legal tribunals. In *Beach v. Sterling Iron & Zinc*

Co. 54 N. J. Eq. 65, 33 Atl. 286, Vice Chancellor Pitney, in his able review of the authorities, criticised the case of *Merrifield v. Worcester*, and said that, so far as the expressions there used favor the notion that a city or town may collect and discharge sewage matter into a fresh-water stream to the injury of a riparian owner and without liability to action, they are contrary to the law as held in England for centuries. The decree in that case recognizing the right of the riparian owner was unanimously affirmed in this court, upon the opinion of the vice chancellor, in 55 N. J. Eq. 824, 41 Atl. 1117. Riparian owners above tide own *ad medium flum aquæ*, and have a property right in the water flowing along and over their land. This property right cannot be impaired, except by the lawful use of the waters by riparian owners higher up the stream. Lower owners must submit to such pollution as results from the natural or reasonable use of the owners above, produced by the surface drainage or by the percolation of offensive matter through the soil. But the higher owners cannot lawfully combine, and by construction of artificial conduits collect foul matter, and pour it in mass into the stream. Such a scheme, when put into operation, constitutes the taking of private property, which the legislature cannot authorize, except upon just compensation to the party injured. The rights of such riparian owners are clearly stated in the opinion of Mr. Justice Lippincott in this court in the case of *East Jersey Water Co. v. Bigelow*, 60 N. J. L. 201, 38 Atl. 631.

By reason of the location of the Jersey City waterworks upon the tidal stream, the mayor and common council of Jersey City, complainants in this suit, have no rights in the waters of the stream distinct from the rights of the general public therein, nor are they endowed with superior rights by the legislation of 1852. Pub. Laws 1852, p. 419. That legislation did not guarantee or assure to Jersey City the purity of the water, nor did it vest in Jersey City any part of the state's title in the tidal waters, upon which its present claim can be established and enforced. It was simply the consent of the state that Jersey City might withdraw such quantity of water from the Passaic as might be required to furnish a supply of pure and wholesome water. This provision was intended to qualify and limit the extent of the grant, so that the implication could not arise that Jersey City might, without further legislation, divert the water for other purposes than a water supply for domestic and other like purposes. At the time of the legislative grants to the city of Paterson, in 1867, 1868, and 1871, it would have been competent for the legislature to pass a law prohibiting the further use of the Passaic water in Jersey City, and compelling the city to procure its water elsewhere. Therefore the grant to Paterson must be regarded as a repeal by implication of the previous grant to Jersey City, if it was an impairment of that grant, which cannot be conceded. *Jersey City v. Jersey City & B. R.*

Co. 20 N. J. Eq. 366; *Newark Aqueduct Board v. Passaic*, 45 N. J. Eq. 393, 18 Atl. 106. Jersey City is without a standing to invoke the injunction power in this case.

Ordinarily, where the riparian owner is injured by an unlawful diminution of the quantity of water, or by its excessive pollution, when his legal right is established he is entitled to the exercise of the injunction power of a court of equity. Whether in this case the restraining order of the court should be interposed for the protection of the riparian owners above tide water is the remaining question to be considered. That question must be solved by determining whether, in the situation of the parties here, there is the presence of such circumstances and such equities as may justify this court in withholding its restraining arm. On the one hand, the riparian owner is entitled to redress in respect of the deprivation of his property. On the other hand, the city of Paterson, at an enormous expense, has put into operation under legislative authority, and for a long series of years has used and enjoyed, a system of sewerage which accommodates a population of over 100,000 people. By the restraint prayed for, this sewerage system will be suddenly destroyed, and the homes of this multitude of people will be rendered perilous to health and life, and unfit for occupancy. While the city cannot, upon this continued acquiescence of these riparian owners, predicate the right to deprive them of their property in the stream, yet in view of such acquiescence, and the magnitude of the injury which would fall upon the public by prohibiting the use of the sewers, it would be inequitable to enjoin, if relief can otherwise be afforded. The relators are here asking equity, and they must do equity. A substituted remedy, by giving them adequate compensation for their injury, would be a just disposition of the controversy. The granting or refusing of an injunction is a matter resting in the sound discretion of the court. Where it would cause great injury to the defendants, and might be of serious detriment to the public, without corresponding advantage to the complainant, it will not be granted. The authorities are collected in Stewart, N. J. Dig. p. 620, §§ 7-10. In *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 531, Mr. Justice Depue, in delivering the opinion of this court, said "that an injunction ought not to be granted where the benefit secured by it to one party is but of little importance, while it will operate oppressively and to the great annoyance and injury of the other party, unless the wrong complained of is so wanton and unprovoked in its character as properly to deprive the wrongdoer of the benefit of any consideration as to its injurious consequences," and he recognized the fact of acquiescence as a consideration of importance in determining whether the defendants should be restrained. In the case before us, the injury to the defendants would be so great that an injunction should not be granted to these complainants, whose injury is incidental and comparatively small.

If these complainants amend their bill, or file a new bill asking for an injunction, unless the city will consent to make such compensation for the diminution in the value of their lands as shall be ascertained to be just, such equitable relief can be given to them.

A court of equity will, to effectuate justice, settle unliquidated damages. *Coster v. Monroe Mfg. Co.* 2 N. J. Eq. 467; *Ingersoll v. Newton* (N. J.) 45 Atl. 596. These riparian owners above the flow of the tide have the right, if they so elect, to pursue their remedy at law by instituting suits for damages. In that event the city would be driven to file its bill to restrain the suits, offering to make just compensation. That procedure was taken in *Paterson, N. & N. Y. R. Co. v. Kamiah*, 42 N. J. Eq. 93, 6 Atl. 444, and approved in this court, the decree being unanimously affirmed. *Id.* 47 N. J. Eq. 331, 21 Atl. 954.

The injunction should be vacated, and the record remitted to the court of chancery, and the case proceeded with in accordance with the views herein expressed.

Marcus SAYRE et al., Respts.,
v.

Mayor etc., of NEWARK et al., Appts.

(.....N. J.....)

- *1. The legislature of this state has constitutional power to confer on municipalities the right to use the tidal streams within our borders as outlets for public sewers carrying off surplus water and the sewage from buildings.
2. The charter of the city of Newark grants to the municipal authorities of the city the right to use the Passaic river as such an outlet.
3. The fact that such a use of the Passaic river pollutes the water and air in the neighborhood of a dock on the river owned by private persons, and thus lessens the value of the private property, will not justify an injunction to restrain the city from constructing and operating a sewer which the municipal authorities have, within the limits of their legal discretion, determined to be necessary for sewerage purposes.

(Lippincott, J., dissents.)

(April 2, 1900.)

APPEAL by defendants from a decree of the Chancery Court enjoining defendants from depositing sewage in the Passaic river. *Reversed.*

The facts are stated in the opinion.

Mr. Joseph Coult, for appellants:

There is a distinction between injuries which affect the air merely by way of noises and disagreeable gases, resulting in personal discomfort, and those which injuriously af-

fect the land itself or the structures upon it. As to the former, each person living in society must submit to a degree of discomfort depending in some measure upon the circumstances of his residence.

Hennessey v. Carmony, 50 N. J. Eq. 615, 25 Atl. 374.

The mere apprehension of a public nuisance from pollution of a stream by the sewage of a city does not present a case for an injunction.

Wood, Nuisances, §§ 788, 789; *Wolcott v. Melick*, 11 N. J. Eq. 204, 66 Am. Dec. 790; *Duncan v. Hayes*, 22 N. J. Eq. 25; *Hutchinson v. Delano*, 46 Kan. 345, 26 Pac. 740; *Robb v. La Grange*, 158 Ill. 21, 42 N. E. 77.

A court of equity exercises its restraining powers in cases of nuisance with very great caution.

Hagerty v. Lee, 45 N. J. Eq. 255, 17 Atl. 826; *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 25; *McNeal v. Assisunk Creek Meadow Co.* 37 N. J. Eq. 204; *Stoudinger v. Newark*, 28 N. J. Eq. 187; *Washburn & M. Mfg. Co. v. Worcester*, 116 Mass. 458.

The courts of equity will not sit in review of the proceedings of subordinate political municipal tribunals, and where matters are left to the discretion of such bodies, the exercise of that discretion in good faith is conclusive, and will not, in the absence of fraud, be disturbed.

High, Inj. 1st ed. § 785; *Soden v. Emporia*, 7 Kan. App. 583, 52 Pac. 461; *Hines v. Lockport*, 50 N. Y. 236; *Wicks v. De Witt*, 54 Iowa, 130, 6 N. W. 176; *Brewster v. Devenport*, 51 Iowa, 427, 1 N. W. 737; *North Vernon v. Voegler*, 103 Ind. 325, 2 N. E. 821; *Sullivan v. Phillips*, 110 Ind. 320, 1 N. E. 300; *Avery v. Job*, 25 Or. 512, 36 Pac. 293; *Titus v. Boston*, 161 Mass. 209, 36 N. E. 793; *Detroit v. Hosmer*, 79 Mich. 384, 44 N. W. 622.

Public work authorized by law, undertaken for the public benefit, will be deemed to be beneficial and not harmful, and such a work prosecuted by the public authorities will be presumed to have been properly constructed.

Michener v. Philadelphia, 118 Pa. 535, 12 Atl. 174; *Allen v. Woods*, 20 Ky. L. Rep. 59, 45 S. W. 106.

In cases where the nuisance is not created by a public body in the performance of a public duty, and where the remedy may be by suit, equity will interfere at the instance of a private individual only where the complainant suffers some private, direct, and material damage beyond that which is suffered by the public at large, and which without such interference will be an irreparable injury to him.

Higbee v. Camden & A. R. Co. 19 N. J. Eq. 276; *Van Wagenen v. Cooney*, 45 N. J. Eq. 24, 16 Atl. 689; *Allen v. Monmouth County Freeholders*, 13 N. J. Eq. 68; *Hinchman v. Paterson Horse R. Co.* 17 N. J. Eq. 75, 86 Am. Dec. 252; *Bigelow v. Hartford Bridge Co.* 14 Conn. 565, 36 Am. Dec. 502; *O'Brien v. Norwich & W. R. Co.* 17 Conn. 372; *Irwin v. Dixon*, 9 How. 28, 13 L. ed.

*Headnotes by DIXON, J.

See note to *Flatt Brothers & Co. v. Waterbury*, ante, 691.
48 L. R. A.

33; *Smith v. Boston*, 7 Cush. 254; 10 Enc. Pl. & Pr. p. 807.

Mere diminution in the value of his property without irreparable injury will not furnish the foundation for equitable relief.

Morris & E. R. Co. v. Prudden, 20 N. J. Eq. 536; *Zabriskie v. Jersey City & B. R. Co.* 13 N. J. Eq. 314; *Raritan Twp. v. Port Reading R. Co.* 49 N. J. Eq. 11, 23 Atl. 127.

The Passaic river is a tidal stream. The complainant has no right in the waters of this river, by virtue of its riparian proprietorship.

Stevens v. Paterson & N. R. Co. 34 N. J. L. 532, 3 Am. Rep. 269; *Gould v. Hudson River R. Co.* 6 N. Y. 522; *Wood, Nuisances*, § 592; *Brookline v. Mackintosh*, 133 Mass. 215.

The primary uses of tidal rivers are navigation and drainage.

Having no rights as a riparian owner in tidal waters, a shore owner cannot complain of injury to the water caused by the discharge therein of polluting matter, unless a nuisance is created thereby by which he is specially injured, as, for instance, by a deposit of matter in front of his dock, interfering with its use.

Haskell v. New Bedford, 108 Mass. 209; *Lilly White v. Trimmer*, 36 L. J. Ch. N. S. 325; *Atty. Gen. v. Gee*, L. R. 10 Eq. 131.

Mr. Thomas N. McCarter, Jr., for respondents:

The fact that this sewer is to serve a public need cannot avail against the private injury to the complainant, especially when, as shown in the case, it is perfectly possible to bring about the desired result by the mere repairing of an intercepting sewer already constructed, but allowed to fall in disrepair.

Higgins v. Flemington Water Co. 36 N. J. Eq. 538; *Hennessy v. Carmony*, 50 N. J. Eq. 616, 25 Atl. 374; *Susquehanna Fertilizer Co. v. Malone*, 9 L. R. A. 737, 73 Md. 268, 20 Atl. 900; *Atty. Gen. v. Birmingham*, 4 Kay & J. 528; *Atty. Gen. v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 146.

The right of an individual to sue to enjoin a private nuisance of this character is unquestioned.

McDonald v. Newark, 42 N. J. Eq. 136, 7 Atl. 855; *Miller v. Morristown*, 47 N. J. Eq. 62, 20 Atl. 61, 48 N. J. Eq. 645, 25 Atl. 20; *Hart v. Union County Freeholders*, 59 N. J. L. 90, 29 Atl. 490.

Permission to build sewers does not give authority to create a nuisance.

Atty. Gen. v. Leeds, L. R. 5 Ch. 583; *Atty. Gen. v. Birmingham*, 4 Kay & J. 528; *Atty. Gen. v. Hackney Local Board*, L. R. 20 Eq. 626; *Goldsmid v. Tunbridge Wells Improv. Comrs.* L. R. 1 Eq. 161; *Atty. Gen. v. Colney Hatch Lunatic Asso.* L. R. 4 Ch. 146; *Atty. Gen. v. Acton Local Board*, L. R. 22 Ch. Div. 221; *Morse v. Worcester*, 139 Mass. 389, 2 N. E. 694; *Chapman v. Rochester*, 110 N. Y. 273, 1 L. R. A. 296, 18 N. E. 88; *State v. Portland*, 74 Me. 268, 43 Am. Rep. 586; *Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218; *Grcy v. Paterson* (N. J.) *ante*, 717, 42 Atl. 749.

The building of such a sewer as this, under the evidence in this cause, must, from the nature of things, create a nuisance, and therefore will be enjoined on final hearing.

Rex v. White, 1 Burr. 337; *Davidson v. Isham*, 9 N. J. Eq. 180; *Holsman v. Boiling Spring Bleaching Co.* 14 N. J. Eq. 335; *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Cleveland v. Citizens' Gaslight Co.* 20 N. J. Eq. 201; *Wolcott v. Melick*, 11 N. J. Eq. 204, 66 Am. Dec. 790; *Duncan v. Hayes*, 22 N. J. Eq. 25; *Hennessy v. Carmony*, 50 N. J. Eq. 616, 25 Atl. 374; *Atty. Gen. v. Steward*, 20 N. J. Eq. 415; *Meigs v. Lister*, 23 N. J. Eq. 199; *Babcock v. New Jersey Stock Yard Co.* 20 N. J. Eq. 296; *Higgins v. Flemington Water Co.* 9 Stew. 36 N. J. Eq. 538; *State ex rel. Board of Health v. Hutchinson*, 39 N. J. Eq. 218; *Butterfoss v. State ex rel. Board of Health*, 40 N. J. Eq. 325; *Perrine v. Taylor*, 43 N. J. Eq. 128, 12 Atl. 769; *Beach v. Sterling Iron & Zinc Co.* 54 N. J. Eq. 65, 33 Atl. 286, 55 N. J. Eq. 824, 41 Atl. 1117; *State ex rel. State Bd. of Health v. Jersey City*, 55 N. J. Eq. 116, 35 Atl. 835; *State ex rel. Board of Health v. Lederer*, 52 N. J. Eq. 675, 29 Atl. 444; *Atty. Gen. v. Luton Local Bd. of Health*, 2 Jur. N. S. 180; *Atty. Gen. v. Kingston-on-Thames*, 11 Jur. N. S. 597; *Atty. Gen. v. Nichol*, 16 Ves. Jr. 342; *Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218; *Robb v. La Grange*, 158 Ill. 21, 42 N. E. 77; *Cutlin v. Valentine*, 9 Paige, 575, 38 Am. Dec. 567; *Woodruff v. North Bloomfield Gravel Min. Co.* 9 Sawy. 441, 18 Fed. Rep. 753.

The doctrine that because it is municipal work it will be presumed to be proper, and the court will not interfere, has no authority in law.

Haskell v. New Bedford, 108 Mass. 209.

Mr. Robert H. McCarter also for respondents.

Dixon, J., delivered the opinion of the court:

The complainant Marcus Sayre is the owner, and the Marcus Sayre Company is the lessee, of land having a frontage of about 200 feet on the west side of the Passaic river, in the city of Newark, where they carry on the business of buying and selling masons' materials. At that point, and for several miles above the city, the tide ebbs and flows in the river, and the river is navigable for vessels of considerable size. Consequently the state was the owner of the bed of the river below ordinary high-water mark, but in pursuance of an implied license from the state, growing out of the local common law of New Jersey, as declared in *Bell v. Gough*, 23 N. J. L. 624, and *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269, the complainant, owning the upland, had built a dock in front thereof, and thus had acquired title to so much of the shore as was occupied by the dock. The object of the bill of complainant is to restrain the city of Newark from completing and using a public sewer now in process of construction, and designed to empty its contents into the Passaic river below low-water mark, about 50 feet north of the complainant's property.

Atty. Gen. v. Leeds, L. R. 5 Ch. 583; *Atty. Gen. v. Birmingham*, 4 Kay & J. 528; *Atty. Gen. v. Hackney Local Board*, L. R. 20 Eq. 626; *Goldsmid v. Tunbridge Wells Improv. Comrs.* L. R. 1 Eq. 161; *Atty. Gen. v. Colney Hatch Lunatic Asso.* L. R. 4 Ch. 146; *Atty. Gen. v. Acton Local Board*, L. R. 22 Ch. Div. 221; *Morse v. Worcester*, 139 Mass. 389, 2 N. E. 694; *Chapman v. Rochester*, 110 N. Y. 273, 1 L. R. A. 296, 18 N. E. 88; *State v. Portland*, 74 Me. 268, 43 Am. Rep. 586; *Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218; *Grcy v. Paterson* (N. J.) *ante*, 717, 42 Atl. 749.

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The ground of objection is that the sewage discharged from the sewer will be carried by the tide to the complainant's property, and will so infect the water and air in the neighborhood as to impair the comfort and health of persons engaged on the premises, and thus lessen the value of the property. The sewer in question is designed to be an auxiliary in the city's plan of sewerage. Experience has shown that in times of heavy rain the existing sewers are inadequate to carry off the water and sewage that seek passage through them, and hence the filthy material is backed up into the streets and the cellars of connected buildings. The object of the new sewer is mainly to receive this surplus and conduct it to the river, and the evidence in the cause shows that the city authorities have exercised their discretion in planning the sewer, and are constructing it with care, for the accomplishment of that purpose. We are thus brought to the controlling questions in the case: (1) Whether the legislature has intended to authorize the city to construct and use such a sewer; (2) whether the legislature has constitutional power to grant such authority; and (3) whether the complainants, as private owners of property likely to sustain some incidental damage from the operation of the sewer, are entitled to have the city restrained from exercising the authority conferred.

As to the first question: By the original charter of Newark as a city, passed February 29, 1836 (Pub. Laws 1836, p. 185), the common council were empowered to pass all such ordinances as they should deem proper for regulating the streets, and causing common sewers and drains to be made in any part of the city. By a supplement to the charter passed February 28, 1838 (Pub. Laws 1838, p. 218), "the mayor and common council of the city, to enable them more fully, effectually, and completely to exercise the powers already conferred on them of passing all such ordinances as they shall think proper and of raising and borrowing money for causing common sewers and drains to be made in any part of the city," were authorized and empowered to take and appropriate to the use of the city all such lands, waters, and streams within and adjacent to the said city as might be suitable or necessary to drain and carry off the water from the streets, lanes, alleys, and grounds in the city. This act makes provision for compensation to the owners of property taken. By another supplement, approved February 28, 1849 (Pub. Laws 1849, p. 203), the city was empowered to cause the expense of building sewers to be assessed, in whole or in part, on the owners of property benefited. This plainly contemplates the construction of common sewers for the benefit of private property. By an act to revise and amend the charter of the city, approved March 11, 1857 (Pub. Laws 1857, p. 116), these provisions were re-enacted so far as they relate to the regulation of streets, the construction of sewers, and the assessment of the expense thereof on property benefited, and nothing therein contained was to impair

or take away any right acquired or given by any former act. This statute also expressly empowered the council to provide for the protection and maintenance of the health of the city. By a supplement to this act approved March 19, 1857 (Pub. Laws 1857, p. 301), the authority of the city to construct the sewer in the first and second wards of the city, commonly known as the "North Sewer," is distinctly asserted by the legislature. This sewer was built to drain private property as well as streets, and empties into the Passaic river. A further supplement, approved March 26, 1872 (Pub. Laws 1872, p. 828), expressly recognizes the authority of the city to construct sewers in the public streets for the draining of private property lying along the streets. The evidence in this case shows that at least as early as 1854 the municipality constructed common sewers through the streets, having their final outlet in the Passaic river, to carry off, not only the water and refuse in the streets, but also the sewage from private property, and from that time to the present this power has been continually exercised. In *Stoudinger v. Newark*, 28 N. J. Eq. 137 (A. D. 1877), a bill was filed to prevent the city from constructing what is known as the "Millbrook Sewer," which ran from High street, through various streets, to the Passaic river, and was intended to conduct into the river the foul waters of the Millbrook, and the sewage of the streets and houses along its course. But Vice Chancellor Van Fleet decided that the city had power to build the sewer, and held that the location of sewers, their size and capacity, and the materials of which they should be constructed, were matters which by the charter were committed to the judgment of the municipal authorities, and so long as they kept within their power, and did not abuse it, their acts were not subject to judicial revision. The order of the court of chancery denying an injunction was affirmed by this court (28 N. J. Eq. 446), with a declaration that it was not only the right, but the duty, of the municipal authorities to erect and maintain all necessary sewers. In view of this course of public conduct on the part of the city, of this series of legislative enactments, and of these judicial utterances, we are impelled to the conclusion that the legislature has intended to confer upon the city of Newark the right to use the Passaic river as an outlet for such sewers as the municipal authorities deem necessary for removing the surplus water and sewage of the river and its inhabitants.

The next question is whether the legislature has the constitutional power to confer such a right. In *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269, Chief Justice Beasley, expressing the opinion of this court that the legislature had the power to grant lands in a navigable river below high-water mark, without regard to the owner of the adjacent upland, declared "that all navigable waters within the territorial limits of the state, and the soil under such waters, belong in actual propriety to the

public; that the riparian owner, by the common law, has no peculiar rights in the public domain, as incidents of his estate; . . . that, as a general rule, the public domain is subject altogether to the control of the legislature; . . . that, unless in certain particulars protected by the Federal Constitution, the public rights in navigable rivers can, to any extent, be modified or absolutely destroyed by statute. . . . But the dominion of the legislature over the *jura publica* appears to be unlimited. By this power they can be regulated, abridged, or vacated." These explicit declarations of the judgment of this court seem to place beyond question the power of the legislature to authorize the municipalities of the state to use the tidal navigable streams within our borders for sewerage purposes. The Federal Constitution interposes no obstacle to the exercise of such a power, provided the availability of the stream for interstate and foreign commerce be not impaired; and, as no private property exists in such waters, there remain only the *jura publica*, over which, in the words of the chief justice, the dominion of the legislature appears to be unlimited. Indeed, the history of sewers shows that from time immemorial the right to connect them with navigable streams has been regarded as part of the *jus publicum*. Although in England, until modern times, sewers were used chiefly to drain lowlands liable to be submerged by tide and rain, and the streets of towns, yet in other countries for centuries past, and more recently in England and the United States, they have been constructed to carry off the sewage of dwellings; and, whenever tidal streams could conveniently be reached, they have been employed as the medium of discharge to the sea. Such a use of public waters must necessarily entail some defilement. The degree of pollution to be permitted is a matter over which the legislature has full power and control. It therefore seems clear that in New Jersey the legislature may constitutionally confer on the municipalities of the state the right to use tidal streams for sewerage purposes, and that in the proposed construction and operation of the sewer now in question the city of Newark is within the limits of its delegated authority.

The last point for consideration is whether the complainants may restrain the exercise of this authority because of the incidental damage which it will cause to them and their property. The principle laid down by the supreme court in *Beseman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 164, and approved by this court in 52 N. J. L. 221, 20 Atl. 169, disposes of this phase of the controversy. That principle is that if a corporation, though private, in the reasonable exercise of a franchise lawfully granted to it for a public purpose, causes an incidental damage to private property, such damage is *damnum absque injuria*. The principle thus enunciated is applicable *a fortiori* to a public corporation. The same doctrine was declared with reference to tidal streams in *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 48 L. R. A.

532, 3 Am. Rep. 269, where the chief justice said that, "as a general rule, the public domain is subject altogether to the control of the legislature, and that incidental damage resulting to individuals from the exercise of such control gives no legal claim to compensation." We have, therefore, the city of Newark, a public corporation, executing, within the bounds of its discretion and with care, a franchise lawfully granted to it by the legislature for a public purpose, but thereby producing consequential damage to the complainants. Such damage is a loss for which there is no remedy. It is a burden to which the sufferers must submit, as members of the community from which they receive compensatory benefits. There are decisions in the courts of this state to the effect that even negligence on the part of a public corporation in the performance of a public function, whether quasi judicial or ministerial, will not justify an action for damages against the corporation on behalf of a person who has sustained special damages by reason of such neglect. The exact purport of these decisions, and whether, consistently with them, the aggrieved party might not seek relief by injunction or mandamus, under circumstances otherwise appropriate to those means of redress, we need not now consider; for there is neither allegation nor proof of such negligence in the present case.

Our conclusion is that the intended action of the city is lawful, and therefore the injunction issued out of chancery should be dissolved, and the bill dismissed.

Depue, J., concurring:

The Passaic river, at Newark, is a tidal stream. The ebb and flow of the ordinary tide at the Centre Street bridge, near which the mouth of the proposed sewer is located, is 4 feet and 9 inches. The river empties into Newark bay, $4\frac{1}{2}$ miles below the bridge. The tides extend above the city to the Dundee dam, about 8 miles above the bridge, and 6 miles above the city line. As far up the river as Newark the river is navigable with steamboats and vessels engaged in the sea-going trade with almost every port in the United States on the Atlantic coast. Above the city the river is navigable with steamboats and vessels of considerable size as far as the Dundee dam. Between the city and the Dundee dam the Federal government has at times expended considerable sums of money in removing reefs and obstructions, and otherwise improving that part of the river for navigation. Besides the city of Newark, with its population of 250,000 inhabitants, Paterson, with its population of 100,000,—cities with large manufacturing establishments, discharging waste into the sewers, and sometimes directly into the stream,—the sewage of Passaic, Rutherford, Montclair, Orange, East Orange, Belleville, Arlington, Kearney, East Newark, and Harrison is carried into the river. With such a mass of sewage cast into the river, the waters of the stream have become polluted and foul. But this is not a suit by the attorney general, *eo*

officio, for the purpose of vindicating or protecting any public right. The complainants are the owners of a lot of land in the city, having a frontage on the river of 250 feet, on which there have been erected a wharf and dock. The premises are used for the brick, lime, cement, and masons' materials business. A large part of the materials used in the business is brought there by boats and scows, and there are employed daily upon the premises from thirteen to twenty-five men, engaged in the business of the company. The outlet of the proposed sewer in the stream is just above the Centre Street Bridge, 55 feet north of the northerly line of the complainants' property. The suit is for the prevention of a private injury to private property anticipated by the construction of the proposed sewer. It presents at the threshold a consideration of the rights of the state, and of a riparian owner who has improved his connection with tide water.

The title to a tidal stream below ordinary high tide is in the state, as absolute owner. The decision of this court in *Stevens v. Patterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269, placed the law of this subject on a firm foundation as a finality. In that case Chief Justice Beasley, in delivering the opinion of the court, said: "As a general rule, the public domain is subject altogether to the control of the legislature, and that incidental damage resulting to individuals from the exercise of such control gives no legal claim to compensation. The principle seems universally conceded that, unless in certain particulars protected by the Federal Constitution, the public rights in navigable rivers can, to any extent, be modified or absolutely destroyed by statute. . . . The dominion of the legislature over the *jura publica* appears to be unlimited." This decision was made in a case where the riparian owner had neither wharfed out, nor otherwise improved, his connection with the tidal stream, and consequently had no property rights to be affected by the execution of the public grant then in question. How far the doctrine contained in this extract from the chief justice's opinion in its universality will be modified by the fact that in the present case the complainants have constructed a dock on the property in question, will hereafter be discussed. In fresh-water streams the property in the bed of the stream is in private ownership, with a usufruct as private property, subject to certain public rights. From an early period in England the right of drainage and sewerage was regarded as a public right, and was regulated by statute as early as Henry VI. 5 Chit. Burn., Just. 993; 5 Comyns, Dig. *Sewers*, 453, 465. In England and in this country power to construct and utilize sewers in private streams has frequently been granted by act of Parliament or act of the legislature. The right to devote a private stream to purposes which are to a certain extent public uses is founded on the common-law right of the upper proprietors. In streams of this class the right of upper proprietors is limited to the reasonable use of 48 L. R. A.

the common property. *Higgins v. Flemington Water Co.* 36 N. J. Eq. 538, 543. "In tidal streams, although the King has the property, the people have likewise the use necessary. *Rea habet proprietum, sed populus habet usum ibidem necessarium.*" Callis, *Sewers*, 13; Hall, *Rights of the Crown*, 14. A right conferred by the state to use its property for sewer purposes is without limitations and qualifications that attach to the use of private property for those purposes.

By the charter of the city of Newark, and the supplements thereto, the legislature empowered the city to construct sewers so as to discharge into the Passaic. By the act of 1891 the power of the common council in this respect was transferred to the board of street and water commissioners. The location of the proposed sewer, and its connection with the river for the purpose of discharging sewage therein, were lawful acts, under competent municipal authority, and a legitimate exercise by the city of a right conferred by the legislature. The decision of this case must rest, therefore, on the legal rules established for determining the liability for damages to a riparian owner arising from the exercise of legislative authority for such use of a tidal stream, and the conditions under which the exercise of that right will afford redress to a riparian owner, who has improved his connection with tidal waters, for an injury to his property. Cases cited by the vice chancellor, such as *Atty. Gen. v. Leeds*, L. R. 5 Ch. 583, and *Atty. Gen. v. Birmingham*, 4 Kay & J. 528, are instances where the sewerage of a town was into small brooks, and the pollution was inevitable, and the property affected was private property. It will also be observed that in such cases the right of sewerage was under statutes which, as will appear by the *Leeds Case*, conferred the right to use the stream on condition that no nuisance was created. The cases cited from the courts of our own country, of which *Chapman v. Rochester*, 110 N. Y. 273, 1 L. R. A. 296, 19 N. E. 88; *Nolan v. New Britain*, 69 Conn. 668, 38 Atl. 703, 707, 708, and *Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218, are types, are also cases of drainage into small streams. In these cases the waters affected were private waters, and the appropriation of them for public sewerage far exceeded the reasonable use, such as determines the rights of upper and lower proprietors on private streams, and the injury was such as amounted to a palpable invasion of private property, and justifiable only under the right of eminent domain, on just compensation. *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; *Nolan v. New Britain*, 69 Conn. 668, 38 Atl. 703, 707, 708. *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 661, 4 N. E. 321, was an action for damages caused by the insufficiency of the sewerage system to carry off the sewage, whereby it was forced through a manhole, and inundated the plaintiff's premises. Cases coming under the above classifications are inapplicable to this litigation. These are the decisions

on which the vice chancellor rests his judgment. They cannot rule this case, for the reason that the right of sewerage into private waters rests upon principles different from those which prevail where the sewerage is into public waters.

By the law of this state, a riparian owner has no property in the land by reason of his adjacency to tidal waters, while it remains under water. The inchoate right which the owner of the upland has to acquire an exclusive right to the property by wharfing out or otherwise improving the same gives him no property in the land while it remains under water. *State, Roberts, Prosecutor, v. Jersey City*, 25 N. J. L. 525; *Stewart v. Fitch*, 31 N. J. L. 18. Such was the title under discussion in *Stevens v. Paterson & N. R. Co.* 37 N. J. L. 532, 3 Am. Rep. 269, to which the expression of the chief justice, that incidental damages resulting to individuals from the exercise of legislative control gives no legal claim to compensation, was applied. At common law the right of the owner of lands along the shore of tidal waters extended only to ordinary high water; but in this state such owner may extend his improvements by wharves and other improvements to the low water. Such was declared to be the law in this state before the adoption of any of the statutes regulating riparian rights, and is attributed to what has been called "local usage" or "local common law." But by the common law of England and the local common law of this state the owner of riparian lands acquires a property in his reclamations by wharfing out or otherwise improving, and the state cannot appropriate the shore so recovered to public use, without adequate compensation. Consequently, for any invasion of his property, or use of it without lawful authority, such owner is entitled to the same remedies as the owner of property is entitled to under the general law of the state. Among the rights of a riparian owner who has made his improvements between high and low water mark is the right to the use of his wharf, and of access to the navigable waters. In *Lyon v. Fishmongers' Co.* decided in the House of Lords, and considered, not only in England, but in this country, as the leading authority on the subject of the right at common law of a riparian owner who has improved and wharfed out on the bank of the stream, Lord Cairns used this language: "Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *qua* owner or occupier of any lands on the bank, nor is it a right which *per se* he enjoys in a manner different from any other member of the public. But, when this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place; and it becomes a form of enjoyment

of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action, or restrained by an injunction." L. R. 1 App. Cas. 662, 671. This doctrine of the common law in this respect has been affirmed as the law of this state. In *Gough v. Bell*, which established the law of this state as a finality, the action was in trespass *quaro clausum fregit*. The defendant pleaded *liberum tenementum*. The plaintiff made title under a deed from the heirs of Coles for the upland adjoining Harsimus cove, above high water. Coles acquired title in 1804, and was the undisputed owner of the soil bounded by the river. The defendant made title under a survey by the proprietors of East Jersey to Boudinot, dated May 21, 1802, for 53½ acres of land then lying entirely below ordinary high water in Harsimus bay. Boudinot, January 2, 1804, conveyed to Budd, in fee, the same lands. November 8, 1836, an act of the legislature was passed vesting in Budd all the right and title of the state of New Jersey to the lands which had been surveyed to Boudinot, and conveyed to him by Boudinot. Pub. Laws 1836, p. 13. The grant of the state to Budd was for lands entirely under water, and the right of the state to make such a grant, independently of considerations hereafter mentioned, was undisputed. The question was whether the title so granted was valid as against the Coles title. It appeared in the case that as early as 1814 or 1815 Coles commenced the erection of a wharf extending from his own land towards the channel of the river, a distance of over 1,000 feet, which was completed before the passage of the act of 1836. He also reclaimed a part of the mud flats in front of his land, lying between high and low water, by filling in with earth, and raising them above the level of the tide. At the time of the passage of the act the place where the trespass was committed was not subject to the flow and reflux of the tide. It was admitted, as was stated by Chief Justice Green, that, within the boundaries of the grant, the legislature had power to make it, and the question for decision was whether the title to the *locus in quo* was in the state at the time of the passage of the act. After an exhaustive examination of prior decisions in this state, the chief justice expressed his conclusions that "the title of the state extends, as at common law, to high-water mark, but it is to high-water mark as it actually exists. Where the waters have receded by alluvion, or by the labor of the adjoining proprietor, the title of the state does not extend beyond the actual high-water line. That any encroachment upon the shore or other part of the public domain may at all times be restricted and controlled by legislation is admitted. That any erection prejudicial to the common rights of navigation or fishery may be abated is not denied. But, in the absence of such legislative restriction, where no nuisance is created, the riparian proprietor may appropriate the shore between high and low water mark to his own use." He adds: "The custom of making

such appropriation, long enjoyed and universally acquiesced in, constitutes a local common law, which this court will recognize, and which it would be alike unsafe and unwise to disregard." The chief justice then expressed his opinion (which was concurred in by the court) that the act of 1836 did and could convey to Budd no title to the soil from which the flow and reflow of the tide had been excluded by the improvements of the riparian owners at the time of the passage of the act, and judgment was given for the plaintiff. The judgment of the supreme court was affirmed in the court of errors and appeals, and by these decisions the law was settled in this state that, if the owner of land bounded by the shore upon tide water make improvements upon or reclaim the shore adjoining his lands, the part of the shore so improved or reclaimed belongs to him, and cannot be granted by the state. 22 N. J. L. 441, 23 N. J. L. 624. In a subsequent case Chief Justice Green, in referring to the decision of *Gough v. Bell*, used this language: "By the common law of this state, wharves erected by the shore owner below tide, and within the limits of the *jus publicum*, vest in the shore owner. It was so held by all the court in *Gough v. Bell*. The judges, it is true, differed as to the foundation and nature of the right of the shore owner; but all agreed that, when the land was reclaimed or the wharf erected by the tacit or express consent of the legislature, it became private property, and divested of its public character. And the owner has the same absolute dominion over it—the same exclusive right of enjoyment in it—that he has in and over other private property." *O'Neill v. Annett*, 27 N. J. L. 290, 293, 72 Am. Dec. 364. In *Keyport & M. P. S. B. Co. v. Farmers' Transp. Co.*, Chief Justice Beasley, delivering the opinion of this court, used this language: "It has already been conclusively settled by judicial decisions in this state that after such land-owner has reclaimed from the dominion of the water the land along his front, even beyond low-water mark, his title to such portion thus reclaimed becomes vested and indefeasible, except so far as it, in common with all other property, is subject to the state's eminent domain." 18 N. J. Eq. 511, 516. And in the *Stevens Case* Chief Justice Beasley, referring to *Gough v. Bell*, remarked that the final decision in that case was a concurrence in the views expressed by Chief Justice Green in his opinion delivered in the supreme court, and he declared that the existence and legality of the usage which conferred on the riparian owner the right to extend his lands by artificial means below the line of high water was *res judicata* in this state. 34 N. J. L. 545, 3 Am. Rep. 269. Property in a wharf or dock on a navigable stream consists in the ability of the owner to use the structure in connection with the navigable water.

The problem for solution, then, is the consideration of the scope of the legislative authority granted to the city to connect its sewers with the Passaic, in respect to the

rights of a riparian owner who has improved and acquired a property in his improvements by reclaiming and wharfing out. I am unwilling to assent, even *sub silentio*, to the proposition that under our law the city of Newark may vent its sewage into the river *ad libitum*, to the destruction of wharves and docks on the Passaic of great value and of incalculable public benefit, without the owners of such property being entitled to a remedy by action or otherwise. Such, in my judgment, is not the law of this state. The evidence in this case shows that the complainants have sustained a serious injury by the discharge of earth and sewage into the streams from the city sewer at Ballantine's dock, which was carried by the water to and in front of the complainants' dock—that the complainants' dock has thereby been filled up from year to year by the refuse coming down from the sewer, so that occasionally the dock had to be dredged out. The gravamen of the complaint in this bill is the apprehension of the same or greater injury in that respect by the opening of the proposed sewer nearer to their property. The injury complained of and apprehended is purely an injury to private property, in which the public is in no sense concerned. For such an injury, done without legislative sanction, an action will lie. The city justifies under the power conferred on it by the legislature. The issue in this case presents the construction and effect of the powers granted by the legislature to the city for the use of the Passaic for sewerage, with respect to injuries sustained by the owners of improved riparian property, for which, without competent legislative authority, an action or injunction might be maintained. The legal rules that control where an injury to private property is occasioned in the course of the exercise of legislative authority were adjudged in *Reseman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 164. Affirmed in this court in 52 N. J. L. 221, 20 Atl. 163. The suit was brought by an owner of property adjacent to the tracks of the company's railroad, alleging an injury from the use of the company's track for the passage of locomotives and cars in the transportation of cattle, sheep, swine, manure, and other freight, so as to render his dwelling houses unfit for habitation, and wrongfully allowing its cars loaded with such freight, both in the daytime and at all hours of the night, to stand upon said track, emitting noisome odors, etc., and shifting and distributing its cars, and blowing the whistles of its locomotives, and causing great and unusual noises, etc., and jarring the doors and walls of said dwelling houses, etc., whereby, etc. To the declaration the defendant pleaded its chartered right to build a railroad, and that it used the same in the prosecution of its business as a common carrier of passengers and freight, as it lawfully might do, and did thereby necessarily create some smells and some noises, and did necessarily shift and distribute its cars, and did necessarily transport thereon cattle, sheep, swine, manure, and other freight, as it lawfully might do,

without that, etc. This plea was demurred to, and the chief justice, in sustaining the plea, placed his opinion on the stable ground that the franchises granted to the defendant legalized the running of trains and the transportation of freight by the company, and, the acts complained of being themselves lawful, those incidental injuries which necessarily and unavoidably resulted from the exercise of legislative authority, if prosecuted in all respects with care and skill, were *damnum absque injuria*. It will be observed that the chief justice in the decision of this case qualified the doctrine on which the *Stevens Case* was decided, and limited the immunity of such public body from liability for damages resulting to individuals from the exercise of legislative control to those incidental injuries which necessarily and unavoidably result from the exercise of legislative authority, and added a condition that the franchises granted should be exercised with due care and skill. The difference in this respect between the decisions in the two cases was eminently proper. In the first case the chief justice was dealing with the right of a riparian owner who had acquired no property by improving his connection with the tidal stream, and in the other case the injury was to an owner of adjacent lands whose property was affected in the exercise of public franchises under legislative authority.

The doctrine adjudged in the *Beseman Case* accords with the decisions of the English courts. *Vaughan v. Taff Vale R. Co.* 5 Hurlst. & N. 679; *Hammersmith & C. R. Co. v. Brand*, L. R. 4 H. L. 171; *London, B. & S. C. R. Co. v. Truman*, L. R. 11 App. Cas. 45. In these cases the injuries, the subject of suit, were such as resulted from the operation of railways under legislative authority, and it was held that an action would not lie for damage necessarily resulting from the exercise of the powers of an act of Parliament: that a cause of action could arise only from negligence in the execution of the statutory powers. These decisions were made upon statutory powers granted to private corporations in the exercise of public franchises for their own emolument. The legal rule thus established has greater support in reason and in public policy with respect to municipal bodies upon which devolve the duty of providing sewers for the health and comfort of the inhabitants. It was applied to the construction and operation of a sewer built and managed by a public body under statutory authority, and held that it was a public body acting in the discharge of a public duty, and, as that which happened was only the inevitable result of what Parliament had authorized them to do, they were not liable. *Dixon v. Metropolitan Bd. of Works*, L. R. 7 Q. B. Div. 418. In *Geddis v. Proprietors of Bann Reservoir*, the defendants were incorporated by statute to make and maintain by means of a reservoir a constant water supply for owners of mills situate on the river Bann. To do this they had power to collect waters into a reservoir, from which water was from time to time to

be sent down to the river through a channel in a stream called "Muddock," and they had power to maintain, widen, deepen, and cleanse proper channels and watercourses, etc. The plaintiff's property was injured by flooding, as the result of the defendant's permitting to pour down through the channel of the Muddock more water than it would hold. In the House of Lords it was held that the plaintiff was entitled to recover in an action for damages, on the ground that the defendants, having power to widen and deepen the channel of the Muddock sufficiently to contain the water, were bound to do so before sending the water down. Lord Blackburn, in his opinion, states the principle in these words: "It is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone, but an action does lie for doing that which the legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is, within this rule, 'negligence' not to make such reasonable exercise of their powers." L. R. 3 App. Cas. 430, 455.

The principle adjudged in the *Beseman Case* was applied by the Supreme Court of the United States under circumstances identical with those in this case. *Boston v. Leckie*, 17 How. 426, 437, 15 L. ed. 118, 123; *Richardson v. Boston*, 19 How. 263, 270, 15 L. ed. 639, 642. These two decisions were upon the same facts, and in relation to the same property. The city had power by statute to construct its sewers into tide water, and the owner had erected a wharf on adjoining property. The first case was by the tenant in possession; the other, by the owner. In the first case it was held that an injury to the wharf arising from the construction of the owner into tide water was *damnum absque injuria*; but in the second case it was held that if the drain constructed by the city was not carried out sufficiently to discharge its contents so as to be swept off by the tides, but caused an accumulation of matter at the outer end of the plaintiff's wharves, in so much that vessels could not approach with the same depth of water as formerly, that was an injury to the plaintiff for which he was entitled to recover. The use of the Passaic river by the city as an outlet for its sewers being lawful, such incidental injuries as necessarily and unavoidably result from the exercise of such legislative authority are *damnum absque injuria*; but for injuries arising from negligence the city, being without the protection of legislative authority, is responsible therefor to the owners of improved riparian property. For it will be observed that the legal rule which exempts public bodies from liability to pay damages for injuries to private property applies only to those incidental injuries which necessarily and unavoidably result from the exercise of the legislative authority. The city justifies under the power contained in

its charter. In its answer it describes the construction and use of the proposed sewer as the best plan that could be devised, by ventilation and otherwise, to prevent the venting of fermented and foul sewage into the river, the location and use of the sewer, etc., with great particularity. The answer of the city to the bill of complaint, as a justification, conforms in principle to the plea in the *Beseman Case*. These averments present an issue for decision in this case,—in fact, the real issue on which this litigation should be disposed of. An answer justifying under the city charter, which authorized the city to connect its sewers with the Passaic, without such averments as are contained in this answer, with respect to the location, construction, and use of this sewer, would have been imperfect, and would be struck out. And, on the testimony taken, prominence was given to evidence explanatory of the location, mode of construction, and adaptability of the proposed sewer to lessen the injury to private property that might be affected by the sewerage. By the evidence it appears that the sewer proposed to be constructed by the city is 4,347 feet in length, with an opening into the Passaic 6 feet in diameter, and extending below low-water mark. It extends into sewer districts Nos. 5 and 6 of the city. District No. 5 embraces an area of 225 acres, and the sewer now in that district is discharged into the Passaic at Ballantine's dock, 254 feet north of the complainants' property. District No. 6 embraces 562 acres, and the sewer now in that district is discharged through Market street into the Passaic at the city dock, 2,000 feet south of the complainants' property. Into the proposed sewer will drain 295 acres in a thickly populated portion of the city, having a population estimated at 20,000. The necessity for this sewer arises from the fact that the sewerage in these two districts has become inadequate, because of the increase of storm water, and a nuisance was created by the overflow of the sewers in times of heavy rains, lifting off the covers of the manholes, and discharging sewage into the streets and flooding the cellars. The proposed sewer was designed as a means of relief. Upon the construction of this sewer, it is not proposed to dispense with the sewers that are now in existence in these districts. The sewer begins in Arlington street, near the Market street sewer, crosses sewers that are connected with the sewer system emptying into the Passaic at the city dock and at Ballantine's dock, and is adapted to carry off storm water, which would accumulate at the time of severe rains. Necessarily it would take up some part of the house sewage. Otherwise than relieving that portion of the city that was flooded at times of severe rains from the overflow of water, the proposed sewer did not increase the sewage carried into the river by the sewers already in existence. The separation of the fluids in sewage from the solid matter appears to be a step in the right direction. The plan for construction provides for ventilated manholes every 200 feet, for the pur-

pose of relieving the sewer from the evolved gases, and the delivery of the sewage at the mouth of the sewer, as far as possible, in an unfermented state. This method of constructing sewers is of recent adoption. The testimony of the witnesses who are experts on the subject makes it clear that a sewer constructed with such ventilation as the sewage proceeds from the intake to the outlet will relieve the outlet, in a great measure, from the foul gases usually discharged. Mr. Schaeffer, a witness called by the complainants, says that perforated covers placed over the manholes would prevent decomposition, by admitting fresh air and causing the interior of the sewer to be kept cooler, and less liable to be in a condition for decomposition to take place. Therefore the sewage would be deposited at the outlet more freely in its natural state. Dr. Disbrow testifies: "There is no danger from sewerage poison if the sewage is active. As long as it flows with plenty of ventilation, there is no danger whatever. If the ventilation were every 200 feet, enough oxygen would be supplied to dilute the gas sufficiently for its complete oxidation or burning up, and would be the only scientific way to construct a sewer. If it were so constructed, there could not be at the point of discharge any obnoxious odors or gases that would be injurious or affect anyone." Dr. Wallace says: "The sewer is to be constructed with perforated manholes. With these, any gases which might arise through decomposition would be liberated. There would not be much smell at point of discharge. Gas would not be liberated if the discharge was below the surface of the river, as it would if it dropped down into the river." Ernest Adams says: "The perforated tops in sewers help to create a current of air, and are considered to be the only method, or one of the best methods, to ventilate sewers." It is a fair deduction from the evidence with respect to ventilation in the course of the sewer that the emission of foul gases in the other sewers, such as that at Ballantine's dock and the city dock sewer, was probably due to the fact that the sewage was not subjected to the ventilating process in its passage to the river.

For the purpose of determining what acts of a city in the construction and use of its sewers are or are not actionable, the distinction is between the duties of a municipality which are judicial or quasi judicial, and those which are ministerial. With respect to the former no action is maintainable, and a remedy by action is given only for negligence in performing such duties as are ministerial. In *Attwood v. Bangor*, 83 Me. 582, 22 Atl. 466, the action was to recover damages for the unlawful location, construction, and maintenance of a sewer below low-water mark in the Penobscot river, whereby the plaintiff's dock was rendered less valuable, by reason of the liability of vessels to ground on the end of the sewer, and on the sediment flowing out of it. It was held by the court that the city had a right to extend its sewer across the flats of the river to a point below low-water mark; that, in the performance of

its duty to the public in locating sewers for the drainage of the city, the city council acted judicially, and for that judicial act the city was under no common-law liability, but, if the construction was improperly and unskillfully made it was a ministerial act, for which the city might be made liable to any party injured thereby. The same distinction between the duties of municipal authorities with respect to acts that are of a quasi judicial nature, involving the exercise of judgment and discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory, and ministerial duties, such as the construction and repair of sewers, was adopted in the Supreme Court of the United States in *Johnston v. District of Columbia*, 118 U. S. 19, 30 L. ed. 75, 6 Sup. Ct. Rep. 923. To the same effect are *Morse v. Worcester*, 139 Mass. 389, 2 N. E. 694; *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 680; *Franklin Wharf Co. v. Portland*, 67 Me. 46, 24 Am. Rep. 1; *Lynch v. New York*, 76 N. Y. 60, 32 Am. Rep. 271; and *Clark v. Peckham*, 10 R. I. 35, 14 Am. Rep. 654.

The complainants have no cause of complaint that the outlet of this sewer is nearer their property than the sewers already in the river. The location of the outlet of a public sewer is necessarily committed to the discretion of the public authorities. The proper place for such location is determined by public necessity and convenience, and the decision of the municipal authorities on this subject is conclusive, because it is the exercise of a discretion reposed in them by law, and not reviewable by the courts. *Attwood v. Bangor*, 83 Me. 592, 22 Atl. 466; *Morse v. Worcester*, 139 Mass. 389, 2 N. E. 694; *Lynch v. New York*, 76 N. Y. 60, 32 Am. Rep. 271; *Stoudinger v. Newark*, 28 N. J. Eq. 187. This whole subject is considered and decided by the supreme court of Massachusetts in *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 692. In that case the plaintiff was the owner of land abutting on a natural stream running through the city. He sued the city for the violation of his rights as riparian owner, in polluting its waters so as to render them unfit for mechanical and other purposes. The drains and sewers were constructed by the city under authority conferred upon the common council by the city charter. The ground of liability was that dirt, filth, and other materials were carried into the stream by means of these drains and sewers. It was held that the plaintiff could not recover against the city for the pollution so far as it was attributable to the plan of sewerage adopted by the city, but that a recovery might be had so far as it was attributable to the improper construction or

unreasonable use of the sewers, or to the negligence or other fault of the city in the care or management of them; that for the incidental disadvantage, loss, or inconvenience necessarily resulting to individuals in their rights of property from the maintenance and use of the drains in a proper and reasonable manner, without negligence in their care and management, no action could be maintained, but in the construction of works so laid out the town or city is responsible that it will be done in a proper manner, and with a reasonable degree of skill and care, and if, for want thereof, any unnecessary injury is caused to the property or rights of individuals, the town or city may be charged therewith. This case has been discredited as applied to private waters, where reasonable use is the measure of the right of the upper proprietor; but the doctrine of the case is abundantly supported upon principle and authority as to tidal streams, where the right of the public has been derived from the state to use its property, and maladministration of the powers conferred is the condition of responsibility. It must be assumed that the city, in the exercise of its rights, will make all reasonable efforts to avoid injury either to riparian owners, or to the health and comfort of its inhabitants. If by the use of the river for sewers by the city, or by other places along the river, its condition has become such that such use should be prohibited or regulated, the subject devolves upon the legislature to prohibit or regulate as in its judgment may seem fit. In England statutes regulating sewers and the use of streams for that purpose have been passed, some of which are referred to in 16 English Ruling Cases, 413-427, 619-628. From an early period in England a body known as "Commissioners of Sewers" has been in existence, with extensive powers and control over the subject. 5 Comyns, Dig. title *Sewers*, pp. 453 *et seq.*; 5 Chit. Burn. Just. 593. Under the law of the state the city has the right to construct this sewer, with an outlet into the Passaic river at such a point as the duly-constituted authorities of the city in their judgment should adopt. If, by reason of fault in the construction or management of the sewer, injury to private property is sustained, redress may be had therefor by an action for damages, but the evidence makes no case for an injunction *quia timet*. For the reasons above given, I concur in the decision of this court reversing the decree of the court of chancery, and dismissing the complainants' bill.

Lippincott, J., dissents.

OHIO SUPREME COURT.

CINCINNATI VOLKSBLATT COMPANY,
Plff. in Err.,

v.

Albert F. HOFFMEISTER.

(62 Ohio St. 189.)

- *1. Injunction is the proper form of remedy to enforce the right of a stockholder in a private corporation, given by § 3254, Rev. Stat., to inspect the books and records of the corporation.
2. The right to inspect does not depend upon the motive or purpose of the stockholder in demanding such inspection, and a petition which shows that the plaintiff is a stockholder, that he has requested the defendant to allow him to inspect the books and records of the corporation, and fix a reasonable time for the same, which request has been refused, states a cause of action.
3. As incident to such right is the right to have such inspection by a proper agent, and to take copies from such books and records.

(March 6, 1900.)

ERROR to the Superior Court of Cincinnati to review a judgment in favor of plaintiff in a proceeding to obtain permission to inspect the books of the defendant corporation. *Affirmed.*

Statement by Spear, J.:

The defendant in error, Albert F. Hoffmeister, commenced his action against the Cincinnati Volksblatt Company, in the superior court of Cincinnati, by the filing of a petition in which it is alleged that: "The defendant is a corporation organized under the laws of the state of Ohio. The plaintiff is a stockholder in said corporation, and is the owner and holder of five (5) shares of its capital stock, of the face value of five hundred (\$500) dollars each. The plaintiff has requested the defendant to allow him to inspect the books and records of said corporation, and to fix a reasonable time for said inspection. Defendant has refused such request, and refuses to allow the plaintiff to inspect its books and records at any time. Wherefore the plaintiff prays that the defendant be enjoined from refusing to allow him to inspect its books and records, and prays the court for such other and further relief as he may be entitled to at law or in equity." A demurrer to the petition being overruled, the defendant company answered, admitting its corporate existence, and that plaintiff is the owner of the number of shares of stock alleged in the petition, and denying other allegations; also averring that the plaintiff's action was not brought in good faith, but to compel defendant to

purchase the stock held by him under a threat to apply for the appointment of a receiver for the company; also that plaintiff is interested in a rival company, a competitor of defendant, and the application is made in bad faith, for the purpose of injuring defendant, and to compel it to purchase the stock; also that plaintiff is not, under the allegations of the petition, entitled to any relief, and that the court has no jurisdiction of the action. A reply took issue with the new matter alleged. Upon trial the court found the issues for the plaintiff; that he is entitled to inspect any of the books and records of defendant, at any reasonable time, and that he may make such inspection by himself or by agent, bookkeeper, or accountant, and may take copies of any of said books and records; and judgment was entered enjoining defendant from preventing an inspection of any of the books and records of defendant, at any reasonable time, and the taking of copies thereof by the plaintiff himself, or by his agent, bookkeeper, or accountant. This judgment was affirmed by the general term of the superior court and the company brings error.

Mr. Charles W. Baker, for plaintiff in error:

Plaintiff below has mistaken his remedy. It is not by injunction, mandatory or otherwise.

High, Inj. § 2.

If the plaintiff has any remedy at all, it is by mandamus under § 6741, Rev. Stat.

State ex rel. Templin v. Farmer, 7 Ohio C. C. 429; *Spelling. Priv. Corp.* §§ 656, 657; *High, Extr. Legal Rem.* §§ 5-24; 4 *Thomp. Corp.* § 4431; 2 *Kinhead, Code Pl.* § 790.

No stockholder is entitled to any such sweeping and omnibus order as is to be found in this final decree, and certainly not on the plaintiff's petition.

Pratt v. Meriden Cutlery Co. 35 Conn. 36; *Grant, Corp.* § 311; *Foster v. White*, 86 Ala. 467, 6 So. 88; *American Asylum v. Pharis Bank*, 4 Conn. 172, 10 Am. Dec. 112; *Com. ex rel. Sellers v. Pharis Iron Co.* 105 Pa. 111, 51 Am. Rep. 184; *Lyon v. American Screw Co.* 16 R. I. 472, 17 Atl. 61; *People ex rel. Hatch v. Lake Shore & M. S. R. Co.* 11 Hun. 1, Affirmed in 70 N. Y. 220.

The demurrer should have been sustained. 1 *Kinhead, Code Pl.* § 682; *Putnam v. Valentine*, 5 Ohio, 187; *Van Wert v. Webster*, 31 Ohio St. 420; *Spanglar v. Cleveland*, 43 Ohio St. 526, 3 N. E. 365.

Messrs. Alfred B. Benedict and Jerome D. Creed, for defendant in error:

The stockholder's remedy to compel an inspection under the statute is by suit in equity for a mandatory injunction. He has no remedy by mandamus.

Mandamus in Ohio has preserved its original high, prerogative character, issuing only to redress public injuries, and never to redress private grievances.

State ex rel. Bross v. Carpenter, 51 Ohio St. 83, 37 N. E. 261; *Freon v. Carriage Co.*

*Headnotes by the Court.

NOTE.—As to the right to inspect books of the corporation, see *Weißenmayer v. Blüner* (Md.) 45 L. R. A. 446, and *note*; also *State ex rel. Weinberg v. Pacific Brewing & Malting Co.* (Wash.) 47 L. R. A. 208. 48 L. R. A.

42 Ohio St. 30, 51 Am. Rep. 794; *Holland v. Dickson*, L. R. 37 Ch. Div. 669; *Mutter v. Eastern & M. R. Co.* L. R. 38 Ch. Div. 92; *Pender v. Lushington*, L. R. 6 Ch. Div. 70; *Huyler v. Cragin Cattle Co.* 40 N. J. Eq. 392, 2 Atl. 274; *Mitchell v. Rubber Reclaiming Co.* (N. J. Eq.) 24 Atl. 407; 4 Thomp. Corp. § 4432; Pom. Eq. Jur. § 1412.

Mandamus is not the proper remedy to restore to membership in a corporation a member unlawfully excluded.

Fraternal Mystic Circle v. State ex rel. Fritter, 61 Ohio St. 628, 48 N. E. 940.

At common law a stockholder had a right to inspect, but some courts held that he must allege some reason for wanting an inspection, while other courts held that the right was absolute, just as the right of a partner is absolute to have access to the books of his partnership.

2 Cook, Stock & Stockholders, 4th ed. § 512.

Where a statute confers a right to inspect, the right is absolute. All that the stockholder needs to do is to bring himself within the language of the statute.

Holland v. Dickson, L. R. 37 Ch. Div. 669; *Mutter v. Eastern & M. R. Co.* L. R. 38 Ch. Div. 92; *Pender v. Lushington*, L. R. 6 Ch. Div. 70.

Stock in Ohio is personal property.

Rev. Stat. § 3255.

Stock is not the certificate, but the sum total of the rights a stockholder has in the company, to wit: the right to dividends, the right to vote, the right to a certificate of stock, the right to have the certificate transferred on the books of the company, the right to inspect the books, and other rights not necessary to enumerate.

Jermain v. Lake Shore & M. S. R. Co. 91 N. Y. 483; *Elliot*, Priv. Corp. § 81, p. 61; 1 Bl. Com. p. 138.

One may assert his property rights regardless of motive.

Letts v. Kessler, 54 Ohio St. 73, 40 L. R. A. 177, 42 N. E. 765; *Morris v. Tuthill*, 72 N. Y. 575; *Davis v. Flagg*, 35 N. J. Eq. 491; *M'Donald v. Smalley*, 1 Pet. 620, 7 L. ed. 287; 4 Thomp. Corp. § 4412; 1 Cook, Stock & Stockholders, 4th ed. § 514; *State ex rel. Wilson v. St. Louis & S. F. R. Co.* 29 Mo. App. 301; *State ex rel. Spinney v. Sportman's Park & Club Asso.* 29 Mo. App. 328; *Mitchell v. Rubber Reclaiming Co.* (N. J. Eq.) 24 Atl. 407; *Martin v. William J. Johnston Co.* 25 Abb. N. C. 350, 12 N. Y. Supp. 844; *Foster v. White*, 86 Ala. 467, 6 So. 88.

Plaintiff need not show that he was injured by the refusal to let him see the books.

Kelsey v. Pfaulder Process Fermentation Co. 20 N. Y. S. R. 533, 3 N. Y. Supp. 723.

The right is not personal merely.

4 Thomp. Corp. § 4426; *Foster v. White*, 86 Ala. 467, 6 So. 88; *Mitchell v. Rubber Reclaiming Co.* (N. J. Eq.) 24 Atl. 407; *Phoenix Iron Co. v. Com. ex rel. Sellers*, 113 Pa. 563, 6 Atl. 75; *State ex rel. Martin v. Bienville Oil Works Co.* 28 La. Ann. 204. 48 L. R. A.

The right to inspect includes the right to take copies.

Mutter v. Eastern & M. R. Co. L. R. 38 Ch. Div. 92.

Spear, J., delivered the opinion of the court:

It is argued in support of the petition in error that the plaintiff has mistaken his remedy; that, if he has any, it is by mandamus, and not by injunction; and that the superior court is without jurisdiction, that court having no jurisdiction in mandamus. Also that sufficient facts are neither stated in the petition nor proven to entitle the plaintiff to any injunction whatever, and that, under any possible showing, he was not entitled to the sweeping order that the court made.

1. The proper form of action. As to mandamus our statute (Rev. Stat. § 6741) provides: "Mandamus is a writ issued in the name of the state, to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station." And by § 6744 it "must not be issued in a case where there is a plain and adequate remedy in the ordinary course of the law." In some jurisdictions the remedy of mandamus is given to right wrongs similar to the one here complained of. We are not, however, concerned with the law of other states, but with that of our own, and it seems hardly necessary to take space to demonstrate that in Ohio mandamus is not, but that injunction is, the proper remedy in a case of this nature. The complaint of plaintiff is that he is unlawfully prevented from the enjoyment of a right which is incident to his ownership of stock, and his remedy is that the corporation be compelled to desist from such deprivation. This does not call for the performance of an act which the law specifically enjoins. It is, on the other hand, an act which may be compelled by injunction in the common and ordinary exercise of that power. There is, therefore, a plain and adequate remedy open to him in the ordinary course of the law, for, within the meaning of this statute, an equity proceeding is a proceeding of that character. There is, in the opinion of the writer, another, and perhaps better, reason than the foregoing for the conclusion announced (*Fraternal Mystic Circle v. State ex rel. Fritter*, 61 Ohio St. 628, 48 N. E. 940), but the one given is deemed sufficient for the purposes of this case (*Freon v. Carriage Co.* 42 Ohio St. 30, 51 Am. Rep. 794; *State ex rel. Bross v. Carpenter*, 51 Ohio St. 83, 37 N. E. 261).

2. It being determined that the action was properly brought, and that the court had jurisdiction, is the petition sufficient, or must the plaintiff, before he can have standing in court, set out what his reasons for desiring the inspection asked are, and show that he is actuated by proper motives, and in the pursuit of justifiable ends? Such is the contention of plaintiff in error. The statute is (§ 3254): "And the books and records of

such corporation shall at all reasonable times be open to the inspection of every stockholder." But it is insisted that this provision is not intended to enlarge the right, but is a mere affirmation of the common-law rule, and that that rule embodies many conditions, among them that the stockholder must allege and prove that he is acting in good faith. Without stopping to discuss the extent of, and the limitations upon, the rule as established by the common law (for the holdings are at variance upon it), we inquire what reason there is for saying that the intent of the legislature was to merely affirm the common-law rule. If that had been all, why take the trouble to legislate on the subject at all? Is it not more reasonable to conclude that the object was to get rid of all uncertainty, and of various conditions, whatever they were, and establish the right by a rule clear, direct, simple, and practically without qualification? The language is plain. The right given is clear. One condition, and one only, is attacked, viz., that the right can be exercised only at reasonable times. Ordinarily, the motive or purpose of the party who is in the exercise of, or is about to exercise, a clear legal right, is unimportant. *Letts v. Kessler*, 54 Ohio St. 73, 40 L. R. A. 177, 42 N. E. 765, and authorities cited; *M'Donald v. Smalley*, 1 Pet. 620, 7 L. ed. 287. A like rule prevails as to one's pursuit of an equitable remedy. *Morris v. Tuthill*, 72 N. Y. 575; *Davis v. Flagg*, 35 N. J. Eq. 491; 4 Thomp. Corp. § 4412, and authorities cited. No reason is apparent why the rule should not apply to the case at bar. We are of the opinion that, where a suitor demands the enforcement of a clear right given him by law, whether the remedy be legal or equitable, his motive for such action is not a proper subject for judicial investigation. The petition stated a cause of action, and, if supported by the evidence, warranted the granting of equitable relief.

3. Was the order of the trial court too broad? The finding by the court of all the issues for the plaintiff settles the questions of fact for this court, but it is not improper to add that there was an entire failure to show, on the part of defendant, that the plaintiff was acting from the improper motives charged in the answer, and that the evidence, all of which we have read and considered, fully justifies the finding in favor of the plaintiff. So, that, even had the petition been obnoxious to a demurrer in failing to allege a proper purpose for the suit, the defendant, having obtained a full hearing on the charges stated in the answer, would have no ground of complaint on account of the action of the court on the demurrer. The contention is that whatever right of examination the statute gives is a personal right, and must be exercised by the stockholder in person. Since when, we would inquire, has it been the law that one who has given him a clear right as to property may not exercise it by any proper agent? The proposition has the quality of novelty, but it is not sound. It must be apparent, on reflection, that, if so circum-

scribed a limit were placed on the right, its exercise in many instances would be futile. *Foster v. White*, 86 Ala. 467, 6 So. 88; *Mitchell v. Rubber Reclaiming Co.* (N. J. Eq.) 37 Am. & Eng. Corp. Cas. 42, and notes, and same case in 24 Atl. 407; *State ex rel. Martin v. Bienville Oil Works Co.* 28 La. Ann. 204. Nor is the right limited to one inspection. It is an incident to ownership of stock, and may be exercised at any reasonable time so long as the relation of stockholder subsists. The right to take copies from the records follows as an incident to the right to inspect. It rests, as does the entire right to examination rest, upon the broad ground that the business of the corporation is not the business of the officers exclusively, but is the business of the stockholders. *Phœnix Iron Co. v. Com. ex rel. Sellers*, 113 Pa. 563, 6 Atl. 75; *Mutter v. Eastern & M. R. Co.* L. R. 38 Ch. Div. 92.

We refrain from extended discussion of the questions involved, because they are fully and ably discussed, and the authorities cited at large, in the briefs of the respective counsel which precede, and to which attention is here directed. We would add, however, that the rights of the plaintiff in this case are based upon a recognition of his standing as an integral part of the corporation. The idea that the corporation is an entity distinct from the corporators who compose it has been aptly characterized as "a nebulous fiction of thought." Much learning has been indulged in and much space occupied by text writers and others in an effort to differentiate the essential character of a corporation from that of its stockholders, and great ingenuity has been displayed in the argument; but it has been, in the main, a fruitless metaphysical discussion. For the purpose of description, and in defining corporate rights and obligations and characterizing corporate action, the fiction that the corporation is an artificial person or entity, apart from its members, may be convenient, and possibly useful, but, in the opinion of the writer, the argument favoring the essential separate entity of the corporation fails, and it is believed that the effort has resulted in misleading conceptions, and in much confusion of thought upon the subject. When all has been said, it remains that a corporation is not in reality a person or a thing distinct from its constituent parts, and the constituent parts are the stockholders, as much so in essence and in reality as the several partners are the constituent parts of the partnership. Stripped of misleading verbiage, the corporation is a device created by law whereby an aggregation of persons who may avail themselves of its privileges by organization are permitted to use their property in a way different from that which is permitted to others who do not so organize, and with certain special advantages, among which are a measure as to personal liability for debts, and the power to perpetuate the organization, denied by the law to all others. With this conception of a corporation, it would seem to follow, as matter of course, that the property of a corporation, although subject

under some conditions to rights of creditors, is, in the last analysis, that of the stockholders; and that when one seeks an inspection of its books, records, or property he is in reality but seeking an inspection of his own, and that this should be accorded fully, freely, and at all times when such inspection will not unreasonably inconvenience others who have like interest in and rights to the property, and that the attempt to unreasonably hamper such inspection by officers, managers, or others is an unjust exercise of power, and one which courts should not sanction. Nor can the officers of the corporation, or the other stockholders, justly complain. They have chosen this method of investing their means and conducting the business for personal profit,—a method which, as we have seen, is especially favored by the law,—and they should expect to endure such inconveniences, and such chances of exposure of management as the method entails. In other words, it is not unreasonable that they should be required to take the bitter with the sweet.

No error is found in the judgments of the courts below, and they will be affirmed.

Agnes NOBLE, *Plff. in Err.*,
v.

D. L. TYLER, Admr., etc., of Marcella McLean, Deceased.

(61 Ohio St. 432.)

- *1. Rents are not apportionable between the administrator of a tenant for life and the remaindermen, where there is no privity, and the estate of the latter becomes an estate in possession immediately upon the death of the life tenant, and puts an end to the lease made by him.
2. The administrator of the estate of a tenant for life, or his lessee, is entitled, under §§ 6026, 6027, Rev. Stat., to the "annual crops raised by labor," as assets of the estate of the deceased, whether severed or not at his death.
3. M., the owner of a life estate, remainder to certain other persons, on August 15, 1892, leased the land to a tenant, to be farmed for a year, for which the lessor was to receive as rent \$800. She died August 22, 1893. The wheat sown in the fall of 1892, together with the crops of 1893, had all been cultivated and harvested before her death, except the corn, which had been cultivated and laid by in July, and was harvested in November. The rent was secured by a note payable March 1, 1894. *Held*, that the note for the rent is assets of the estate of the deceased life tenant.

(January 9, 1900.)

ERROR to the Circuit Court for Butler County to review a judgment affirming a judgment of the Court of Common Pleas

*Headnotes by the COURT.

NOTE.—As to right to crops on death of life tenant, see *Bradley v. Bailey* (Conn.) 1 L. R. A. 427, and *note*; and some cases in *note* to *Batterman v. Albright* (N. Y.) 11 L. R. A. 800. 48 L. R. A.

disallowing exceptions to items in the inventory of the estate of Marcella McLean, deceased. *Reversed*.

Statement by **Minshall, J.:**

The suit in error in this case grew out of exceptions filed in the probate court by the plaintiff in error to certain items in the inventory of the estate of Marcella McLean, deceased, as filed by her administrator, D. L. Tyler. The exceptions were overruled, and an appeal taken to the common pleas. It, as requested, found the facts, and thereon overruled the exceptions, and the judgment was affirmed by the circuit court. It appears from the finding of facts that Marcella McLean was the owner of a life estate in two certain farms, one of 208 acres and the other of 83 acres, which estate had been devised to her by the will of her father, Elias Ayers, who died March 13, 1885, the remainder being devised to certain of his grandchildren,—Walter Ayers, David Ayers, and Bertha Ayers. Marcella died August 22, 1893, testate, leaving the residuum of her property to Agnes Noble; and D. L. Tyler was duly appointed her administrator with the will annexed. Among what is claimed to be assets of her estate are two notes,—one for \$800, made by John Burch, due March 1, 1894, and given for a year's rent of the 208-acre tract; and the other for \$350, given by Charles McLean, due at the same time, and given for the rent of the 83-acre tract. The leases and the notes were made August 15, 1892, and September 3, 1892, respectively. The administrator, assuming that the rent should be apportioned between the estate of Marcella McLean, the life tenant, and the remaindermen, inventoried each note at half its value; the makers being perfectly solvent. The residuary legatee, Agnes Noble, filed exceptions to this, claiming that each note should be inventoried as an asset of the estate at its full value. The finding of fact in regard to the leasing of the farms and the giving of the notes is as follows: "That Marcella McLean held possession of said tracts of 208 acres and 83 acres from the death of her father, Elias Ayers, until her death, 22d August, 1893. That on 15th August, 1892, she leased the said 208 acres to John Burch to be seeded in the fall of 1892 and farmed for the year 1893. That Burch seeded about 36 acres in the fall of 1892 in wheat, which was by him harvested in June, 1893; 15 acres timothy harvested July, 1893; and that in the spring of 1893 he planted about 42 acres in corn on said farm, and it was all laid by as early as July, 1893, but which was not gathered and harvested until November, 1893. That at the date of said lease said Burch gave his note for \$800 for said rent, payable to Marcella McLean, or order, on or before the 1st day of March, 1894. That on the 3d day of September, 1892, said Marcella McLean leased said 83 acres to Charles McLean, which was to be seeded by him in the fall of 1892, in part, and the balance farmed during the year 1893. That in the fall of 1892 he seeded on said tract 24 acres in wheat, and that the

same was harvested in June, 1893. The balance of said farm he planted in corn in the spring of 1893, and it was all laid by as early as July, 1893, but which was not gathered and harvested until November, 1893. That for the rent for said year 1893 said Charles McLean gave his note for \$350, the same payable to Marcella McLean, or her order, on or before March 1, 1894. Each of said notes was written on same piece of paper as the lease. Said two notes so given by John Burch and Charles McLean were in the possession of Marcella McLean at her death, and held by her, and came into the hands of said D. L. Tyler, as her said administrator with the will annexed, no part of the same having been paid."

Messrs. Millikin, Shotts, & Millikin, for plaintiff in error:

There is no provision made in the statute of Ohio for apportioning the rent between the life tenant and the heir at law, or between the life tenant and a remainderman; and it follows that where the farm is rented and planted during the life of the life tenant the entire crop, or its equivalent, shall go to the administrator of the deceased owner.

The statute laws of Ohio, §§ 6026 and 6027, have settled the rule that the administrator is entitled to the rent, whether in the shape of crops or money.

The right to take crops after the termination of the tenancy rests partly upon the idea of compensation, but chiefly upon the policy of encouraging husbandry, by assuring the fruits of his labor to the one who cultivates the soil.

1 Washb. Real Prop. 132, § 3.

Growing crops are personal estate, and do not pass by judicial sale.

Cassilly v. Rhodes, 12 Ohio. 88; *Houts v. Showalter*, 10 Ohio St. 125; *Albin v. Riegel*, 40 Ohio St. 339.

The only Ohio case that bears directly upon the question before the court is *Van Hayes v. West*, 3 Ohio C. C. 65.

Messrs. Slayback & Harr, for defendant in error:

We have no statute in this state providing for the disposition of rents which accrue after the death of the owner of real estate.

For the respective rights of the administrator and the reversioner or remainderman, we must look to the rules of the common law.

Where a decedent owned real estate at the time he died, occupied by tenants who paid rent therefor, the rent that became due and was unpaid at the time of such death belongs to his estate, and must be collected as assets by the executor or administrator. But all the rent that became due after such death, even though part of the time for which it is due elapsed before such death, belongs to the heir or devisee of the real estate; and with it the executor or administrator has nothing to do; not even if he afterwards sells such real estate to pay debts.

Giaque, Decedents' Estates, pp. 285, 286, §§ 26, 28; *Woerner, Administrators*, §§ 300, 48 L. R. A.

301; 3 Redf. Wills, p. 184; *Sohier v. Eldredge*, 103 Mass. 345; *Fay v. Holloran*, 35 Barb. 295; *Bloodworth v. Stevens*, 51 Miss. 475; *Ball v. First Nat. Bank*, 80 Ky. 501; *King v. Anderson*, 20 Ind. 385; *McDowell v. Hendrix*, 67 Ind. 513; *Logan v. Caldwell*, 23 Mo. 372; *Price v. Pickett*, 21 Ala. 741.

Rents accruing after the testator's decease, though paid for a period of occupation a part of which was before his decease, are income, and belong to the heir.

Sohier v. Eldredge, 103 Mass. 345; 3 Redf. Wills, p. 184, § 12; *King v. Anderson*, 20 Ind. 385; *Sutliff v. Atwood*, 15 Ohio St. 186; *Millikin v. Welliver*, 37 Ohio St. 460.

Minshall, J., delivered the opinion of the court:

The real question in this case is, When did the rent for which these notes were given accrue? If, upon the facts as found, it accrued, in the proper sense of the term, in the lifetime of Marcella McLean, the notes, to their full value, should have been inventoried as assets of her estate. The lease in each case, or, more properly speaking, the agreement for the occupation and farming of the land, was made, the one August 15, 1892, and the other September 3d of the same year. They gave to the tenant in each case the right to seed part of the land in wheat in the fall of 1892, and to farm the land for the year 1893. This is the common way among farmers of renting lands to be farmed for a year; wheat, in our climate, being sown in the fall and harvested in the following summer. No one would claim, under this letting, either tenant could have sown his tract in wheat in the fall of 1893, with the right to harvest it in 1894, for all his rights in the premises were to end with the harvesting of the crops cultivated in that year, and the rent then accrued, and would have been payable, but for the agreement by which the time was extended to the 1st of March following. By an indulgence of the common law in favor of agriculture, incorporated in the statute law of this state (§§ 6026, 6027, Rev. Stat.), one whose estate may be terminated by an event the time whereof is uncertain has the right to reap what he has sown although this may, to some extent, trench upon the occupancy of the tenant of the next estate in remainder or reversion. This, however, cannot be said to impair the next estate, for it is an incident, created by law, of every estate in reversion or remainder,—a burden, if it be one. imposed, as we have said, in the interest of agriculture; for, when the termination of an estate is uncertain, it would greatly discourage the cultivation of the land if every such tenant must sow at his peril. Hence it is that the right to harvest growing crops sown and cultivated before the termination of the particular estate, in no legal sense infringes upon the next estate in possession. Every such estate is created subject to such contingency, and the right is an incident to every estate whose termination is not fixed by some definite time. When the time of the termination of an estate is definitely

known, the reason ceases, and no such right exists; and this is why we have said that, if either of the renters of Mrs. McLean had sown the land rented to him in wheat in the fall of 1893, he would have done so at his peril, as the termination of his tenancy was a fixed period, limited to the time in which annual crops are usually harvested in the fall. It therefore follows, as we think, that the agreement for the cultivation of the particular farms of the deceased terminated in her lifetime, and the rent agreed to be paid on or before March 1, 1894, had accrued, and the notes should have been inventoried at their full value as assets of her estate. The makers of the notes could make no defense to their collection, as they had fully enjoyed, under the agreement and the law, the consideration for their respective promises to pay.

Much confusion has arisen in the case from the fact that the rent did not, by the agreement of the parties, become due until March 1, 1894,—about six months after the death of the life tenant,—from which it is assumed that the rent then accrued. This would imply that the term, instead of being for a year, was for a year and six months, which is contrary to the fact. The accrual of rent does not necessarily depend upon the time fixed by the parties for its payment. The accrual of rent has respect to the term of the lease. It accrues as the term elapses, and is fully accrued when the term is complete. The term and the enjoyment of it is the consideration for the rent. When the term is complete, the rent has accrued. If, as claimed, the question depends upon when the rent is made payable, irrespective of the time of its accrual, then the next in estate might be entitled to it any number of years after it had been earned, for any number of years may be given for its payment. It is then evident that the accrual of rent depends upon the lapse of the term for which it is to be paid, and not upon the lapse of the time given for its payment. The latter is a matter of agreement between the parties. If there were no express agreement, the rent would become due on its accrual; but by agreement it may be made to become due at any time that will best suit the convenience of the parties. Here, by agreement, it was made to become due in six months after its accrual, or, in other words, after it had been earned by the land. Hence the remaindermen have no claim to this rent. It was all earned, or had accrued, in the legal sense, in the lifetime of Marcella McLean, and is, consequently, assets of her estate, though the notes given for it did not become due until after her death. It is thought that the case of *Sutliff v. Atwood*, 15 Ohio St. 186, sustains the contention of the defendant in error in this regard. All that this case decides that can be in any way helpful to the claim of the remaindermen is that the taking of the notes for rent did not change the character of the consideration for which they were given while they remained in the hands of the lessor, unnegotiated; and, consequently, a suit on them by the lessor against the lessee would be in fact a suit for rent. This

is not questioned. But there is no such question in this case. The principle, however, on which the case was decided, applied to this case, disposes of any claim made for the remaindermen to any portion of the rent due on these notes. Sutliff leased his dairy farm to Atwood for the term of three years at an annual rent of \$500, payable at the end of each year. He transferred the first note to one Quimby, who recovered a judgment upon it, levied on the lease, and purchased it in at the sheriff's sale, and then assigned it to the lessor, Sutliff. The latter then brought suit on the notes for the rent that accrued after the assignment of the lease to him, and it was held that he could not recover. The *ratio decidendi* of the decision is that, being in possession of the devised premises under the assignment, his right to rent was compensated by his duty to pay it; in other words, he could not occupy the position of lessor and lessee at the same time. So, in this case, when the life tenant died, the estate of the remaindermen, by operation of law, at once became an estate in possession, and they could not demand rent therefor from any other person. Whether they in fact took possession is immaterial. They had the right to it, subject to the right of the administrator of the deceased life tenant, or her lessee, to the growing crops; and we may assume, though there is no finding as to the fact, that they took possession, as possession generally accompanies the right. Therefore, having the possession and the right to it, they cannot, in law or reason, demand rent from someone else for a possession which they themselves have and enjoy. In *Millikin v. Welliver*, 37 Ohio St. 460, 468, the corn in question was planted and raised after the death of the lessor, Smith, and so went to the devisees, and not to the administrator.

We have examined the cases and authorities cited by the defendant in error, and fail to see how, on the facts of the case, they support his contention. He assumes that the lease did not terminate until the rent notes became due. In this, as we have shown, he is in error. Neither tenant had any right to enter upon the farm, leased to him, after the crops had been all harvested in the usual time. Most of the cases cited relate to leases made by the owner in fee, who died before the termination of the lease. In such cases, the death of the lessor does not terminate the lease, and, as there is privity of estate between the administrator and the heir, the rent is apportioned; that which had accrued at the death of the lessor going to the administrator, and that which accrues afterwards attends the reversion, and goes to the heir or devisee. In some cases the death of the life tenant does not terminate his estate, as in the case of an estate *per autre vie*. In such cases, and in all other cases where the death of a life tenant does not terminate an existing lease, there may be an apportionment between the administrator and the remaindermen on the above principles. But no case is produced,

and we think no well-considered one can be found, where an apportionment has been made between an administrator of the life tenant and the owner of the next estate, taking effect in possession, immediately upon the death of the life tenant. In such cases at common law, where the term had not ended at the death of the life tenant, no rent could be collected,—not by the administrator, for the reason that the lessee was deprived of the consideration for his promise (the possession of the land); nor by the remainderman, for there is no privity of estate between him and the life tenant's lessee; and for the further reason that rent in his favor cannot issue out of lands in his own possession. Whether this is so in Ohio as to the administrator does not arise in this case, for, as above shown, the tenants enjoyed all they were entitled to under the letting to them, and for which they promised to pay the notes in question; and do not, it seems, deny their liability to pay, either to the administrator or to the remaindermen. And it is worthy of note in this connection that it is admitted that, if Marcella McLean had farmed the lands as they were farmed by the tenants, her administrator would have been entitled to the crops raised in the year 1893, under the statute above referred to. It seems, then, a strange sort of logic by which the conclusion is reached that, having transferred this right to another for a consideration secured by a note, the note would not be hers and so assets of her estate, without regard to when it was made payable. The whole confusion, as we have said, arises out of not properly distinguishing between the accrual of rent and the time when it is made payable. It is generally made payable at the lapse of some particular period of the lease,—as annually, or by the month,—and so becomes payable as it matures; and in all such cases the time of payment and the accrual of the rent are coincident. But, as before pointed out, it is not necessary that this should be so in order to reserve rent. Time for the payment of rent may be given irrespective of the time of its accrual.

Reversed, and exceptions sustained.

BOARD OF COMMISSIONERS OF CHAMPAIGN COUNTY, *Plffs. in Err.*,
v.

Benjamin F. CHURCH, Admr., etc., of
Charles W. Mitchell, Deceased.

J. W. CALDWELL, *Piff. in Err.*,
v.

BOARD OF COMMISSIONERS OF CUYAHOGA COUNTY.

(62 Ohio St. 318.)

*1. The act of the legislature of Ohio,

*Headnotes by the Court.

NOTE.—For constitutionality of statutes making counties or municipalities liable for damages done by mobs, see note to *Glanfortone* 48 L. R. A.

entitled "An Act for the Suppression of Mob Violence," passed April 10, 1896 (92 Ohio Laws, p. 136), is constitutional.

2. The recovery authorized by said act is penal in its nature, and it is within the legislative power to provide therefor. Such legislation is not an exercise of judicial power, nor is it a violation of the right of trial by jury.
3. Such recovery, and the tax levy authorized and required by said act, are within the general powers of the legislature and the provisions of § 7, art. 10, of the Constitution, and such recovery and levy are not in contravention of § 19, art. 1, of the Constitution.
4. In an action brought under such statute, to recover the penalty of \$5,000 for the death of a person caused by lynching. It is error for the court to charge the jury to the effect that if the collection of individuals who lynched the deceased had assembled without any unlawful purpose, and afterwards committed the acts of violence which resulted in the death of such person, the plaintiff could not recover, and that the verdict should be for the defendant.
5. In an action brought under such statute to recover the penalty for an injury caused by lynching, where it is sufficiently alleged in the petition that the plaintiff had suffered a lynching at the hands of a mob composed of a collection of individuals, who had assembled for an unlawful purpose, and attempted to exercise correctional power over the plaintiff and his fellows, the allegations in the petition are not negatived by the specific averments, also contained in the petition, that the plaintiff was struck by "a heavy glass insulator thrown at him by one of the mob," and that he was "shot through the leg with a leaden bullet fired from a revolver in the hands of some of the mob."

(April 10, 1900.)

ERROR to the Circuit Court for Champaign County to review a judgment reversing a judgment of the Court of Common Pleas in favor of defendants in an action brought to recover damages for the death of plaintiff's intestate by a mob. *Affirmed*.

ERROR to the Circuit Court for Cuyahoga County to review a judgment affirming a judgment of the Court of Common Pleas in favor of defendants in an action brought to recover damages for injuries alleged to have been inflicted upon plaintiff by a mob. *Reversed*.

Statement by **Davis, J.:**

Benjamin F. Church, as the administrator of Charles W. Mitchell, deceased, filed a petition against the board of commissioners of Champaign county, under the "Act for the Suppression of Mob Violence," passed April 10, 1896 (92 Ohio Laws, p. 136), to recover \$5,000 for the lynching of said Mitchell, at Urbana, in said county. Defendant demurred to the petition, and the demurrer was sustained by the court of common pleas, and the petition dismissed. The circuit

v. New Orleans (C. C. E. D. La.) 24 L. R. A. 592; and *Chicago v. Manhattan Cement Co.* (Ill.) 45 L. R. A. 848.

court reversed the judgment of the court of common pleas, and the defendant then answered. The first defense contained in the answer of the defendant is a general denial, and the second defense alleges that the said act is repugnant to the Constitution of Ohio. A demurrer to the second defense of the answer was sustained, and on the trial of the case the court gave to the jury the following special charge upon the request of the defendant: "The jury is charged, as a matter of law, that although you may find and believe, from the evidence before you in this case, that said Charles W. Mitchell, referred to in the petition, suffered death at the hands of a collection of individuals in Champaign county, Ohio, on or about the 4th day of June, 1897, if you further find from the evidence that said collection of individuals did not assemble for any unlawful purpose, and did not intend to do damage or injury to anyone, and did not pretend to exercise correctional power over other persons by violence, and without authority of law, at the time of assembling, but was or were attracted and induced through motives of curiosity, and the events that had transpired around the courthouse yard and jail during the night and morning preceding, to meet and assemble together, and being thus assembled, without any unlawful purpose, and not intending to do damage or injury to anyone, or pretending to exercise correctional power over any other person or persons by violence and without authority of law, afterwards committed the acts of violence resulting in the death of said Charles W. Mitchell, then the plaintiff in this case cannot recover, and your verdict should be for the defendant." And afterwards, in the general charge, the court instructed the jury in part as follows: "Much has been said concerning the meaning of special charge No. 5 given on behalf of the defendant, and the court therefore deems it proper to instruct the jury that the meaning which you are to give to that charge is that—and I give it in the words of the charge itself, omitting the first introductory sentences—if, after being assembled, the collection of individuals referred to before, without any unlawful purpose having been formed, and not intending to do damage or injury to any person, or pretending to exercise correctional power over any other person, committed the acts of violence which resulted in the death of Charles W. Mitchell, then the plaintiff cannot recover." "The special charges given you before the argument began are as much the charge of the court as are these general instructions, and, so far as it treats of the same subjects, the general charge is to be received in addition to, and as explanatory of, the special charges." The verdict was for the defendant, and on petition in error the circuit court reversed the judgment of the court of common pleas for error in the charge of the court. J. W. Caldwell brought his action, under the same statute, against the board of county commissioners of Cuyahoga county, to recover the sum of \$1,000 for an injury which he alleged that he had received

at the hands of a mob in that county. A demurrer to the petition, on the ground that the petition does not state facts sufficient to constitute a cause of action, and that said act is unconstitutional, was sustained by the court of common pleas, and the judgment of the court of common pleas was affirmed by the circuit court. These cases came up on petitions in error to reverse the respective judgments of the circuit court.

Messrs. T. J. Frank, E. P. Middleton, and S. S. Deaton, for Champaign County, plaintiff in error:

No such liability against a county as is provided for in this statute existed at common law.

Western College of Homeopathic Medicine v. Cleveland, 12 Ohio St. 375; *Robinson v. Greenville*, 42 Ohio St. 625, 51 Am. Rep. 857; *Gianfortone v. New Orleans*, 61 Fed. Rep. 64, 24 L. R. A. 592; *Rock Island v. Steele*, 31 Ill. 543; *Schuyler County v. Mercer County*, 9 Ill. 20.

Penal statutes must be strictly construed. They cannot be extended by implication to cases not strictly within their terms.

23 Am. & Eng. Enc. Law, p. 375, note 1, p. 378; *Shultz v. Cambridge*, 38 Ohio St. 659; *White v. Woodward*, 44 Ohio St. 347, 7 N. E. 446.

Statutes in derogation of the common law are to be construed strictly.

23 Am. & Eng. Enc. Law, p. 387, note 1. Statutes passed in exercise of the police power of the state are to be strictly construed.

23 Am. & Eng. Enc. Law, pp. 348-388, notes 1-3.

If the language of a statute is unambiguous there is no rule for construction, even though the objects of the act are defeated.

McCormick v. Alexander, 2 Ohio, 65; *Bruner v. Briggs*, 39 Ohio St. 478.

The bare fact that three or more persons in a violent manner beat another does not raise the presumption of law that they assembled with that intent, after being assembled agreed mutually to assist one another in the execution of such purpose, for, if the law from such conduct deduced the inference either as a conclusive or a disputable presumption that the intent existed, which is a necessary ingredient to a riot, there would be no distinction between riots and affrays.

State v. Kempf, 26 Mo. 429.

The act entitled "An Act for the Suppression of Mob Violence," passed by the general assembly of Ohio on the 10th day of April, 1896 (92 Ohio Laws, p. 136), is unconstitutional and void.

The constitutional limitation as to trial by jury is on the power to abridge, and not on the power to extend. The right may be extended, but not abridged.

Gunsaulius v. Pettit, 46 Ohio St. 28, 17 N. E. 231; *Salt Creek Valley Turnp. Co. v. Parks*, 50 Ohio St. 578, 28 L. R. A. 769, 35 N. E. 304.

The right to retain property already in

possession is as sacred as the right to recover it when dispossessed.

Hocking Valley Coal Co. v. Rosser, 53 Ohio St. 24, 29 L. R. A. 386, 41 N. E. 263.

My property is as much imperiled by an action against me for money, as it is by an action against me for my land or my goods.

Normal School Dist. Bd. of Edu. v. Blodgett, 155 Ill. 441, 31 L. R. A. 70, 40 N. E. 1025.

Due process of law requires that a party shall be properly brought into court, and that he shall have an opportunity, when there, to prove any fact which, according to the Constitution and the usages of the common law, would be a protection to him or his property.

People ex rel. Witherbee v. Essex County Supers. 70 N. Y. 234; *Clark v. Mitchell*, 84 Mo. 578; *People ex rel. Herrick v. Smith*, 21 N. Y. 595; *Risser v. Hoyt*, 53 Mich. 201, 18 N. W. 611; *Zeigler v. South & North Ala. R. Co.* 58 Ala. 594; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Bank of Columbia v. Okely*, 4 Wheat. 244, 4 L. ed. 561.

What constitutes judicial power, within the meaning of the Constitution, is to be determined in the light of the common law, and of the history of our institutions, as they existed anterior to and at the time of the adoption of the Constitution.

State v. Harmon, 31 Ohio St. 250; *De Camp v. Archibald*, 50 Ohio St. 625, 35 N. E. 1056.

The legislature cannot exercise judicial powers.

19 Am. & Eng. Enc. Law, p. 454, note 3; *Ponder v. Graham*, 4 Fla. 23; *Jones v. Perry*, 10 Yerg. 59; *State ex rel. McCurdy v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622; *Dorsey v. Dorsey*, 37 Md. 64, 11 Am. Rep. 528; *Re Selby*, 6 Mich. 193; *People v. Frisbie*, 26 Cal. 135; *Sydnor v. Palmer*, 32 Wis. 406; *Lane v. Dorman*, 4 Ill. 238, 36 Am. Dec. 543.

Ascertainment of indebtedness from one to another and a direction for payment are judicial acts which cannot be performed by the legislature.

Lane v. Dorman, 4 Ill. 238, 36 Am. Dec. 543; *Central P. R. Co. v. Gallatin*, 99 U. S. 761, 25 L. ed. 516.

The act of the general assembly in question arbitrarily fixes the pecuniary interest of the next of kin of the said Charles Mitchell, and adjudicates and determines the damages to be \$5,000 without any regard whatever to the common law, or the history of our institutions as they existed anterior to and at the time of the adoption of the state Constitution, and denies to the defendant the right of trial or defense as to the pecuniary interest, or damage sustained, if any, and determines the question of fact and law affecting the property rights of the defendant by legislative decree and judgment, contrary to the established rules of a court of law and the law of the land.

Janesville v. Carpenter, 77 Wis. 288, 8 L. R. A. 808, 46 N. W. 128; *State ex rel. Holtz v. Henry County Comrs.* 41 Ohio St. 435; *De Camp v. Archibald*, 50 Ohio St. 625, 35 L. R. A.

N. E. 1056; *Hocking Valley Coal Co. v. Rosser*, 53 Ohio St. 24, 29 L. R. A. 386, 41 N. E. 263.

This statute is unconstitutional for the reason that it is an encroachment of the legislative upon the judicial branch of government, and by its terms necessarily deprives the defendant of any right of trial as to material and disputed facts, and subjects the taxpayers of the county to the loss of property without due course of law.

Hanson v. Vernon, 27 Iowa, 28, 1 Am. Rep. 215; *Marion Twp. Bd. of Edu. v. State*, 51 Ohio St. 539, 25 L. R. A. 770, 38 N. E. 614; *Ervine's Appeal*, 16 Pa. 267, 55 Am. Dec. 499; *Ponder v. Graham*, 4 Fla. 23; *Caldwell v. Cuyahoga County Comrs.* 15 Ohio C. C. 167.

The money to be recovered under this statute, and to be collected, as a debt against the county, is not directed to be paid, applied, or used for any public use or purpose for which an exaction on property can be levied.

Marion Twp. Bd. of Edu. v. State, 51 Ohio St. 539, 25 L. R. A. 770, 38 N. E. 614; *Hanson v. Vernon*, 27 Iowa, 28, 1 Am. Rep. 215; *Palavret's Appeal*, 67 Pa. 479, 5 Am. Rep. 450; *Mays v. Cincinnati*, 1 Ohio St. 273; *Western U. Teleg. Co. v. Mayer*, 28 Ohio St. 521; *Taylor v. Ross County Comrs.* 23 Ohio St. 84; *State ex rel. McCurdy v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622.

The power of the legislature to impose taxes is not unlimited. It is within the province of the courts to determine in particular cases whether the extreme boundary of legislative power has been reached and passed.

Western U. Teleg. Co. v. Mayer, 28 Ohio St. 521; *State ex rel. Hibbs v. Franklin County Comrs.* 35 Ohio St. 468; *Hanson v. Vernon*, 27 Iowa, 28, 1 Am. Rep. 215; *Brodhead v. Milwaukee*, 19 Wis. 624, 98 Am. Dec. 711; 25 Am. & Eng. Enc. Law, p. 74, note 5.

Taxation having for its only legitimate object the raising of money for public purposes, and the proper needs of government, the exaction of money from the citizens for other purposes is not a proper exercise of the power, and must therefore be unauthorized.

Cooley, Const. Lim. 487; *Hanson v. Vernon*, 27 Iowa, 28, 1 Am. Rep. 228; *Sharpless v. Philadelphia*, 21 Pa. 167, 59 Am. Dec. 759.

A tax is generally understood to mean the imposition of a duty imposed for the support of the government.

Pray v. Northern Liberties, 31 Pa. 69; *Cooley*, Const. Lim. 479; *Hanson v. Vernon*, 27 Iowa, 28, 1 Am. Rep. 215.

The act in question authorizes a tax to be levied and collected for a private purpose, and for the private use and benefit of private individuals.

Marion Twp. Bd. of Edu. v. State, 51 Ohio St. 531, 25 L. R. A. 770, 38 N. E. 614; *Taylor v. Ross County Comrs.* 23 Ohio St. 84; *Western U. Teleg. Co. v. Mayer*, 28 Ohio St. 521; *Lima v. McBride*, 34 Ohio St. 340; *State ex rel. Hibbs v. Franklin County*

Comrs. 35 Ohio St. 468; *Brodhead v. Milwaukee*, 19 Wis. 624, 88 Am. Dec. 711; *Hanson v. Vernon*, 27 Iowa, 28, 1 Am. Rep. 215; *Palaisre's Appeal*, 67 Pa. 479, 5 Am. Rep. 450; *Caldwell v. Cuyahoga County Comrs.* 15 Ohio C. C. 167; *Smith v. Atlantic & G. W. R. Co.* 25 Ohio St. 91.

There are limitations upon the police power.

Cooley, Const. Lim. 6th ed. 710; 1 Dill. Mun. Corp. 4th ed. § 142; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389; *Hare, Am. Const. Law*, 618; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Norman v. Heist*, 5 Watts & S. 171, 40 Am. Dec. 493; *Hoke v. Henderson*, 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 677; *Dash v. Van Kleeck*, 7 Johns. 477, 5 Am. Dec. 291; *Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162; *Ervine's Appeal*, 16 Pa. 256, 55 Am. Dec. 499; *Internal Improvement Fund v. Bailey*, 10 Fla. 239; *Taylor v. Place*, 4 R. I. 324; *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567; *People ex rel. Mutual L. Ins. Co. v. New York City & County Supers.* 16 N. Y. 424; *Cincinnati, W. & Z. R. Co. v. Clinton County Comrs.* 1 Ohio St. 77; *Merrill v. Sherburne*, 1 N. H. 199, 8 Am. Dec. 52; *Salt Creek Valley Turnp. Co. v. Parks*, 50 Ohio St. 568, 28 L. R. A. 769, 35 N. E. 304; *State ex rel. McCurdy v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622.

This act of April 10, 1896, is in conflict with the provision of the Constitution of our state, which prohibits the legislature from exercising judicial functions, and it also contravenes the provision that no person can be deprived of his property without due process of law.

Fryor v. Downey, 50 Cal. 388, 19 Am. Rep. 656; *Ratcliffe v. Anderson*, 31 Gratt. 105, 31 Am. Rep. 716; *State v. Walsh*, 136 Mo. 400, 35 L. R. A. 231, 37 S. W. 1112; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781; *Hovell v. Fry*, 19 Ohio St. 559; *Salt Creek Valley Turnp. Co. v. Parks*, 50 Ohio St. 568, 28 L. R. A. 769, 35 N. E. 304; *State ex rel. McCurdy v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622.

Messrs. George M. Eichelberger and Charles H. Bosler for Church, defendant in error.

Mr. Willis Vickery, for Caldwell, plaintiff in error:

The Constitution of the state of Ohio provides for a government of unlimited powers, and whatever is not prohibited by the Constitution is reserved to the people thereof, and what is not prohibited in so many words by the Constitution of the state of Ohio can be legislated upon by the legislature.

Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625; *People ex rel. Wood v. Draper*, 15 N. Y. 543.

The wisdom of the law is not a subject for the court to consider.

Cooley, Const. Lim. 202, 204.

If an act is to be held void it is not because the judges have any control over the legislative power, but because the act is forbidden by the Constitution, and because the 48 L. R. A.

will of the people which is therein declared is paramount to that of the representatives expressed in any law.

1 Bryce, Am. Com. 430; Cooley, Const. Lim. 195; *Lindsay v. East Bay Street Comrs.* 2 Bay, 61.

The courts will not so construe a law as to make it conflict with the Constitution, but will rather put such an interpretation upon it as will avoid conflict with the Constitution, and give it the force of law, if this can be done without extravagance.

Inkster v. Carver, 16 Mich. 484; *Newland v. Marsh*, 19 Ill. 376; *Roosevelt v. Godard*, 52 Barb. 533; *Parsons v. Bedford*, 3 Pet. 433, 7 L. ed. 732; *Grenada County Supers. v. Brogden*, 112 U. S. 261, sub nom. *Grenada County Supers. v. Brown*, 28 L. ed. 704, 5 Sup. Ct. Rep. 125.

The courts have nothing to do with the policy, expediency, or propriety of the acts of the legislature.

Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; *Merchants' Union Barb Wire Co. v. Brown*, 64 Iowa, 275, 20 N. W. 434; *People ex rel. Hayden v. Rochester*, 50 N. Y. 525; *Sears v. Cottrell*, 5 Mich. 251; *People ex rel. Wood v. Draper*, 15 N. Y. 532; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Ham v. McClaws*, 1 Bay, 93; *People ex rel. Detroit & H. R. Co. v. Salem Twp. Board*, 20 Mich. 452, 4 Am. Rep. 400; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *Adler v. Whitbeck*, 44 Ohio St. 562, 9 N. E. 672; *Morgan v. Nolte*, 37 Ohio St. 23, 41 Am. Rep. 485; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162; *Hedderich v. State*, 101 Ind. 564, 51 Am. Rep. 768; *McComas v. Krug*, 81 Ind. 327, 42 Am. Rep. 135; *Robinson v. Schenck*, 102 Ind. 319; *Darlington v. New York*, 31 N. Y. 189, 88 Am. Dec. 248.

Messrs. F. H. Kaiser and F. L. Taft, for Cuyahoga County, defendant in error:

This statute is void because the language employed therein is so indefinite that the intent of the legislature is not ascertainable, and therefore the enforcement of the statute is impossible.

Bond v. Swearingen, 1 Ohio, 395; *State ex rel. Long v. Brinkman*, 7 Ohio C. C. 165.

This statute opens a wide door for the perpetration of frauds upon the counties of this state, and is therefore against public policy and void.

This statute takes private property, and makes it subservient to private welfare.

Weisner v. Douglas, 64 N. Y. 99, 21 Am. Rep. 586.

Legislative power cannot be delegated.

Cincinnati, W. & Z. R. Co. v. Clinton County Comrs. 1 Ohio St. 77.

At common law a county cannot be held liable for the negligence or other wrongful acts of its officers.

Hamilton County Comrs. v. Mighels, 7 Ohio St. 110.

A liability imposed upon the county is a liability imposed upon the state itself; and, if the liability is imposed upon the state, then the state, and not the arm which the

state thrusts out into a particular locality, should be taxed to meet that liability.

Cincinnati, W. & Z. R. Co. v. Clinton County Comrs. 1 Ohio St. 89; *Western College of Homeopathic Medicine v. Cleveland*, 12 Ohio St. 377.

Davis, J., delivered the opinion of the court:

These cases require a decision of the question whether "An Act for the Suppression of Mob Violence," passed April 10, 1896 (92 Ohio Laws, p. 136), is constitutional. It is argued that the provisions of this statute contravene article 1 of the 14th Amendment to the Constitution of the United States, and are also repugnant to the Constitution of Ohio, because they violate the right of trial by jury, because they authorize the taking of property without due process of law, because they are a violation of private rights of property, because they are an exercise of judicial functions by the legislature, and because the object and purposes of the statute are not within the taxing power.

In the ardor of attack, it seems to have been overlooked that the Constitution extends its protection over individuals, as well as counties and municipal corporations. Even a criminal has some rights which cannot be forfeited. Every person who is accused of crime is guaranteed a fair trial, and he cannot be deprived of life or liberty without due process of law. The faith of the body politic is pledged to make good the constitutional guaranties to the individual. To the counties and municipal corporations are delegated, in large measure, the duties of local administration. Within their jurisdiction they stand in the place of the state, in enforcing the laws, and in protecting the life, the liberty, and the property of the citizen. If a large number of the people of any county become imbued with the lynching spirit, or negligent and indifferent to the due and orderly enforcement of the laws, so that lawless men may act with impunity, then there is no course for the state to take, other than to intervene and directly protect the individual, as well as to enforce upon the community the observance of good order. The power of the state to do this cannot well be questioned. What is known as the "police power" is based on the public safety, the public health and morals, and the general welfare, and it is therefore as broad as these conditions may require. In this respect, as in other respects, the power of the legislative branch of the state government is plenary, except as it may be specifically and clearly limited in the Constitution. Within these limitations the legislature may prescribe such laws, sanctioned by fines, penalties, forfeitures, or damages as will enforce the observance of the peace and dignity of the state, and compensate the injured party; for, unfortunately, the public conscience is oftentimes more easily quickened in this way than by teaching and persuasion.

Now, as to the alleged violation of the right of trial by jury, it may well be doubted whether counties and municipalities have

any such absolute right of trial by jury that they may complain of its infringement by the legislature. They are creatures of constitutional and legislative enactment. They have only such powers and privileges as are given them, and these powers and privileges may, in general, be modified or taken away.

But cases like these need not be disposed of on that ground. The contention is that the statute deprives the defendant of the right to have the amount to be paid assessed by a jury as damages. A county or municipality can no more complain of this statute as an infringement upon the right of trial by jury than the man who has been tried by a jury and found guilty of a crime can complain that the law under which he is tried does not provide that the jury shall assess the amount of his fine or adjudge the extent of his imprisonment. The primary purpose of the legislature was punishment and correction. The expressed object of the law is "the suppression of mob violence." That the legislature might, in the exercise of the police power, fix the amount of a penalty without the intervention of a jury, was long ago decided by this court in *Cincinnati, S. & C. R. Co. v. Cook*, 37 Ohio St. 265. And, this being so, it is of no concern to the party paying the penalty to whom the state, in its sovereignty, may pay it. It may well, as under this statute, turn the money over to those who suffer by the act of lynching. In this respect it makes no difference whether in the statute it be called penalty, or compensation, or damages. Nor does it alter the case that the amount is fixed—that is, determined—by the statute, as in this case, or that it is to be found by a jury. Nor yet does it matter that it is declared to be "for the suppression of mob violence," as in this case, or "for compensating parties whose property may be destroyed in consequence of mobs or riots," as in the statute which was upheld in *Darlington v. New York*, 31 N. Y. 187, 88 Am. Dec. 248; because the imposition of any amount by authority of the state is, in either case, essentially penal and corrective in its nature. The party paying the money so recovered—that is, as a penalty—has no right to complain that the sovereign pays it over to the person injured, or pays it for the benefit of the minor children of a person suffering death by lynching, or to the next of kin of such person; nor that the sovereign provides that "such recovery shall not be regarded as a part of the estate of the person lynched, nor be subject to any of his liabilities." Nor is it a matter which can be put in issue for trial by jury; for the legislature does not authorize nor attempt a compensation of the injury according to the measure of the injury, to be settled on an inquiry of damages.

We have dwelt on this phase of the law more than we have thought necessary, because it is the source of the main contention in these cases. We shall very briefly advert to the remaining questions presented for our consideration.

In the nature of things, the limitations of the taxing power are not ordinarily, nor nec-

essarily, limitations on the police power; but the matter is set at rest for the cases at bar by the Constitution itself, which provides as follows: "The commissioners of counties, the trustees of townships, and similar boards, shall have such power of local taxation, for police purposes, as may be prescribed by law." Const. art. 10, § 7. This court held in *Sessions v. Crunkilton*, 20 Ohio St. 349, 358, that when local taxation is exercised for purposes which are demanded by, or are conducive to, public health, convenience, or welfare, it is within the constitutional meaning of "police purposes."

From what has been said, it will appear that this statute does not authorize nor attempt the taking of private property for a private use, nor even the taking of private property for a public use, in the exercise of the right of eminent domain. It authorizes the recovery of a penalty against the county, and authorizes an order to be made on the commissioners of the county, to include the same in the next succeeding tax levy. This, as we have seen, the legislature has power to enact, under the general police power, the general taxing power, and § 7, art. 10, of the Constitution. Hence § 19, art. 1, of the Constitution does not apply.

Again, this legislation is not an exercise of judicial power; because it does not adjudicate any transaction, case, or controversy which arose before its enactment, and of which the judicial tribunals might have been cognizant. It provides what shall be the law, binding upon the judicial department, after its enactment, and is not, in any sense, a trespass upon the province of the courts.

Having disposed of the foregoing objections to the statute, we assume that the contention that it provides for the taking of property without due process of law is already sufficiently answered. Many other questions have been raised and discussed. They are all such as might well have been addressed to the legislature, but they cannot be considered here. We conclude that the act is constitutional.

On the trial of the case of "Church, Adm'r, etc., against the Commissioners of Champaign County," in the common pleas court, the court charged the jury, in substance, that if the collection of persons who lynched Mitchell had assembled without any unlawful purpose, and afterwards committed the acts of violence which resulted in the death of Mitchell, the plaintiff could not recover, and the verdict should be for the defendant. The court afterwards made an explanation of this instruction, but the explanation did not explain, especially since the court instructed the jury that such unlawful purpose or design may be formed either before or at the time of assembling, "or it may be formed with the agreement of mutual assistance after they have assembled," and that "no formal or express agreement need be proved to establish such unlawful purpose, but it may be inferred from all the facts and circumstances proved in the case, and its existence and the time of its

formation are questions of fact for the jury." And the court not only refused to instruct the jury, as requested by the plaintiff, that the fact that Mitchell was lynched was evidence that the individuals who lynched him intended to lynch him, but instead the court charged the jury that the lynching of Mitchell might be considered as evidence of the unlawful intent, and also charged that such lynching did not raise a presumption of law that they assembled with that intent. The charge, when all taken together, seems, very plainly, to have told the jury that, if the crowd came together with an innocent purpose, and afterwards lynched Mitchell, they would not be a mob unless they had specifically agreed to be a mob after they had assembled. This charge is not merely seriously misleading. It is erroneous. It is an ancient doctrine in the criminal law, as old as Hale's Pleas of the Crown, at least, that, although the assembly was lawful, the persons assembled might unite in unlawful conduct and thus become rioters.

In "Caldwell against the Commissioners of Cuyahoga County," a demurrer to the petition was sustained in the court of common pleas, and the petition was dismissed. This judgment was affirmed by the circuit court. Besides the constitutional objections which we have already considered, the counsel for the commissioners urge that the petition is defective, because the plaintiff therein avers that he was struck by "a heavy glass insulator thrown at him by one of the mob," and was "shot through the leg with a leaden bullet, fired from a revolver in the hands of some of the mob." It is argued that as the shooting was done by a pistol in the hands of one person, and as the glass insulator was thrown by one person, it does not appear that the specific acts which occasioned the plaintiff's injuries were the acts of a "collection of individuals" or a "mob." We do not think that there is much force in this argument. It is clearly alleged in the petition that the plaintiff and his fellow workmen were assaulted by a collection of individuals, who had assembled for an unlawful purpose, and tried to exercise correctional power over the plaintiff and his fellows, without any authority of law, and that thus and thereby the plaintiff suffered a lynching at the hands of said mob. The petition contains a sufficient statement of a cause of action against the county, under the statute in question, and the details which are set forth in the petition are not inconsistent with the more general averments contained therein. The demurrer should have been overruled. We have carefully considered all of the arguments and authorities which counsel have submitted, and we are thoroughly satisfied with the foregoing conclusions.

In "*Commissioners against Church, Adm'r of Mitchell*," the judgment of the Circuit Court is affirmed.

In "*Caldwell against Commissioners*," the judgment of the Circuit Court and the judgment of the Court of Common Pleas are reversed.

NEW JERSEY SUPREME COURT.

Elmer RUNYAN

v.

CENTRAL RAILROAD COMPANY, *Pfif. in Err.*

(.....N. J.....)

- *1. When passengers in the passenger cars of a railroad have carried with them into such cars, and with them upon their journey, small packages of merchandise, in derogation of the common-law contract of carriage, the usage or practice to do so, in order that the passengers may rely upon it as a regulation of the railroad company that such packages can be so carried, must be so general, certain, uniform, and notorious, and it must be so clearly proved, that it can be concluded that the officers and agents of such company possessed knowledge of such usage, and acquiesced therein, in such manner that it became a part of the contract of carriage.
2. The proof of such usage must not only be clear and explicit, but it also must be distinguished from mere acts of accommodation. The mere fact that such acts of accommodation have been constantly permitted by the servants of the railroad company, not in obedience to duty or contract, but as a matter of form and indulgence, cannot compel their continuance. Such mere accommodation can be discontinued at any time.
3. A habit of one particular passenger to carry such package of merchandise into the passenger cars, and with him on his journey, will not constitute the usage or practice which can be relied on by passengers as a general regulation of the railroad company.
4. The proof of usage involves questions both of law and fact. It is a question of law what is a sufficient usage to bind parties. The usage must be strictly proved and construed; and when the facts are undisputed it becomes a question of law whether such usage has been established, and its binding force upon the parties. Under such circumstances, it cannot be left to the jury to determine whether the usage existed, or what operation or force must be given to it.
5. When the facts and circumstances are undisputed by which a custom or usage is sought to be established, and they are such that but one legitimate reasonable conclusion or inference can be drawn, it becomes a question of law, for the court to determine, whether such usage has been proved or not.
6. *Quære*: Can the habit of a single passenger to carry small packages of merchandise with him into the passenger car of a railroad company, and with him on his journey, with the knowledge of the servants of the company in charge of such cars, estop the company from examination of such merchandise in order to ascertain the contents, to justify his exclusion, without rea-

sonable notice to him to discontinue such habit?

(November 22, 1899.)

ERROR to the Circuit Court for Union County to review a judgment in favor of plaintiff in an action brought to recover damages for refusal to permit plaintiff as a passenger to carry packages onto defendant's train. *Reversed.*

The facts are stated in the opinion.

Messrs. Corbin & Corbin for plaintiff in error.

Messrs. McCarter, Williamson, & McCarter for defendant in error.

Lippincott, J., delivered the opinion of the court:

This is the same case, in a different form, as reported in the court of errors and appeals in 61 N. J. L. 537, 43 L. R. A. 284, 41 Atl. 367. The facts, up to a certain point, are the same as set forth in the opinion in that case. In that case the judgment of nonsuit was reversed because of an erroneous rejection of evidence offered by the plaintiff on the trial thereof, tending to show, or introductory to the proof of, a custom, usage, or practice on the part of the passengers of the defendant company to carry packages of merchandise with them into cars, to be transported with them on the journey, and to show that the company, with knowledge of the custom, usage, or practice, had acquiesced in it, and that thereby arose a regulation of the company that such packages might be carried as personal baggage. The plaintiff in this case had purchased a ticket from New York to Elizabeth, on a passenger train between those places, and attempted to enter the car of the defendant to go to Elizabeth. He then had with him a small satchel, containing sundry articles of use, and, besides, in his arms and hands, a 10-pound package of nails and a letter file, which he had purchased in the city of New York. The agents of the defendant company refused to allow him to enter the car with the package of nails and letter file. He insisted upon entering the car with these packages. He was prevented from doing so, and he eventually took his passage to Elizabeth on a train of the Pennsylvania Railroad, and he now sues to recover damages of the defendant company because of his exclusion from the cars of that company. He recovered a verdict against the company, upon which judgment has been entered, and the cause is now under review upon writ of error at the instance of the defendant. The court of errors and appeals, in its opinion (61 N. J. L. 537, 43 L. R. A. 284, 41 Atl. 367), held that the ticket of the plaintiff, which he had purchased for his passage, was but a token of his right to transportation, and that the plaintiff was a passenger, with all his common-law rights, and that at common law he was entitled to take with him for use his personal baggage appropriate to the journey

*Headnotes by LIPPINCOTT, J.

NOTE—As to right of a passenger to carry packages into a car, see also *Bullock v. Delaware, L. & W. R. Co.* (N. J.) 37 L. R. A. 417; and prior decision in the present case in 43 L. R. A. 284.
45 L. R. A.

and its object,—that is, not only wearing apparel for use and ornament, but also, other articles, all within reasonable limit, the use of which was personal to him during his journey, and in accomplishing its purposes.” The package of nails and the letter file in the hands of the plaintiff, under the evidence in the case, which is the same in this respect in the former case, were held in no wise to belong to the class of articles which he had the right to carry with him at common-law, as they plainly were not for the personal use of the plaintiff upon the journey, or in accomplishing its purpose. But the court, in treating of the offer of evidence which was erroneously excluded, said that “if the defendant company had, previous to the denial of admission of the plaintiff to their cars complained of, for a long time acquiesced in, and made accommodation for, the carriage of small packages of merchandise of its passengers as personal baggage so as to lead them to accept and rely upon its attitude in that respect as one of its regulations, that it could resume its rights under the law only after reasonable notice of its rescission of the regulation so made. It could not suddenly enforce the right resumed against passengers who were in good faith traveling in reliance upon the previous regulation, without reasonable notice, and ignorant of, and unprepared for, any change in it. We think that the questions asked were admissible as a step in the plaintiff’s proofs, and were wrongfully overruled, and for that reason that the judgment should be reversed.” Therefore the present case must be governed by this principle enunciated by the court of errors and appeals, that a custom, usage, or practice of passengers to carry small packages with them on the passenger cars, acquiesced in by a railroad company, embodies or ingrafts itself into the contract of carriage of the passenger as a regulation of the company, and can only be segregated from such contract by reasonable notice of the rescission of such regulation, or reasonable notice of the resumption of the common-law contract of carriage. This must be considered settled in this state, notwithstanding the fact that the questions which were proposed and excluded on the former trial were admissible, as it seems to me, upon an entirely different ground than that they tended to prove a custom or usage. It will be noticed that the whole stress of the decision in the former case was placed upon the fact that the usage or custom was of such a character as gave the passenger a right to rely on it as a regulation which for the time being became a part of the contract of carriage.

In the case *sub judice*, an attempt was made on the trial, in behalf of the plaintiff, to establish a custom, usage, or practice of passengers on this railroad to carry packages of merchandise into the cars with them on their journeys, and that provision had been made by the company for the carriage of such packages in this manner, and to accommodate the passengers in the exercise of this custom and usage, and that, by reason of these facts, the defendant company had ac-

quiesced in such custom or usage, and that upon its attitude in this respect the plaintiff had the right to rely, as one of its regulations, without notice of its discontinuance or rescission. The plaintiff in this case relies entirely upon the establishment of a previous custom, usage, or practice of passengers to carry small packages of merchandise with them into the cars and on the journey. This is made the basis of proof in this case, and it is not claimed that a right of recovery can stand upon any other ground.

After the evidence upon the part of the plaintiff had closed, a motion to nonsuit was made and refused. The first assignment of error is based upon an exception allowed to this refusal. The consideration of this assignment of error requires an examination into the question whether the evidence is of such a character as that it should be sent to the jury to determine whether such a custom, usage, or practice had been established, or, in other words, whether an implied regulation had been established that passengers could carry such packages with them. In the decision in the court of errors and appeals, the court was dealing with the overruling of an offer of evidence; and nothing at all was determined as to the character of proof necessary to establish the implied regulation, or necessary to establish the custom or usage from which acquiescence of the railroad company could be concluded, and upon which the plaintiff could rely as a part of his contract of carriage. It is clear that such a custom or usage is in derogation of the contract at common law. It is in derogation of the common-law right of the defendant, and strips it of a benefit of which it is possessed at common-law. It interpolates itself into the contract, and therefore the custom, usage, or practice must be strictly proved, the evidence adduced to prove it must be clear; it must be strictly construed; and great care should be exercised in allowing a custom, usage, or practice to change contracts either expressly entered into or implied at common law. *Southwest Virginia Mineral Co. v. Chase*, 95 Va. 50-57, 27 S. E. 826; *Metcalf v. Weld*, 14 Gray, 211; *Thornton v. Suffolk Mfg. Co.* 10 Cush. 376; *Lawson, Usages & Customs*, pp. 99-101; 27 Am. & Eng. Enc. Law, title *Usages and Customs*, p. 717. It is to be remembered that the right of the company to bar the plaintiff with merchandise was clear, unless it be by force of some custom, usage, or practice otherwise clearly established against the company, in which they have clearly acquiesced; and the burden is upon the plaintiff to establish such custom, usage, or practice, and acquiescence, by a preponderance of proof. He is the only one who testified to any facts in relation to this matter, and he commences by showing that racks were adjusted to the sides of the car, near the roof thereof, and that these racks would hold such packages as he was carrying, and other similar packages; but he himself testifies that they were suitable for, and intended also for, packages and articles for the personal use of the passengers on their journey, and to accomplish the pur-

pose thereof; and, therefore, keeping in mind the rule of the common law in reference to the contract of carriage, the proof of the fact that racks were there, into which small packages could be placed, does not even in the slightest tend to show that the railroad had made provisions in this way to carry merchandise. The presumption is the other way, and he testifies to nothing which overcomes it. It might just as well be insisted that the floor of the car between the seats was provided for this purpose, as well as such other unoccupied spaces which could be conveniently or inconveniently used for such purpose. Again, he does not testify beyond his own use of these racks, or any other part of the car, for such packages of merchandise. It may be well to refer specifically to his evidence in this respect, and perhaps well to set it out in its entirety. His whole evidence is as follows:

Q. Have the trains or cars that run between Elizabeth and New York any provision for parcels?

A. They have.

Q. What is it?

A. They have racks about that long and about that deep [witness illustrating].

Q. You say, "About that long." What do you mean?

A. About 2 feet 6 inches.

Q. Where are they generally located?

A. Along the upper side of the car, just above the windows; between the windows; a little higher than the windows.

Q. I think you have already testified that you have been accustomed to travel between New York and Elizabeth frequently?

A. I have, very often.

Q. And have you frequently carried parcels of this kind on the cars? (Here there was an objection to the question, and allowance, and exception.)

A. Yes.

Q. There never had been any objection to your doing this?

A. Never before.

Q. Can you tell us whether from your observation and experience prior to and up to and including the 30th day of December, 1896, passengers traveling between New York and Elizabeth, or other stations on the New York-New Jersey Central Railroad, were accustomed to, and were permitted to, carry packages?

A. Yes; four times as big as mine. (Here there was an objection to the latter part of the answer, and the witness said, "I will say yes, then," and the latter part of the answer is stricken out.)

Q. For how long a time did you observe such a habit on the part of the Central Railroad Company, allowing this to be done?

A. Ever since I have been traveling over the road,—for about ten years.

On cross-examination:

Q. You say you have seen passengers in the cars of the Central Railroad Company 48 L. R. A.

for the last ten years put their parcels in the racks?

A. Yes.

Q. You did not know what was in them, except your own parcels?

A. I did not.

Q. You have seen umbrellas, hats, coats, and cloaks put in the rack?

A. Yes.

Q. And shawls?

A. Yes.

Q. And small handbags?

A. Yes.

Q. Could you put such a handbag as you have in the racks?

A. Yes.

Q. But not very much bigger than that?

A. Oh, yes; twice the size of that.

Q. These racks are generally made of wire?

A. Yes; I believe they are.

Q. And are lightly constructed?

A. Yes; I think they are strong enough to hold a man's weight.

Q. Some of them are flat, and some of them round, are they not?

A. I have seen flat ones.

Q. And they are put up under the roof of the car, and you have seen people put paper parcels in them?

A. Yes; I have.

Q. They are the same sort of racks on the Central Railroad, substantially, as those used on all the roads?

A. Except there are different shapes.

And on redirect examination:

Q. Have you heard previous to this of any objection on the part of the railroad company to the carrying of parcels by the passengers owning them?

A. No, sir.

It will be noticed that the witness carefully avoided, except so far as his own acts were concerned, testifying to or attempting to identify any other parcels or packages of merchandise which he had seen other passengers carrying into the cars, and he does not testify that he had any knowledge what any packages he had ever seen other passengers carry contained. Upon his evidence no inference or conclusion can be drawn, either by the court or by a jury, with any reasonable degree of proof, that any packages carried by other passengers were such in their character as were at all prohibited the passenger in the exercise of his common-law right. For aught that appears in the evidence in the case, they may have been packages of articles intended for personal use on the journey, or to accomplish the object thereof. So far as the establishment of a custom is concerned, the evidence entirely fails to establish it. It is but necessary to consider fundamentally the necessary requisites of a legal custom controlling a contract, to determine that none of its elements exist in this case. Whatever the practice or usage contained in the evidence, it did not attain the force and effect of what is known as a "legal custom," which ingrafts itself

into a contract, and controls the rights of the parties thereto. If it is undertaken to distinguish between what is known as a "legal custom" and what is known as a "usage" or "practice," the same difficulty in relation to the sufficiency of the evidence arises. The plaintiff relies upon a general usage or a general practice to establish the attitude and acquiescence of the defendant company, upon which he must rely in order to sustain his right to carry this package of merchandise with him. If he fails in this proof, he fails in this action, because the case was tried upon the idea that acquiescence in a general usage or practice implied a general regulation which controlled the rights of the company in respect to all other passengers as well as to himself. The plaintiff was bound to establish such a general usage or practice by a preponderance of proof, in order to succeed in a recovery. The question is whether he has presented such facts—such evidence—as warranted the trial court in submitting the case to the jury, to ascertain whether the usage or practice required had been established. It is remembered in this connection that the rule is that, where the question is one of fair dispute, the jury must determine it. The conclusion has been reached that the proof of the usage or practice is not such that under the rules of law the question of its existence could be submitted to the jury. His evidence is not at all supplemented by other evidence, either positive or circumstantial. There does not appear in the case any evidence touching the existence of such a general usage, either so general that the acquiescence of the defendant could be presumed, nor any facts of acquiescence on the part of its officers, agents, or servants, and nothing to show any actual knowledge on their part. Of this class of evidence the case is entirely barren. There are no facts and circumstances which would in the slightest tend to show any knowledge on the part of the defendant company or its agents. Such evidence is quite material when the establishment of a usage is insisted upon. His testimony shows that he was not a frequent passenger. Sometimes he would go once a week, sometimes twice a week, and sometimes not for a month at a time; and he testifies to no acts, save his own, which have in the slightest any tendency to establish a usage. Whatever the facts may be, the evidence is barren of any which were not of his own creation; and he admits that he is ignorant of any facts which go to prove that anyone but himself ever carried any packages of merchandise in the passenger cars of the defendant company, and, so far as any express knowledge or acquiescence is concerned, the case is entirely silent. His own evidence is devoid of facts which even tend to exhibit the usage insisted upon, and an examination of his evidence shows that it relates to his own acts exclusively. They do not establish the usage or practice upon which he could rely, alike with other passengers, as establishing a regulation alike applicable to all. Whether there had existed in his own conduct theretofore as a passen-

ger such a practice or usage, applicable to him alone, with the knowledge of the company or its servants regulating such matters, as would estop the company from objecting to his carriage of these packages, and from excluding him from the cars with such packages, until after reasonable notice to him to discontinue such practice, is not the question at all, and no opinion is intended to be expressed upon that subject. Neither is it intended to express any opinion upon the question of whether such a usage had grown up of allowing the carrying of packages without requiring passengers to disclose whether they contained such articles as were prohibited by the ordinary common-law contract of carriage, and thus the defendant be prevented from excluding the passenger refusing to so disclose until reasonable notice of the rescission of such custom. These are not the questions raised or discussed, nor were such usages insisted upon as a right of recovery. The insistence was that a general usage had been established which implied acquiescence by the defendant company, and which gave rise to a general regulation, alike applicable to all passengers, to allow the carriage of packages of merchandise with them on their journey on the passenger cars. The usage, to be made a part of this contract of carriage, must be established by plain and explicit evidence. *Steward v. Scudder*, 24 N. J. L. 96-101. In the case of *The Reeside*, 2 Sumn. 567, Fed. Cas. No. 11,657, Justice Story says: "I own myself no friend to the almost indiscriminate habit of late years of setting up particular usages or customs in almost all kinds of business and trade to control, vary, or annul the general liabilities of parties under the common law, as well as under the commercial law. It has long appeared to me that there is no small danger in admitting such loose and inconclusive usage or customs, often unknown to particular parties, and always liable to great misunderstandings and misinterpretations and abuses, to outweigh the well-known and well-settled principles of law. And I rejoice to find that of late years the courts of law, both in England and America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them." In *Wood v. Wood*, 1 Car. & P. 59, it was held that a usage, to be binding, must be certain, uniform, and notorious, so that it must have been known to the parties. *Sewell v. Corp*, 1 Car. & P. 392; *Steward v. Scudder*, 24 N. J. L. 101. Usage cannot be proved by isolated instances, but must be so certain, uniform, and notorious that it must be presumed to have been understood by the parties as entering into and constituting a part of the contract. *Cope v. Dodd*, 13 Pa. 33; *Nichols v. De Wolf*, 1 R. I. 277. The contract by the common law was just as explicit in its terms as if it had been expressed in writing, and the evidence of usage to modify it must show it to be a general one in respect to the business or matter in which it is invoked. *Barton v. McKelway*, 22 N. J.

L. 165. Whatever the usage or practice which will control, or however long a time existed, the proof of it must be clear and explicit; and it must be, and is to be, clearly distinguished from mere acts of accommodation. Many things are done in the course of trade, by way of favor, which cannot be held to constitute usage entering into contracts of the parties. The fact that such acts have constantly been done, not in obedience to duty or contract, but as matter of form, cannot compel their continuance. 27 Am. & Eng. Enc. Law, title *Usages and Customs*, p. 717, and cases cited; *Citizens' Bank v. Grafstin*, 31 Md. 507, 1 Am. Rep. 66; *Metcalf v. Weld*, 14 Gray, 210. A habit of particular person or persons does not of itself constitute usage. *Ibid.* And they are to be strictly construed. *Ibid.* They must be of such generality and publicity in the line of business that the parties sought to be held would be presumed to have knowledge and acquiescence.

Proof of usage involves questions both of law and fact. It is a question of law what is sufficient usage to bind the parties; that is to say, for how long a time, at what places, and with what degree of uniformity it must have been observed. If the facts be disputed, then they become a matter for the jury; but, being undisputed, a given state of facts being found, it becomes a question of law, for the court to determine, whether such a usage as claimed existed, and its binding force upon the parties. Under such cir-

cumstances, it cannot be left to the jury to determine whether the usage existed, or what operation or force must be given to it. 27 Am. & Eng. Enc. Law, p. 732, and cases cited. In this case the facts as testified to by the plaintiff, the only witness in this respect, convince, beyond question, that no usage existed on the part of the passengers to carry packages of merchandise with them in the cars; that is, such packages as under the common law they had no right to carry. The facts testified to did not constitute a usage or practice, and were such as that knowledge could not be inferred on the part of the defendant's officers and agents that such packages were being carried as a practice by the passengers, or as a usage by the passengers. No acquiescence is established. I think upon that subject the case is barren of evidence or proof. The whole case is before the court, and the evidence in behalf of the defendant in no wise aids the defective proof of the plaintiff. The elements of proof in this respect were entirely lacking, and the cause should not have been submitted to the jury. The motion to nonsuit should have prevailed, and for this reason there must be a reversal.

Upon the undisputed independent proof of the defendant in defense of the action, several important questions have been raised and discussed, but they have not been considered.

The judgment must be reversed, and a venire de novo awarded.

PENNSYLVANIA SUPREME COURT.

N. D. JONES, Appt.,
v.
FOREST OIL COMPANY.

(194 Pa. 379.)

A gas pump may lawfully be used to increase the production of an oil well, although the production of wells on adjoining property is thereby diminished.

(January 2, 1900.)

A PPEAL by plaintiff from a decree of the Court of Common Pleas, No. 2, for Allegheny County refusing to enjoin the use of a gas pump in an oil well adjacent to complainant's property. *Affirmed.*

The facts are stated in the opinion of the court below by FRAZIER, J., which was as follows:

"The bill in this case was filed for the purpose of restraining the defendant by injunction from using what is known as a 'gas pump' for pumping oil from one of its wells

on the Boyce farm, in this county. From the bill, answer, and testimony taken at the trial, we find the following facts: First. The plaintiff is the owner in fee simple of a tract of land situate in Robinson township, this county, generally known as the 'W. H. Kelso Farm,' bounded by lands of Tidball, Boyce heirs, Neely, Schaffer, Linton, Noble heirs, and McCurdy, and containing about 126 acres. That the plaintiff has drilled six oil wells on said farm; two of these wells, known as 'Kelso Nos. 2 and 3,' being located 251 and 204 feet, respectively, from the south line of the farm. That well No. 2 was finished and began producing oil in October, 1891; No. 3 was finished and began producing in November, 1891. Second. That the Forest Oil Company is a corporation of this commonwealth, and, as lessee, has the exclusive right to drill for oil and gas on the farm of the Boyce heirs, which farm adjoins the Kelso farm of plaintiff on the south. On this farm the defendant has completed and is now operating several oil wells,—among

NOTE.—As to explosion of nitroglycerine by which gas is drawn from neighboring well, see *People's Gas Co. v. Tyner* (Ind.) 16 L. R. A. 443.

As to permitting the escape of gas from a well into the air, see *Hague v. Wheeler* (Pa.) 22 L. R. A. 141.

As to constitutionality of a statute prohibiting the waste of natural gas by allowing it to

flow into the air, see *State v. Ohio Oil Co* (Ind.) 47 L. R. A. 627, and to the same effect the decision by the Supreme Court of the United States in *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 44 L. ed. 729.

For right to drill wells near the boundary of land and draw oil from under the adjoining land, see *Kelley v. Ohio Oil Co.* (Ohio) 39 L. R. A. 765.

them, a well known as 'No. 1 Boyce,' which is located 162 feet from the line dividing the Kelso and Boyce farms, and is 366 feet south from Kelso No. 3, and 560 feet southwest from Kelso No. 2. The well known as 'Boyce No. 3' is located 200 feet south from the line dividing the Kelso and Boyce farms. Third. That the parties hereto have each leased numerous other farms adjoining the Boyce and Kelso farms for oil and gas purposes, and are now, and have been for some time, producing oil and gas therefrom; that the oil is now obtained from all wells in that field by pumping, the daily production of the wells being small. I further find that the sand or rock from which oil is obtained in this field is of a loose, coarse gravelly nature. Fourth. That Boyce well No. 1 in the early fall of 1898 was producing from twelve to fifteen barrels of oil per day, and that this production gradually fell off until December 1, 1898, when its output was seven and a half barrels, and in January, 1899, it was producing less than one per day. That in February, 1899, the well was shot and cleaned out, and shortly thereafter there was added to its pumping machinery and apparatus a device known as a 'gas pump.' This device is used by oil operators for the purpose of withdrawing gas from the wells by suction, thereby increasing the well's production of oil. That the distance from which these pumps will draw oil and gas depends upon the nature and quality of the oil-producing sand, its effect being felt to a much greater distance in a coarse and loose sand than in a hard and compact sand. That about one week after the use of the gas pump was commenced on the Boyce No. 1 the gas supply in Kelso wells Nos. 2 and 3 of plaintiff began to fall off, and shortly afterwards the oil production of these wells was decreased. That, after the use of the gas pump on Boyce No. 1 was discontinued, Kelso No. 2 went back to its former production, and No. 3 is now producing daily as much as formerly, within 55-100 of a barrel, and both wells now have an ample supply of gas. Fifth. The production of the three wells claimed to be affected by the use of the gas pump was as follows: Kelso No. 2, before use of gas pump on Boyce No. 1, five barrels in six days. Kelso No. 2, while using gas pump on Boyce No. 1, four and one fourth barrels in six days. Kelso No. 3, before using gas pump on Boyce No. 1, three and three fourths barrels in six days. Kelso No. 3, while using gas pump on Boyce No. 1, two and one half barrels in six days. Boyce No. 1, before using pump, produced a fraction less than 1 barrel daily; Boyce No. 2, while using pump, produced a fraction more than 1 barrel daily. Sixth. That the gas pump has been used in every oil field except that known as the 'Bradford Field,' but that it is not generally used except in failing and almost exhausted territory. That its use by one operator necessitates its use by others in the immediate neighborhood, if they desire to prevent the daily production of their wells from being decreased. That if pumps are placed on all wells the production of the

wells is neither increased nor diminished. These pumps can be purchased either in Pittsburg, or at various points in the oil fields, and cost from \$50 upwards, according to size. And that the pump used on Boyce No. 1 cost \$60. Seventh. That gas pumps were in use in the McCurdy field, the field in which the plaintiff's and defendant's wells are located, before being placed on the Boyce well No. 1; and have been in use in that field for more than one year previous thereto, and are now being used on wells in that field. Eighth. That the farms of plaintiff and defendant, described in findings 1 and 2, lie wholly in what is known as the 'McCurdy Oil Field,' which field was discovered in the year 1890, and has been operated since that time. That the production of the wells has largely decreased, and at this time the field is almost exhausted.

"Conclusions of Law.

"The question for determination in this case is a new one. Counsel have not referred us to any case in which this question was involved; nor have we, in our examination of the case, found any. The question here is to what extent an owner of oil wells may use mechanical devices for bringing the oil to the surface. In operating his own wells, may he use appliances which diminish the production of his neighbor's wells? It is not denied that a gas pump will to some extent affect the production of oil wells located in the immediate neighborhood of the well to which the pump is attached, if the sand from which the oil is obtained is of a porous, pebbly nature, as is the case in the McCurdy field. To some extent, the law governing the use of subterranean waters by the owner of the surface is applicable to the production of oil. In regard to wells and springs, the law is well settled that the owner of land is not entitled to recover for injuries to his wells and springs caused by the acts of an adjoining owner, if the injury results from a lawful exercise of the rights of the adjoining owner, on his own property, and without malice or negligence. An owner of land may dig a well upon his property, and if, in so doing, he taps the hidden flow of water, which supplies his neighbor's spring, it is a loss to the neighbor for which the law provides no remedy. *Lybe's Appeal*, 106 Pa. 626, 51 Am. Rep. 542. In *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 145, 57 Am. Rep. 445, 6 Atl. 456, it is said: 'It must be conceded, we think, that every man is entitled to the ordinary and natural use and enjoyment of his property; he may cut down the forest trees, clear and cultivate his land, although in so doing he may dry up the sources of his neighbor's springs, or remove the natural barriers against wind and storm. . . . In sinking his well he may intercept and appropriate the water which supplies his neighbor's well.' In this case the defendant has the exclusive right to bore for oil on the farm of the Boyce heirs adjoining a farm owned by plaintiff. The right being a lawful one, the defendant is at liberty to use all lawful means to obtain 'all the gas and oil contained in, or obtainable through,

the land.' *Westmoreland & C. Natural Gas Co. v. De Witt*, 130 Pa. 249, 5 L. R. A. 732, 18 Atl. 725. And to that end it may resort to the use of all known lawful modern machinery and appliances.

"The plaintiff's claim is that the use of a gas pump in the production of oil is unlawful, because, as he alleges, by its powerful suction the oil and gas are drawn from his adjoining farm, thereby decreasing his production. Plaintiff assumes that there is a certain fixed amount of oil and gas under his farm, in which he has an absolute property. True, they belong to him while they are part of his land; but when they migrate to the lands of his neighbor, or become under his control, they belong to the neighbor. On this point, in *Brown v. Vandergrift*, 80 Pa. 147, Judge Agnew, in referring to the production of petroleum, says: Its fugitive and wandering existence within the limits of a particular tract is uncertain.' And in *Westmoreland & C. Natural Gas Co. v. De Witt*, 130 Pa. 249, 5 L. R. A. 732, 18 Atl. 725, Justice Mitchell says: 'Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner.

... They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining or even a distant owner drills his own land and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his.' From these cases we conclude that the property of the owner of lands in oil and gas is not absolute until it is actually within his grasp, and brought to the surface. If possession of the land is not necessarily possession of the oil and gas, is there any reason why an oil and gas operator should not be permitted to adopt any and all appliances known to the trade to make the production of his wells as large as possible? If one may lawfully use a steam pump, may he not lawfully use a gas pump? In *Ballard v. Tomlinson*, L. R. 29 Ch. Div. 115, it was held that a landowner has the right to all of the percolating stream under his land, the court saying: 'This percolating water below the surface of the earth is therefore a common reservoir or source in which nobody has any property, but of which everybody has, so far as he can, the right of appropriating the whole. The principle of natural user does not apply at all. The plaintiff, if he has a right to use anything in nature, has a right to exercise that user by all the skill and invention of which man is capable; and it seems to me that as long as the plaintiff uses only lawful means as against his neighbor, however ingenious or however artificial those means may be, his right to appropriate the common source is not diminished because he 48 L. R. A.

uses the most artificial or most ingenious methods.' If it is lawful to take water from a substrata by the 'exercise of all the skill and invention of which man is capable,' we see no reason why it is not lawful to produce oil by those means, especially as the possession of the soil for purposes of tillage gives the owner no actual possession of the oil and gas underlying it. The evidence shows that the gas pump has been in constant use in all fields, except one, to a greater or less extent, since the discovery of oil; that its use has been generally recognized by all operators; and that it is only used on wells in territory which is almost exhausted. Gas pumps have been used in this field for almost a year past, within 1,500 feet of the wells of both plaintiff and defendant, without objection. Their cost is within the reach of all operators, and, when used by all, none are injured.

"It seems to me that if it is unlawful to use a gas pump, because its use may perhaps lessen the supply of gas in the well of an adjoining owner, and thereby diminish his production of oil, for the same reason it is unlawful to use a steam pump; and, if neither gas nor steam can lawfully be used in pumping, very few wells at this day will pay drilling and operating expenses.

"In view of the testimony and authorities above cited, we conclude that the use of a gas pump by defendant, under the circumstances of this case, is not an unlawful act that should be restrained by injunction; that the plaintiff is not entitled to the relief prayed for; and that the bill should be dismissed. And now, July 29, 1899, the preliminary injunction heretofore granted in this case is dissolved, and the bill dismissed, at costs of plaintiff."

Messrs. A. M. Brown and John D. Brown for appellant.

Messrs. E. W. Cummins and J. McF. Carpenter, for appellee:

Water, oil, and gas stand on the same footing and belong to the same class as regards proprietary and other rights pertaining to them.

Westmoreland & C. Natural Gas Co. v. De Witt, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724; *Brown v. Spilman*, 155 U. S. 670, 39 L. ed. 304, 15 Sup. Ct. Rep. 245.

No one has at any time any property in water percolating below the surface of the earth, even when it is under his own land; but everybody has a right to appropriate that percolating water, at least while it is under his own land, to the extent that he may take it all, so as to prevent any of it going on the land of his neighbor.

Ballard v. Tomlinson, L. R. 29 Ch. Div. 115; *Haldeman v. Bruckhart*, 45 Pa. 514, 84 Am. Dec. 511; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Lybe's Appeal*, 106 Pa. 628, 51 Am. Rep. 542; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 145, 57 Am. Rep. 445, 6 Atl. 453; *Williams v. Ladew*, 161 Pa. 283, 20 Atl. 54.

Per Curiam:

Though this particular question is some-

what of a novelty, the principles which control it are very familiar, and perfectly well settled. They are well expressed in the

opinion of the learned court below, and, on the findings of fact and conclusions of law there contained, *we affirm the decree.*

NORTH CAROLINA SUPREME COURT.

George CREDLE *et al.*, Admsrs., etc., of
Henry W. Wahab, Deceased, *et al.*,
v.

Steven B. AYERS, *Appt.*

(.....N. C.....)

1. **Mesne profits are recoverable from a defaulting vendee** in a land contract for the time that he withholds possession of the premises pending an action of ejectment against him, in which he gives a defense bond under Code, § 237.
2. **The measure of damages in ejectment for withholding possession of land is the actual rental value of the land, irrespective of what the defendant may have gathered from it.**
3. **The court may itself find the facts in question without a reference therefor, where a referee has failed to pass upon objections to evidence.**
4. **Evidence of the rental value of adjoining farms is not admissible on the question of the amount recoverable as mesne profits for withholding possession of land.**

(February 20, 1900.)

A PPEAL by defendant from a judgment of the Superior Court for Hyde County in favor of plaintiffs in an action to recover possession of real estate after defendant had defaulted in payment of the first instalment of the purchase money thereof. *Affirmed.*

The facts are stated in the opinion.

Messrs. Small & MacLean, for appellant:

Section 237 in no wise assumes that every plaintiff in an action to recover possession is also entitled to recover rents and profits. The object of the statute is only to provide for a judgment for rents and profits if the facts and circumstances of the particular case shall justify such a judgment.

Allen v. Taylor, 96 N. C. 37, 1 S. E. 462.

This is one of the actions in which the plaintiffs are seeking to recover the possession, and are not entitled to recover the rents and profits, and therefore there is no liability for the same as against the defendant or his surety.

The mortgagor is the equitable owner and the mortgagee is the legal owner of the land. The mortgagor is allowed to remain in possession and is entitled to reasonable notice to quit, and entitled to receive the rents and profits while he is in possession.

Hemphill v. Ross, 66 N. C. 477; *Pearsall v. Mayers*, 64 N. C. 549; *Wellborn v. Simon-ton*, 88 N. C. 268; *Killebrew v. Hines* 104 N. C. 188, 10 S. E. 159, 251; *Carr v. Dail*,

NOTE—As to right of doweress to mesne profits, see *note* to *Roan v. Holmes* (Fla.) 21 L. R. A. 180.

For mesne profits in case of cotenancy, see *note* to *Gage v. Gage* (N. H.) 28 L. R. A. on page 857.

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114 N. C. 284, 19 S. E. 235; *Hinton v. Wals-ton*, 115 N. C. 7, 20 S. E. 164.

If the mortgagor is left in possession, he is regarded for most purposes as the owner and takes the rents and profits.

Pingrey, *Mortg.* § 826; 15 Am. & Eng. Enc. Law, p. 812, note 3; *Teal v. Walker*, 111 U. S. 248, 28 L. ed. 417, 4 Sup. Ct. Rep. 420; *Freedman's Sav. & T. Co. v. Shepherd*, 127 U. S. 494, 32 L. ed. 163, 8 Sup. Ct. Rep. 1250; *Betz v. Verner* (N. J.) 7 L. R. A. note on p. 630; *Pom. Eq. Jur.* § 1204; *Story*, *Eq. Jur.* 12th ed. 1017; *Jones*, *Mortg.* 779, 771.

Messrs. Shepherd & Shepherd also for appellant.

Mr. Charles F. Warren, for appellees: After default and demand the possession of the vendee or mortgagor is unlawful.

Kiser v. Combs, 114 N. C. 640, 19 S. E. 664; *Hinson v. Smith*, 118 N. C. 503, 24 S. E. 541.

If the plaintiffs have lost title pending the action, the title is still lodged and vested in Makely, not a stranger, but a party plaintiff in this action, and Ayers has voluntarily surrendered to him the possession of the land. This meets the requirement that in actions of ejectment the plaintiff must show the legal title and the right of possession under it, both at the time the action is brought and at the time of the trial.

Arrington v. Arrington, 114 N. C. 116, 10 S. E. 278.

The mortgage of Makely was not a menace to Ayers. Makely was a party to the bond for title, and bound himself by its terms and provisions.

Ayers assumed the debts as a part of the purchase money, and became the principal debtor and primarily liable for them, Makely consenting. He made default in his payments, and by reason thereof, Makely, who would not otherwise have foreclosed, did foreclose, and Wahab and Credle lost the farm.

3 *Pom. Eq. Jur.* § 1206; 15 Am. & Eng. Enc. Law, pp. 834, 835, 837-840; *Woodcock v. Bostic*, 118 N. C. 822, 24 S. E. 362; *Kerr*, *Real Prop.* § 2166.

Where the right or title of the plaintiff in ejectment expired after the commencement of his suit, but before trial, and there was consequently no question of title or possession to try, the plaintiff was allowed to recover actual damages.

10 Am. & Eng. Enc. Law, p. 537; *Wilkes v. Lion*, 2 Cow. 333; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Jackson ex dem. Henderson v. Davenport*, 18 Johns. 295; *Brown v. Galloway*, *Pet. C. C.* 291, *Fed. Cas.* No. 2,006; *Doe ex dem. Morgan v. Bluck*, 3 Campb. 447; *Thrustout ex dem. Turner v. Grey*, 2 Strange; 1056; *Sutherland*, *Damages*, § 848.

Vendee in action of ejectment by vendor must give bond before answering.

Allen v. Taylor, 96 N. C. 37, 1 S. E. 462.

Vendor is entitled to judgment for possession unless vendee gives bond under the Code, §§ 237, 390.

The demand for possession and refusal, the bringing of the action of ejectment, and the execution of bond by defendant, are equivalent in law to an entry.

Dow v. Memphis & L. R. R. Co. 124 U. S. 652, 31 L. ed. 565, 8 Sup. Ct. Rep. 673; *Sage v. Memphis & L. R. R. Co.* 125 U. S. 361, 31 L. ed. 694, 8 Sup. Ct. Rep. 887; *Freedman's Sav. & T. Co. v. Shepherd*, 127 U. S. 494, 32 L. ed. 163, 8 Sup. Ct. Rep. 1250.

Clark, J., delivered the opinion of the court:

The vendee having defaulted in payment of the first instalment of the purchase money, due November, 1894, the vendors (and their mortgagee, Makely, who had joined in the contract of sale) brought an action of ejectment in December, 1894, at the end of thirty days thereafter, under the terms of the contract. The plaintiffs could have brought their action either (1) for possession of the land; (2) for sale and foreclosure; or (3) *in personam*, for judgment for the debt; or for all three. They elected to take the first, and have sued for possession and damages for withholding. *Allen v. Taylor*, 96 N. C. 37, 1 S. E. 462; *Silvey v. Aaley*, 118 N. C. 959, 23 S. E. 933.

The defendant contends that he is not liable for mesne profits, and relies upon *Killebrew v. Hines*, 104 N. C. 182, 10 S. E. 159, 251; *Carr v. Dail*, 114 N. C. 284, 19 S. E. 235; and *Hinton v. Walston*, 115 N. C. 7, 20 S. E. 164. Those cases hold that a vendee or mortgagor, before or after breach, who is permitted to retain possession, is entitled to the rents and profits (unless there is an express stipulation in the contract or mortgage to the contrary, as in *Crinkley v. Egerton*, 113 N. C. 444, 18 S. E. 669; *Jones v. Jones*, 117 N. C. 254, 23 S. E. 214); but here the withholding by the defendant, after action brought in December, 1894, was wrongful, and he became liable, like any other defendant in ejectment, for the mesne profits. For what other purpose than to secure such mesne profits is the defense bond required, under Code, § 237? Had the bond not been given, or not been raised to \$5,000, as required by the court (*Rollins v. Henry*, 77 N. C. 467), the plaintiffs would have had possession by default (Code, § 390; *Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269, and cases cited); or if the defendant had been allowed to defend without the bond, by reason of poverty, a receiver would have been appointed to secure the rents and profits (*Horton v. White*, 84 N. C. 297). This case differs from *Leach v. Curtin*, 123 N. C. 85, 31 S. E. 269, in that possession is here sued for and demanded in the complaint. The defendant surrendered possession to Makely in May, 1896. That did not release the defendant's liability for rents and profits for 1895, during the wrongful withholding, unless there had been a stipulation to that effect. Otherwise, any tenant in possession could wrongfully withhold possession of land 48 L. R. A.

after action brought, and enjoy the rents and profits till forced to trial, and then release himself and bond from liability for mesne profits by abandoning possession. In such case the plaintiffs take judgment for the mesne profits till they got possession, and for the title, but not for the possession. *Woodley v. Hassell*, 94 N. C. 157; *Clark's Code*, 3d ed. § 384. Under the former practice, in actions of ejectment, damages were recoverable only up to the time action was begun, but under the present system they are recoverable up to the trial. *Pearson v. Carr*, 97 N. C. 194, 1 S. E. 916; *Arrington v. Arrington*, 114 N. C., at page 120, 19 S. E., at page 279; 10 Am. & Eng. Enc. Law, 1st ed. p. 537; *Sutherland, Damages*, § 848. Here, up to surrender of premises, and by agreement in the order of reference, these are restricted to the rents and profits for the year 1895.

The mortgagee, Makely, foreclosed and bought the premises in May, 1896. That could have no effect upon the liability of the defendant for mesne profits during his wrongful withholding. This, being "fruit fallen," by the defendant's own authorities (*Killebrew v. Hines* and others, above cited), would go to the plaintiffs Credle & Wahab, and not to their coplaintiff and mortgagee, Makely. But the defendant is relieved from difficulty, as Makely is a coplaintiff, assenting to the recovery of judgment by Credle & Wahab, and, besides, his express agreement, releasing such mesne profits to them, is in the record.

The referee finds as a fact that the defendant, by his negligence and want of good husbandry, materially lessened the productiveness of the land, and exposed the crop to the depredation of hogs and cattle. He correctly held, as a matter of law, that the measure of damages was the actual rental value of the land, and not what the defendant actually gathered from the land. The language of the defense bond required by Code, § 237, is for payment of costs and damages for loss of rents and profits. The object is to put the plaintiffs, when wrongfully kept out of possession, *in statu quo*, by giving as compensation the rental value that could have been had if the possession of the premises had not been withheld. 10 Am. & Eng. Enc. Law, 1st ed. p. 542 (c).

The defendant further excepted because the referee failed to pass upon certain objections to evidence, and that the judge, instead of referring the case, found those facts himself. This was admissible (*Wallace v. Douglass*, 103 N. C. 19, 9 S. E. 453; *Brackett v. Gilliam*, 125 N. C. 380, 34 S. E. 444); and the defendant has had benefit of those exceptions in his exceptions to the rulings of the judge. Nor was there error in the referee rejecting evidence as to rental value of adjoining farms, as that would have raised collateral issues. *Warren v. Makely*, 85 N. C. 12; *Bruner v. Threadgill*, 88 N. C. 361; *Hinton v. Pritchard*, 98 N. C. 355, 4 S. E. 402.

Affirmed.

ILLINOIS SUPREME COURT.

Albert DALLEMAND *et al.*, Appts.,
v.

Isaac SAALFELDT, Admr., etc., of David
Saalfeldt, Deceased.

(175 Ill. 310.)

1. That failure to comply with an ordinance requiring the openings into elevator shafts to be kept closed when not in use was negligence, and was the proximate cause of the death of a person who fell down the shaft, may be found from evidence showing that such person, who was attempting to ascend on the elevator, was required to stand near the edge to operate it, and that the opening was protected only by a bar across, while the lining of the elevator shaft made a horizontal edge above the opening, so that one standing near the opening might come in contact with such bar or edge and be dragged from the elevator and precipitated down the shaft.

2. The dangers attendant upon the running of an unsafe elevator are not assumed by one employed to wash bottles in the basement, and whose duty does not involve the use of the elevator.

3. Whether or not an employee acts properly in obeying an order of a foreman to take bottles to an upper floor by the use of an elevator is a question for the jury.

4. A youth nineteen years old, employed only five to seven weeks at work in which he occasionally uses an elevator, is not, as matter of law, charged with knowledge that it is unsafe, where no instruction upon the matter is given him, and there is nothing to show that the danger is apparent.

5. An employee who performs a particular service by order of the foreman, which is outside the scope of his employment, does not thereby assume risks incident thereto unless they are such that an ordinarily prudent man would not encounter them.

(October 24, 1898.)

NOTE.—*Servant's right of action for injuries received in obeying a direct command.*

I. Introductory.

II. Direct orders, an immaterial factor, where the risk to which they exposed the servant was one of those assumed.

III. Contributory negligence, when not predicated of compliance with a direct order.

IV. Master and servant not upon the same footing.

V. Servant usually entitled to act on the assumption that his master has performed and will perform his duty.

VI. Rationale of the servant's right to rely on the master.

a. Order an implied assurance of safety.

b. Order tends to throw servant off his guard.

c. Necessity for prompt obedience.

d. Direct order tends to negative voluntariness of action.

VII. When direct orders will not justify the servant's obedience.

VIII. Negligence in respect to the manner of carrying out the order.

IX. Specific order no excuse unless the servant's act was induced by it.

X. By whose orders the master is bound.

I. Introductory.

The fact that the servant at the time when he was injured was complying with a direct, specific, personal order of his master, or his master's representative, has, it is well settled, a material bearing upon the question whether he can hold the master responsible. *Haley v. Case* (1886) 142 Mass. 316, 7 N. E. 877, holding that an instruction requested by the defendant, which enunciated the doctrine as to the effect of the plaintiff's knowledge, was properly qualified by the addition of words drawing the attention of the jury to the aspect of the evidence, though, as the cases to be cited below indicate, the significance of this fact is very different according as the defense of an assumption of the risk or of contributory negligence is relied upon.

The modifications of ordinary principles which

result from the introduction of the elements may be referred to three distinct conceptions:

1. That it is culpable to direct a servant to do something which for any reason exposes him to an extraordinary risk, of which the master has, and the servant has not, actual or constructive notice, unless the direction is accompanied by appropriate instruction and warning. The unfitness of the servant himself may make a risk extraordinary as to him which would not be so as to another servant. *Kehler v. Schwenk* (1892) 151 Pa. 505, 25 Atl. 130.

Thus, a railroad company is liable for injuries received by an inexperienced brakeman in making a dangerous coupling in the night-time, where the conductor refused to allow anyone else to make it, and up to the time of the accident kept persistently urging him to expedite the task, with full knowledge of the danger to which he was exposed. *Shadd v. Georgia, C. & N. R. Co.* (1895) 116 N. C. 968, 21 S. E. 554.

In *Sullivan v. India Mfg. Co.* (1873) 113 Mass. 396, where the defendant had a verdict, the court remarked, in discussing the correctness of the charge given by the trial judge, that where a boy fourteen years old is injured by moving cog-wheels, it is competent for him, although he obeys the order, to show that the employer was negligent in exposing him to peril which he was incapable of appreciating without proper instructions.

See also note to *James v. Rapides Lumber Co.*, 44 L. R. A. 33.—*The duty of a master to instruct and warn his servants as to the perils of the employment.*

2. Another of these conceptions is that the order has an effect analogous to that ascribed in some cases to a promise by the master to remove a certain cause of danger, that is to say, as an implied stipulation on the master's part that he will take upon himself the responsibility for any injuries resulting from obedience to the order.

3. That the circumstance of the directions having immediately preceded and occasioned the act of the servant may properly be deemed to justify the inference that there was neither that free and deliberate exercise of the will, nor that perfect appreciation of the nature and extent of the peril which, as is shown elsewhere, are essential elements, both of an as-

APPEAL by defendants from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

Statement by **Carter**, Ch. J.:

David Saalfeldt, a youth nineteen years old, was employed by appellants in their bottling works in the city of Chicago, to wash bottles. While thus employed, together with two other servants of appellants, in the basement of appellants' establishment, Cavanaugh, the foreman there, received an order from Casey, the foreman on the third floor, to send him (Casey) some bottles. The foreman shouted an order to the three bottle washers to send some bot-

tles to the third floor, without designating which of them should do it. Cavanaugh testified that Saalfeldt had no orders to send up bottles, but that there were standing orders that the two other men should send them, but Keating, the general manager, testified: "His duty was to wash bottles, clean them properly, and put them to drain. It was not his special duty to bring up and down bottles, but he did so at times. When he was asked to assist one of the foremen in taking a large load of bottles off, it was his duty to accompany the men. The bottles were carried in cases and barrels." Saalfeldt, however, put a case of bottles on the freight elevator, and went up, managing the elevator himself, and delivered the bottles to Casey on the third floor. He then returned to the elevator, to go up and get some bottles, as he said, from the fifth floor.

sumption of risks, and of contributory negligence.

The first of these conceptions has been discussed elsewhere, the rules appropriate to the supposed situation being, in fact, precisely the same from the standpoint whether the servant encountered the danger as a consequence of general or of specific orders. See *note* to *James v. Rapides Lumber Co. (La.)* 44 L. R. A. 33, on the duty of the master to instruct and warn servants of perils. As to injuries outside scope of services, see *note* to *Olson v. Minneapolis & St. L. R. Co. post*, 796.

The second rarely emerges in the language used by judges, and need only be noticed in passing.

See *Indianapolis & C. R. Co. v. Love* (1858) 10 Ind. 554, where the master is said to "assume the risk."

The phrase that "the master became subject to all the risk of an accident" is used in *Kehler v. Schwenk* (1892) 151 Pa. 505, 25 Atl. 130.

The third, which has an immediate reference to the mental condition of the servant, and to the quality of his overt act, will now be dealt with under convenient headings.

It is not necessary for the purposes of the general rule that the words of the superior servant which induced the injurious act should have been of a formally imperative character, but only that they should be reasonably susceptible of being construed as a specific order. A workman who said to the foreman when told to clear the track as a train was coming, "There are two stones on the track;" and was told, "It is time you were getting them off," is justified in considering this an order to take them off. *Stephens v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 221 (1888) 90 Mo. 207, 9 S. W. 589.

II. *Direct orders an immaterial factor where the risk to which they exposed the servant was one of those assumed.*

As the only necessary elements in an assumption of a risk are that the servant understood it and voluntarily incurred it, it is obvious that where the defense is relied upon, the fact that the servant was acting in obedience to a direct command when he undertook the work which led to his being injured will not avail him, where it appears that he appreciated the perils involved, and the command was not such as to amount to what the law regards as coercion. The master, therefore, incurs no special responsibility by ordering the servant to perform one of his ordinary duties in the regular course of

the work. *Davis v. Detroit & M. R. Co.* (1870) 20 Mich. 105, 4 Am. Rep. 364; *Wilson v. Tremont & S. Mills* (1893) 159 Mass. 154, 34 N. E. 90 (servant of full age injured while attempting to hold a bag which was being filled with cotton taken from a dryer over spikes driven in a beam so high that he could only reach it with his finger. The court said: "The mere fact that the defendant told him to take the cotton from the dryer did not make a concealed danger of that which was obvious before, or render involuntary his assumption of a risk which was incident to and part of his regular work, and which he knew to be such and understood").

Merely directing a servant to work, "quick" does not render a master liable for injuries received by him in operating a machine, the dangers from which were open and obvious. *Rudinsky v. French* (1897) 168 Mass. 68, 46 N. E. 417 (verdict for plaintiff rightly directed).

One ordered by his foreman to clean rolls in a mill, and who has equal knowledge with the foreman of the danger in attempting to clean them on the front side, assumes the risk of attempting to clean them from that side, whether he ought to have obeyed the order of the foreman or not. *Kean v. Detroit Copper & Brass Rolling Mills* (1887) 66 Mich. 277, 33 N. W. 395.

A trammer in a mine, who obeys directions to help fix a roof and take down some ground in a stope, and is injured by ore or rock falling from a roof which has just been tested in his presence, assumes the risk. *Paule v. Florence Min. Co.* (1891) 80 Wis. 350, 50 N. W. 189.

There is no doubt of the general rule that one who, knowing and appreciating the danger, enters upon a perilous work, even though he does so unwillingly and by order of his superior officer, must bear the risk; but where he is not aware of the danger, and such ignorance is consistent with due precaution, it is otherwise. *Ferren v. Old Colony R. Co.* (1887) 143 Mass. 197, 9 N. E. 608; *s. p. Cincinnati, N. O. & T. P. R. Co. v. Mealer* (1892) 6 U. S. App. 66, 50 Fed. Rep. 725, 1 C. C. A. 633; *Fitzgerald v. Honkomp* (1892) 44 Ill. App. 365.

In other words, he does not make himself an insurer of the servant's safety because the latter is requested to incur a danger, provided that danger is one manifestly incident to the employment. *Welch v. Brainard* (1895) 10 Mich. 38, 65 N. W. 667 (employer is not liable for an injury to a servant caused by the fall of ensilage 10 feet deep, resulting from the latter's undermining the same, although the form-

for Casey. Casey testified that he was looking at the elevator at the time, and in about half a minute after Saalfeldt started up saw him falling below the elevator down the elevator shaft. Saalfeldt fell to the basement, and was killed. The elevator stopped automatically a few inches above the fifth floor. No one saw Saalfeldt when he fell into the shaft, or testified how the accident happened.

At the time of the injury the following ordinances were in force in Chicago, and were given in evidence:

"§ 1571. Hoistways in which an elevator shall be used shall be constructed entirely of brick, from its lowest point, extending up through and 6 feet above the roof. All openings in such hoistway shall be protected by iron doors, and no wood shall be used upon the inside of such hoistways.

"§ 1572. Doors in such shaft shall be made of metal, and the catches or fastenings upon such doors shall be so placed that they can be opened only from the inside of the shaft and entirely under the control of the elevator operator.

"§ 1573. All openings not having doors shall have metallic frames, with prismatic lights in iron frames."

"§ 1614. All doors in shafts of elevators shall have latches so contrived that a key shall be used to unlatch the doors from the outside, but may have a knob or handle to open the door from the inside."

"§ 1653. It shall be the duty of every person owning, controlling, and operating or using, as owner, lessee, or agent, any passenger or freight elevator in any building within the corporate limits, to employ some competent person to take charge of and oper-

er directed the work to be done by undermining instead of by taking from the top).

A similar rule holds where the risk encountered falls under the description of extraordinary, provided only it was one which the servant must be taken to have fully understood. *Linch v. Sagamore Mfg. Co.* (1887) 143 Mass. 200. 9 N. E. 728 (servant injured by explosion of steam pipe caused by his letting steam into it while it was full of water, the danger of doing this being known to him. No recovery, though he was acting under orders and unwillingly). *Hoth v. Peters* (1882) 53 Wis. 405, 13 N. W. 219 (servant injured by fall of lumber from a car which was slippery from frost and ice cannot recover, though he assumed the place of danger by the direction of the foreman).

A carpenter sent to do some work in a brewery, and there directed to place a stringer in a certain room, from which he is driven out by the fumes of ammonia, who when ordered by the superintendent of the brewery to try again, saying that the work must be done, makes another attempt, in which he is seriously injured, assumes all the risk, and cannot recover. *Beltzmillier v. Bergner & E. Brewing Co.* (1888) 22 W. N. C. 33, 12 Atl. 599.

An employee of ordinary intelligence, who knows that trenches are liable to cave in, and that the one in which he is working has just partially caved in at a distance of a few feet, assumes the risk of returning to his work therein upon an order of the superintendent. *Showalter v. Fairbanks, M. & Co.* (1894) 88 Wis. 376, 60 N. W. 257.

Where the plaintiff has been using a handcar which for three months he has known to be defective, the obligations of the parties are not changed by the mere fact that when the time comes for suspending work at noon the foreman tells him and his fellow workmen to get on the car and go to dinner. The rule which relieves a servant from the consequences of continuing to work with knowledge of danger when he is ordered by the employer or his representative into a position of extra hazard has no application to such a case. *Burlington & C. R. Co. v. Liehe* (1892) 17 Colo. 280, 29 Pac. 175.

Speaking generally, therefore, the doctrine that a servant acting under the direct orders of the master or a superior coservant does not assume the risk incident to the work is not applicable except where the service is a special one, and not even then where the danger is open to a person of ordinary prudence and intelligence. *Stuart v. New Albany Mfg. Co.* (1895) 15 Ind. App. 184, 43 N. E. 961.

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III. Contributory negligence, when not predicated of compliance with a direct order.

Some judges, following out the analogy of the doctrine stated in the last section, have held that the rule by which contributory negligence is inferred, as matter of law, from the undertaking or continuance of work which entails an abnormal risk of which the servant was aware, involves the corollary that the addition of the element of a direct order will not prevent the defense from taking effect if the servant understood the perils to which he would be exposed in obeying that order. *Baker v. Western & A. R. Co.* (1882) 68 Ga. 609 (dangerously defective tool used under orders of foreman); *Bell v. Western & A. R. Co.* (1883) 70 Ga. 566 (hand-car known to be defective); *s. p. Nelling v. Industrial Mfg. Co.* (1886) 78 Ga. 260. See, however, *Central R. Co. v. De Bray* (1883) 71 Ga. 406.

But by almost all courts, including those who apply the rule just referred to (see *Pennsylvania*, *Illinois*, and *North Carolina* cases cited *infra*), it is held that the fact of the servant's having been directly ordered to do the act which caused the injury introduces into the situation a differentiating circumstance, which will render his contributory negligence a question for the jury in nearly every conceivable state of the evidence. It does not follow that because the servant could justify a disobedience of the order he is guilty of negligence in obeying it. *Stephens v. Hannibal & St. J. R. Co.* (1888) 96 Mo. 207, 9 S. W. 589.

In other words, if the master, knowing of the existence of abnormal dangers, commands and urges the servant to do something which involves exposure to him, and an accident happens in consequence of the servant's obedience, his previous knowledge of those dangers will not, of itself, prevent his recovering damages. *Moline Plow Co. v. Anderson* (1885) 19 Ill. App. 417.

Hence we find it laid down in a leading case that where, in obedience to an order, the servant performs a duty which, though dangerous, is not so dangerous as to threaten immediate injury, or where it is reasonably probable that the work may be safely done by using extraordinary caution or skill, he may recover if injured. *Patterson v. Pittsburg & C. R. Co.* (1874) 76 Pa. 389, 18 Am. Rep. 412, where the injury was caused by a defective switch. The court said: "Let it be considered that the switch in question was dangerous, yet doubtless many trains had passed over it safely, and hence a man of common prudence might well

ate the same, and any such person who shall neglect to comply with the provisions of this section shall be fined the sum of \$10 for each and every day of such neglect."

The doors to the elevator shaft were of wood, and could be opened either from the elevator side or the room side. "In the basement and fourth and fifth floors were folding doors, working on hinges, and, including both doors, about 6 feet wide. The first, second, and third stories had sliding doors the full width of the respective openings, and were operated by lifting or sliding up the door toward the ceiling, where it remained until pulled down. There was a bar across each door, from 2½ to 3 feet from the floor, which was attached by hinges at one end, and could be raised or lowered from either side or outside the elevator. No particular person had charge of the elevator or

its operation at the time of the accident, nor was any person employed by appellants for that special purpose." The doors were kept open in the daytime. Eisendrath, an architect, testified that the elevator carriage was in the regular form of a freight elevator,— "simply a large platform with the usual side-bars and cross-bars to hang the carriage on." Saalfeldt had run the elevator up and down a number of times—one witness testified to a dozen times, and another testified that he manifested ability to handle it,— but it did not appear from the evidence whether or not the proper and safer mode of using it had been explained to him, or whether he fully understood how to use or control it. The evidence tended to show that the deceased was an intelligent boy, sober, industrious, and careful. Appellee recovered a judgment for \$1,750. The appel-

conclude that, though it was more than ordinarily dangerous, yet many more trains might in like manner be passed over it safely. Under such a state of facts the conductor might properly rest upon the judgment of his superiors who requested him to continue its use, hoping that by extra care and skill he might avert accidents until the switch was reconstructed or properly repaired. On the other hand, if the defect was so great that obviously with the use of the utmost skill and care the danger was imminent, so much so that none but a reckless man would incur it, the employer would not be liable."

It would be a very unjust rule which would allow a master to shield himself from responsibility for the consequence of his own negligence by alleging those acts, not inevitably or immediately dangerous, to have been negligent, which his servant performed by his express order. *Hawley v. Northern C. R. Co.* (1880) 82 N. Y. 370, citing the Pennsylvania case which has also been approved in *Chicago & N. W. R. Co. v. Bayfield* (1877) 37 Mich. 205, and *Richmond & D. R. Co. v. Rudd* (1892) 88 Va. 648, 14 S. E. 361 (following the Pennsylvania case, where a brakeman who was engaged in uncoupling a car without a stick, in contravention of rules, but by order of the conductor, was thrown off the flat car where he was standing and run over).

To the same effect, see *Stuart v. Evans* (1883) 49 L. T. N. S. 138, 31 Week Rep. 706, per Williams, J.; *Illinois Steel Co. v. Schymanowski* (1896) 162 Ill. 447, 44 N. E. 876; *Norfolk & W. R. Co. v. Ampey* (1896) 93 Va. 108, 25 S. E. 226 (servant knew that appliances for coupling were defective, but believed that the coupling ordered could be safely made by hand); *Louisville, E. & St. L. Consol. R. Co. v. Utz* (1892) 133 Ind. 263, 32 N. E. 881 (fact that brakeman walked along the top of a train moving at a high rate of speed not necessarily a bar to his action, where he was acting under orders); *Indiana Car Co. v. Parker* (1884) 100 Ind. 181 (workman not necessarily negligent in changing from one part of his work to another); *Hawkins v. Johnson* (1886) 105 Ind. 20, 55 Am. Rep. 169, 4 N. E. 172 (rule that servant must at his peril choose the safer of two methods of doing his work, not applicable where a servant drove a wagon by express orders along a particular way, and was caught by a shaft which he was stepping over, having found that it was too low to admit of his passing underneath it while seated in the wagon); *Cullen v. Norton* (1889) 52 Ill. 9, 4 N. Y. Supp. 774 (servant ordered to work under 48 L. R. A.

derneath an unexploded blast); *Central R. Co. v. De Bray* (1883) 71 Ga. 406 (brakeman not necessarily negligent in getting off a moving train by the orders of the conductor); and decisions referred to *infra*.

In *Patton v. Western N. C. R. Co.* (1887) 96 N. C. 455, 1 S. E. 863, a section master ordered plaintiff to jump off a rapidly moving train (rate of speed not shown by evidence). The court declined to apply the general rule that such an act is negligent, saying: "It seems that this command was given and promptly obeyed without hesitation. It was rash, negligent, unreasonable, and unwarranted, but the danger to be encountered in obeying it was not so manifest and so great as, under the circumstances, to render a prompt obedience to it contributory negligence on the part of the appellant. An ordinary laborer on railroads—one of ordinary experience—might make a leap without injury; he might not unreasonably believe that he could, taking proper care, and especially so when commanded to do so by a railroad employee of long experience who had the right to command him in the course of his duty. While to jump from a rapidly moving train of cars is very hazardous, and ordinarily to do so is negligence, it is not contributory negligence where the plaintiff—a laborer on the railroad—is suddenly commanded by his employer or its agent to do so, in the course of his employment, and the command at once obeyed from a sense of duty and without waiting to think of and consider the hazard. Such a case is exceptional. The agent of the employer suddenly commands the laborer to do an extra hazardous act in the course of his duty—one that may, though not probably, be safely done by observing due care; one that must be done at once if done at all. The laborer obeys the command promptly, moved only by a faithful sense of duty, and as a consequence suffers serious bodily injury. In that case the injured party does not, in legal contemplation, contribute to his own injury. The facts and circumstances were such as that he might, when suddenly called on, not unreasonably believe that the command was a proper one, and that he ought to obey. Although the act was hazardous, it was not essentially dangerous."

In *Frandsen v. Chicago, R. I. & P. R. Co.* (1873) 36 Iowa. 372, it was held that the following instruction was properly refused: "If the jury find that the plaintiff was instructed by the section foreman to assist in removing the hand car, at a time when a person exercising ordinary care and prudence would reason-

late court has affirmed the judgment, and appellants have further appealed to this court.

McSsrs. Marcus Kavanagh and C. Le Roy Brown for appellants.

McSsrs. Moses, Rosenthal, & Kennedy for appellee.

Carter, Ch. J., delivered the opinion of the court:

The only error insisted upon by appellants is that the trial court erred in refusing to give to the jury the instruction asked by them, at the close of the evidence, to find the defendants not guilty. We are therefore called upon to decide whether or not the evidence, taken as true, and in its most favorable bearing in support of plaintiff's cause of action, with all proper inferences which

ably apprehend danger to his life or limb, he is not required to obey such instruction; and if the jury further find that he does follow such instruction and is injured, and that by disobeying the same the injury could, by the exercise of ordinary care and judgment, have been avoided, then the defendant is not liable." The court said: "Under the evidence it was not error to refuse this instruction. We would not say that it might not properly be given in some possible case. But the bare fact that a position to which an employee is ordered for the discharge of his duty is a dangerous one will not justify his disobedience, since he was employed for that duty, and its discharge may be necessary to save the lives of others, and a failure to do his duty, or disobedience under such circumstances, might be negligence on his part, rendering the employer liable to others injured thereby. To assume a position of danger is not necessarily negligence, but it is often a clear duty; and an employee in such case, even if injured, would have no right of action, since he was employed for such position of danger and paid for assuming it. If, however, the prior negligence of others unnecessarily created the danger, or, by reason of the negligence of others, the injury was caused to him, then he may have his action."

The rule that an employer who furnishes a proper machine is not liable to a servant injured while using it for an improper purpose does not apply in the case of an injury to an inexperienced employee who was using the machine in obedience to the direction of a superior whom it was his duty to obey. *Newbury v. Getchel & M. Lumber & Mfg. Co.* (1896) 100 Iowa, 441, 69 N. W. 743.

A fortiori is the servant entitled to have the case submitted to the jury where he does not know of the danger, but merely sees the physical conditions which create the danger. *Norfolk & W. R. Co. v. Ward* (1894) 90 Va. 687, 24 L. R. A. 717, 19 S. E. 849 (servant entered an unduly narrow ditch under peremptory orders to dig it deeper, and it caved in upon him).

In other cases the same principle is expressed by a restrictive form of statement, the servant being held entitled to obey a specific command of his superior without necessarily incurring the consequences of contributory negligence, unless the execution of that command involves a hazard which no ordinarily prudent person would have subjected himself to (*Newbury v. Getchel & M. Lumber & Mfg. Co.* (1896) 100 Iowa, 441, 69 N. W. 743); or unless a reason-

might be justifiably drawn from it, was so insufficient to support the judgment that it should, for that reason, be set aside. Whether or not the verdict should have been set aside as being against the weight of the evidence is, of course, a question of fact which has been finally settled. We have to do only with the question of law.

It is not contended that appellants were not in default in failing to comply with the ordinances of the city respecting elevators, but the first contention is that such default was not the proximate cause of the injury,—that no causal connection is shown between such default and the accident to the deceased. It is plain from the evidence that, had the ordinance been complied with, and the doors to the openings been kept closed, the accident could not have happened. There was no opening between the platform

ably prudent person in his situation and with his knowledge of the danger would not have obeyed the command (*Stephens v. Hannibal & St. J. R. Co.* (1888) 96 Mo. 207, 9 S. W. 589); or unless the danger is so "apparent" (*Nall v. Louisville, N. A. & C. R. Co.* (1891) 129 Ind. 268, 28 N. E. 183, 611; *Thompson v. Chicago, M. & St. P. R. Co.* (1883) 14 Fed. Rep. 564, 4 McCrary, 629; *Chicago Anderson Pressed Brick Co. v. Sobkowiak* (1890) 38 Ill. App. 531, Affirmed in (1894) 148 Ill. 573, 36 N. E. 572 [laborer injured by fall of overhanging bank]; *Stelmuhauser v. Spraul* (1893) 114 Mo. 551, 21 S. W. 515, 859, or "obvious" (*Texas & P. R. Co. v. Lewis* (1894; Tex. Civ. App.) 26 S. W. 873 [section-hand not negligent because he obeys orders to take hand-car off track when a train is close at hand]. Compare *Schroeder v. Chicago & A. R. Co.* (1891) 108 Mo. 322, 18 L. R. A. 827, 18 S. W. 1094), or "clear" (*Higgins v. Missouri P. R. Co.* (1891) 48 Mo. App. 553), or "glaring" (*Jenney Electric Light & P. Co. v. Murphy* (1888) 115 Ind. 568, 570, 18 N. E. 30; *Lebanon v. McCoy* (1895) 12 Ind. App. 500, 40 N. E. 700 [laborer obeyed order to remove timber lying near a negligently erected bridge]; *Norfolk & W. R. Co. v. Ward* (1894) 90 Va. 687, 24 L. R. A. 717, 19 S. E. 849 [day laborer injured by the caving in of the sides of a narrow excavation which the foreman ordered him to dig to a greater depth than was prudent]; *East Tennessee, V. & G. R. Co. v. Duffield* (1883) 12 Lea, 69, 47 Am. Rep. 319; *Huhn v. Missouri P. R. Co.* (1887) 92 Mo. 440, 4 S. W. 937; *Shortel v. St. Joseph* (1891) 104 Mo. 114, 16 S. W. 397 [case for jury where the laborer was injured by the fall of an arch while he was taking down the supports]; *Stephens v. Hannibal & St. J. R. Co.* (1888) 96 Mo. 207, 9 S. W. 589 [case for jury where section man tried to get two stones off the track when a train was approaching]; *Ballard v. Chicago, R. I. & P. R. Co.* (1892) 51 Mo. App. 453 [servant jumped from moving train]; *Fogus v. Chicago & A. R. Co.* (1892) 50 Mo. App. 250 [plaintiff injured by the fall of a large wheel which he was helping to move down an incline against his better judgment]; *Halliburton v. Wabash R. Co.* (1894) 58 Mo. App. 27 [plaintiff injured in following foreman's orders as to way of placing drive-wheels under a locomotive], or "imminent" (*Illinois Steel Co. v. Schymanowski* (1896) 162 Ill. 447, 44 N. E. 876), or "manifest" (*Larson v. Center Creek Min. Co.* (1897) 71 Mo. App. 512; *Last Chance Min. & Mill. Co. v. Ames* (1896) 23 Colo. 167, 47 Pac. 382).—that a person of that average prudence and intelligence whose

of the elevator and the walls of the elevator shaft through which Saalfeldt could have fallen, and it is clear from the evidence that he must have fallen into the shaft from the open space at the doors after the elevator passed up; and, taking the evidence as true, this could have happened only at the fourth floor, and as Casey, who had charge of the work on the third floor, testified that it was only about half a minute after the elevator started up from the third floor that he saw the deceased falling down the shaft beneath the elevator, we cannot say, as a matter of law, that it was an unjustifiable inference for the jury to draw that Saalfeldt was in some manner caused to fall from the elevator into the open space at the open doors of the fourth floor, and from thence into the shaft beneath. As we understand the evidence, the platform of the elevator

was supported by a framework of bars, but was not inclosed, and its entire front was open, and of the same width as the doors,—6 feet. There was a wooden bar across the open doors at the fourth floor, $3\frac{1}{2}$ feet from the floor. These were double doors 8 feet and 3 inches high, and swung on hinges opening into the room. At the top, when closed, they fitted against or into the lower edge of the wooden partition or lining of the elevator shaft that extended up to the next opening. The operating cable was 1 foot from the opening. We are of the opinion that it would not have been, in the eye of the law, an unreasonable conclusion for the jury to reach, from the evidence, that the combination of these open doors, with the bar across them and the horizontal edge of the partition projecting downward from above, were unsafe to one on the ascending

hypothetical conduct is the test of the existence or absence of negligence would have declined, under the given circumstance, to undertake the duty which necessitated the incurring of the danger in question.

In other words, if a danger is not absolute or imminent so that injury must almost necessarily result from obedience to an order, and the servant obeys the order and is injured, the master will not afterwards be allowed to defend himself on the ground that the servant ought not to have obeyed the order. *Chicago Anderson Pressed Brick Co. v. Sobkowiak* (1889) 34 Ill. App. 312.

This rule, closely viewed, amounts to nothing more than a statement that, in determining what is ordinary care on the part of a given individual, all the circumstances of his position should be regarded, including, in cases like the present, the servant's orders, the demands of his duty, the apparent risk to be met, and the purpose of his action, no less than his physical surroundings. Having weighed all these considerations, unless the case then discloses that the risk was such as would not be taken by a man of common prudence, so situated, the court cannot justly declare the assumption of that risk by a servant, in obedience to orders, as negligence. *Schroeder v. Chicago & A. R. Co.* (1891) 108 Mo. 322, 18 L. R. A. 827, 18 S. W. 1094 (where a section-man tried to get a hand-car off the track when a train was approaching).

The practical result of such a doctrine, when stated in terms of the servant's knowledge, is that the servant may maintain an action, unless he not only knows what is the risk to be encountered, but also that it will probably be attended with injury which he cannot avoid by the exercise of care and caution. This form of expression is found in *Halliburton v. Wabash R. Co.* (1894) 58 Mo. App. 27.

The rule is especially applicable where the servant is an immature boy, who objected to do the work, but ultimately did it with reluctance. *Kehler v. Schwenk* (1892) 151 Pa. 505, 25 Atl. 130.

IV. Master and servant not upon the same footing.

A fundamental principle which is frequently insisted upon in cases of the type reviewed in the last section, as well as in those in which a specific order is not an element, has been thus stated in a leading decision: "The servant does not stand on the same footing with the master. His primary duty is obedience,

and if, when in the discharge of that duty, he is damaged through the neglect of the master, it is but meet that he should be recompensed." *Patterson v. Pittsburgh & C. R. Co.* (1874) 76 Pa. 389, 18 Am. Rep. 412.

This essential inequality of the positions of the parties is deemed to warrant the deduction that "a prudent man has a right, within reasonable limits, to rely upon the ability and skill of the agent in whose charge the common master has placed him, and is not bound, at his peril, to set his own judgment above that of his superior." *Indiana Car Co. v. Parker* (1884) 100 Ind. 181; *Rogers v. Overton* (1882) 87 Ind. 410 (not negligence for a trackman to obey order of roadmaster to assist in bending rails without heating them—that being the proper method).

"The master and servant do not stand upon an equal footing, even when they have equal knowledge of the danger. The position of the servant is one of subordination and obedience to the master, and he has the right to rely upon the superior knowledge and skill of the master. The servant is not entirely free to act upon his own suspicions of danger." *Shortt v. St. Joseph* (1891) 104 Mo. 114, 16 S. W. 307.

Compare *Illinois Steel Co. v. Schymanowski* (1896) 162 Ill. 459, 44 N. E. 876; *McKee v. Tourtellotte* (1896) 167 Mass. 69, 48 L. R. A. 542, 44 N. E. 1071 (assurance of safety; *see* VI. a, *infra*); *Larson v. Center Creek Min. Co.* (1897) 71 Mo. App. 512; *Norfolk & W. R. Co. v. Ward* (1894) 90 Va. 687, 24 L. R. A. 717, 19 S. E. 849; *Stephens v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 221; *Colorado Midland R. Co. v. O'Brien* (1891) 16 Colo. 219, 27 Pac. 701 (laborer, not appreciating the risk, went on overloaded construction train); *Turner v. Norfolk & W. R. Co.* (1893) 40 W. Va. 675, 22 S. E. 83 (boy of sixteen years killed while riding on a hand-car through a cut in a curve, which his foreman had entered without sending a man ahead with a flag,—not negligent in obeying order to get on the car).

V. Servant usually entitled to act on the assumption that his master has performed and will perform his duty.

Where a servant obeys the orders of the person authorized to give them, he is not negligent because he assumes that his employer and his employer's agents are doing and have done their duty. *Stuart v. Evans* (1883) 49 L. T. N. S. 138, 31 Week. Rep. 706, *per Williams, J.* (in obeying the commands of the master the

elevator, and necessarily standing near the opening to work the cable; and when this condition of things, connected with the elevator, was maintained by the appellants in violation of the city ordinances, their negligence was sufficiently established. It seems not at all unreasonable that the jury should have found, not only that the defendants below were guilty of negligence, but that such negligence was the proximate cause of the injury. Both were questions of fact, and it would have been error had the court given an instruction to the contrary.

The evidence shows that Saalfeldt was an intelligent, sober, and careful youth, and from this evidence and the circumstances before them, and as there was no eyewitness to the accident, and no countervailing evidence, the jury were authorized to find that

he was, at the time of the injury, using due care for his own safety.

Illinois C. R. Co. v. Norwicki, 148 Ill. 29, 35 N. E. 358. And as the record is made up we must assume, if such an assumption were at all necessary, that the court below instructed the jury that the plaintiff could not recover unless they believed, from the evidence, that at the time of the accident he was observing due care, for the record shows that, after the court refused the instruction to find defendants not guilty, other instructions were asked and given on behalf of each party, but they are not in the record.

So far we have a case where there is such evidence tending to prove that the injury complained of was caused by the neglect and default of the appellants, and while appel-

servant, if he has no information or knowledge to the contrary, has a right to presume that the master has done, and will do, his duty towards him, and can rely upon the judgment and discretion of the master in its performance): *Southwestern Teleph. Co. v. Woughter* (1892) 56 Ark. 206, 10 S. W. 575. See also *Crowley v. Cutting* (1896) 165 Mass. 486, 43 N. E. 197 (servant ordered to steady a stone which is being hoisted by a derrick has a right to rely on the presumption that it is properly fastened): *McMillan Marble Co. v. Black* (1890) 89 Tenn. 118, 14 S. W. 479 (boy set to work under a dangerous projecting rock entitled to assume that it has been tested); *Cook v. St. Paul, M. & M. R. Co.* (1885) 34 Minn. 45, 24 N. W. 311 (floor of depot which had been injured by fire and was under repair gave way); *McGovern v. Central Vermont R. Co.* (1890) 123 N. Y. 280, 25 N. E. 373 (laborer in a grain elevator, who is sent for by the superintendent and ordered to enter one of the bins through a trap door at the bottom to detach from the sides any grain that may be sticking to the sides has a right to assume that the superintendent has previously ascertained that no grain has accumulated in such a position as to be dangerous to men working in the lower part of the bin); *Eldridge v. Atlas S. S. Co.* (1890) 58 Hun, 96, 11 N. Y. Supp. 468 (seaman entitled to assume that which can be safely operated—fact was specially emphasized that he was bound by his articles to obey orders): *Lebanon v. McCoy* (1895) 12 Ind. App. 500, 40 N. E. 700 (demurrer case); *Deweese v. Moramec Iron Min. Co.* (1893) 54 Mo. App. 476 (miner injured by fall of stone from a slope above a pit where he was sent to work, the evidence being that it was impossible by any reasonable care to prevent such occurrences altogether, but that the defendant's vice principal had failed to use proper precautions, in view of the fact that he knew that stones had been falling in uncommonly large numbers on the day of the accident); *Steinhauser v. Spraul* (1892) 114 Mo. 551, 21 S. W. 515. Affirmed on Rehearing in (1892) 114 Mo. 558, 21 S. W. 859 (domestic servant, ordered to ascend ladder, entitled to assume that it is not defective).

Or, to introduce a consideration which lacks this reason for the rule with the one just noticed, the servant has a right to assume that the master, or the master's representative, with their superior knowledge of the conditions, will not expose him to unnecessary perils. *Illinois Steel Co. v. Schymanowski* (1896) 162 Ill. 459, 44 N. E. 876. See also *Powers v. Fall River* (1897) 168 Mass. 60, 46 N. E. 408 (tripod, used instead of derrick for hoisting water pipes, fell 48 L. R. A.

into ditch which servant was digging. Servant's right to rely on superintendent's experience emphasized); *Halliburton v. Wabash R. Co.* (1894) 58 Mo. App. 27.

"Where an employer commands his employee, whom he assumes to direct, to use a defective implement in a particular way, leaving the latter no discretion as to the time or manner of its use, the employee may rely upon the superior knowledge and experience of the employer, unless the defect is so glaring and extreme as to make the danger of using the utensil apparent to anyone." *Jenney Electric Light & P. Co. v. Murphy* (1888) 115 Ind. 566, 18 N. E. 30.

In *Hawley v. Northern C. R. Co.* (1880) 82 N. Y. 370, the court argued thus: "We must take into account the plaintiff's position. His business was that of an engineer, and unless he obeyed orders and ran his engine he would have been obliged to abandon the defendant's service; of one thus situated the law should not be too exacting. We must assume that the officers of defendant, who had charge of the road, and must have known its condition, deemed it safe; and the plaintiff had the right to rely somewhat upon their judgment. Other employees of the road, and hundreds of passengers, were daily trusting their lives upon the road, and on the day of the accident he was ordered to, and did, precede a passenger train. Under such circumstances, was the plaintiff bound to set up his judgment against that of all others, and determine for himself that the road was absolutely unsafe for the passage of his engine, and abandon his position as engineer, or take upon himself the risk caused by defendant's negligence? We think under all the circumstances, and upon all the evidence, given on both sides, that it was a question for the jury to determine, whether the plaintiff acted with reasonable prudence and discretion in venturing to run his engine over the road."

Thus, obedience to an order is not contributory negligence in any case in which the servant has a right to assume that the master will warn him as to any danger which the service may involve. *Lofrano v. New York & Mt. V. Water Co.* (1890) 55 Hun, 452, 8 N. Y. Supp. 717; *Newbury v. Getchel & M. Lumber & Mfg. Co.* (1896) 100 Iowa, 441, 69 N. W. 743.

As to the circumstances under which an instruction is obligatory, see *Cleveland, C. C. & St. L. R. Co. v. Brown* (1893) 18 U. S. App. 10, 56 Fed. Rep. 804, 6 C. C. A. 142 (servant, ordered to cut in two one of the supporting posts of a shed, was ignorant that the shed would fall if the posts were cut).

So, although the general rule is that a serv-

lee's intestate was observing due care for his own safety, that the jury could, without acting unreasonably in the eye of the law, so find; thus making these questions of fact, and not of law. A more serious question is presented by the objection urged that Saalfeldt, as the servant of appellants, assumed the risk as one incident to his employment. The general rule of law on this subject is too well settled and understood to require comment or citation of authority, but whether a given case comes within the rule is not always easy to determine. As a question of fact it has, by the judgment of affirmance of the appellate court, been finally determined in this case that the risk was not incident to the duties which, by his employment, Saalfeldt undertook to discharge, or else that the facts were such as to bring it within an exception to the general rule; and

we are concerned only with the legal question whether or not there was any evidence on which such finding could reasonably be based. The witness Keating, who testified that he was the superintendent of appellants' whole business outside of the office, further testified that Saalfeldt was employed to wash bottles in the basement, that he had no other duties, and that he had nothing to carry upstairs or downstairs as a part of his duties. Cavanaugh also testified that that was no part of his duties. There was no one employed for the special purpose of running the elevator, but there was evidence that Saalfeldt had run it a number of times, and appeared to understand how to run it. The jury were warranted in finding, from the evidence, that it was no part of the duty of Saalfeldt to take cases of bottles up or down on the elevator,

ant is guilty of negligence, as matter of law, where he unnecessarily puts himself in a dangerous position, his culpability, under such circumstances, will be for the jury, where he is entitled to assume that he was ordered to take that position, because his duty required it. *Light v. Chicago, M. & St. P. R. Co.* (1894) 93 Iowa, 83, 61 N. W. 380 (railroad employee is not, as a matter of law, guilty of contributory negligence in attempting to mount a coal car in obedience to the orders of his superior, although he might have ridden safely to the place to which he was directed to go on the foot-board of the engine).

VI. *Rationale of the servant's right to rely on the master.*

The justifiability of the servant's reliance on the master may be referred to various conceptions, which, though distinct, are correlated.

a. *Order an implied assurance of safety.*

In the first place, the giving of a specific order by a master is said to amount to an implied assurance on his part that the work ordered may be done with reasonable safety. *Illinois Steel Co. v. Schymanowski* (1896) 162 Ill. 459, 44 N. E. 876; *Hawkins v. Johnson* (1886) 105 Ind. 29, 55 Am. Rep. 169, 4 N. E. 172; *Keegan v. Kavanaugh* (1876) 62 Mo. 232.

The question whether, as a matter of fact, a trainman knew, or had an opportunity of knowing, the methods employed by the company in running its train by telegraphic orders, becomes immaterial where the superintendent gave a peremptory order that his train should proceed regardless of the movements of another train traveling in the opposite direction. *Sheehan v. New York C. & H. R. R. Co.* (1883) 91 N. Y. 332.

But upon principles explained elsewhere, an employer who would prima facie be held liable for injuries caused by the breaking of a chain on the ground, when without making any inspection he urged his men forward with words which showed that in his opinion there was no danger, cannot be held liable if such an inspection, made with reasonable care, would not have declared the fact that there was a defect in the chain. *Hoffman v. Dickinson* (1888) 31 W. Va. 148, 6 S. E. 53.

An inexperienced foreigner, imperfectly acquainted with English, who, after a machine has acted in an unexpected manner, appeals for advice to the employer whose duty it is to instruct him, and receives an answer which he

supposes to amount to an instruction to go on as before, is not negligent in following that direction. *Bjbjlan v. Woonsocket Rubber Co.* (1893) 164 Mass. 214, 41 N. E. 265.

As to the cases in which an actual assurance of safety is coupled with the order, see *note to McKee v. Tourtellotte* (Mass.) *ante*, 542.

b. *Order tends to throw servant off his guard.*

Secondly, it is recognized that the order, having a natural tendency to throw the servant off his guard, may properly be considered to excuse him from the exercise of the same degree of care as would have been incumbent on him if the case had not involved this factor. *Hawkins v. Johnson* (1886) 105 Ind. 29, 55 Am. Rep. 169, 4 N. E. 172.

"When the master undertakes to direct specifically the performance of work in a particular manner, we cannot say, as matter of law, that the servant is not justified in relying to some extent upon the knowledge and carefulness of his employer, and in relaxing somewhat the vigilance which otherwise would be incumbent upon him. The servant's attention must be principally directed to the performance of the work in the manner in which he is ordered to perform it, and he may be in a less favorable position to see and judge of the surrounding dangers. *Haley v. Case* (1886) 142 Mass. 316, 7 N. E. 877.

c. *Necessity for prompt obedience.*

Thirdly, the courts take into account the fact that when a servant is suddenly called upon to execute a piece of work in a particular manner, under the eye of his employer, or his employer's representative, a careful observation of the conditions is generally quite impracticable if the direction is to be carried out with that promptitude which is expected from subordinates. *Haley v. Case* (1886) 142 Mass. 316, 7 N. E. 877; *Strong v. Iowa C. R. Co.* (1895) 94 Iowa, 380, 62 N. W. 799 (risk of using defective appliances not assumed, where the servant is acting in an emergency, under the order of a superior, where disobedience would imperil the lives of parties to whom the master owes a duty. *Passenger train might have been wrecked by delay. Brakeman required to couple a car to an engine with pilot bar and properly supported*); *Mason v. Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698 (brakeman ordered to couple cars on a dark night not bound to ex-

and that, therefore, the dangers attending that work were not incident to his employment, nor assumed by him by virtue of his contract of service with his employers.

But it is said that Saalfeldt volunteered to take the bottles up on the elevator without any order to do so by anyone having authority so to direct, and that in so doing he voluntarily assumed the risk also. We agree with the appellate court that it was a question of fact for the jury whether or not Saalfeldt acted voluntarily in taking the bottles up on the elevator, or in good faith upon the order of Cavanaugh. Cavanaugh had charge over the men in that department, and gave the order to take up the bottles. Saalfeldt had done such work before, and had not been forbidden to do it. Cavanaugh, the foreman, did not specify which of the three men should obey him, and clearly the jury

may have found that the order was addressed to the three men, to be obeyed by any one of them. Whether Saalfeldt properly acted in obedience to such order or not was clearly a question of fact for the jury, and not of law for the court.

It is, however, further contended that, whether the risk was incident to his contract of employment, and therefore one assumed by him, or whether it was incident to the special service which he undertook to perform in obedience to orders, the judgment is erroneous, because, it is said, he had knowledge of the condition of the elevator and its unsafe surroundings, and, having undertaken to perform it with such knowledge, he could not hold his employers, the appellants, liable. He had been engaged in his work for appellants from five to seven weeks. The evidence does not show that they ever

amine coupling); *Dillingham v. Harden* (1894) 6 Tex. Civ. App. 474, 26 S. W. 914 (servant not bound to examine a skid which he is directed by his foreman to use in lowering rocks into a pit).

A servant "does not stand upon the same footing as his master, as respects the matter of care in inspecting and investigating the risks to which he may be exposed. He has a right to presume that the master will do his duty in this respect, and, therefore, when directed by proper authority to perform certain services, or to perform them in a certain place, he will ordinarily be justified in obeying orders, without being chargeable with contributory negligence or with the assumption of the risks of so doing. *Cook v. St. Paul, M. & M. R. Co.* (1885) 34 Minn. 45, 24 N. W. 311.

In *Greenleaf v. Illinois C. R. Co.* (1870) 20 Iowa, 14, 4 Am. Rep. 181, where a brakeman was killed owing to the want of a ladder on a car, the court argued thus: "Though decedent knew of the defective car, if he acted under instructions and directions of a superior the action would by no means thereby be defeated. Under such circumstances, compelled, as he necessarily would be, to act with promptness and dispatch, it would be most unreasonable to demand of him the thought, care, and scrutiny which might be exacted where there is more time for observation and deliberation. Thus, if a ladder is usually found upon such cars, in the haste necessarily attendant upon uncoupling cars and stopping the train he was not bound to deliberate and settle in his mind that a like means of ascending the car was on this one, though he knew by prior observation that it was wanting."

In *Chicago, R. I. & P. R. Co. v. McCarty* (1896) 49 Neb. 475, 68 N. W. 633, the court said: "Our conclusion, after a consideration of the subject, is that it is a harsh and unreasonable rule which charges a servant, when commanded to perform an act by his master, with the duty of at once determining whether or not the act can be safely performed, and then performing it at his peril, or refusing to perform it at the expense of losing his employment. The risk incurred by obeying a negligent command of the master is not one ordinarily incident to the servant's employment, and is not an assumed risk, because negligence on the part of the master is not presumed to be a feature of the employment. It is true that where ample time exists for examination and reflection a servant may not, beyond a certain limit, continue in the service, performing dangerous acts, 48 L. R. A.

except at his own risk; and it is this consideration which governs the cases holding that the continued use of defective appliances without protest and a promise by the master to remedy them discharges the master from liability. With the case, however, of a command given suddenly, which must be obeyed immediately or not at all, a different question is presented. The servant is confronted with a new danger, one not contemplated when he entered the employment, and one not made a part of it by continued use. The servant has certainly, in the first place, a right to presume that the master gave the command advisedly and in the exercise of due care. If the servant disobey, he forfeits his employment; and even though he be aware of the danger, whether or not it is negligence for him to obey depends upon circumstances. The act may be so foolhardy, so clearly entailing disaster, that the only reasonable course is to disobey. The test of negligence is in such cases, as in others, whether or not a man of ordinary prudence so situated would obey or refuse. In many cases a man of ordinary prudence, compelled to decide instantly, even though aware of the existence of danger, would prefer obedience, and would take the risk."

A carpenter employed by a railroad company who obeys a hasty order to pick up his tools, bedding, etc., and put them on a push car and to get on, does not assume the risks arising from the fact that the car, which then starts down a heavy grade, is not provided with proper appliances to control its velocity. *Miller v. Union P. R. Co.* (1882) 12 Fed. Rep. 600, 4 McCrary, 115.

A servant who obeys a hurried order of his foreman to take hold of a car and push it is not, as a matter of law, guilty of contributory negligence in failing to look ahead and observe an obstruction near the track. The want of time for deliberation, and the position he would naturally assume in doing the work, are a sufficient reason for not holding him strictly to the duty of using his senses to discover danger. *Stackman v. Chicago & N. W. R. Co.* (1891) 80 Wis. 428, 50 N. W. 404.

A brakeman acting in an emergency which gives no time for reflection may be found by the jury not chargeable with contributory negligence in attempting to mount and stop a car going at dangerous speed, when ordered to do so by the conductor, although the ground at that place was uneven and he was unable to see well because his lantern had gone out. *Fox v. Chicago, St. P. & K. C. R. Co.* (1892) 86 Iowa, 368, 17 L. R. A. 289, 53 N. W. 259.

gave him any instructions regarding the use of the elevator, or any information respecting the dangers to be guarded against in using it; and in view of the facts and his inexperience and youth it cannot be said, as a matter of law, that there was no evidence upon which a finding could be based that he did not have knowledge of the danger, or that the danger was not apparent. Whether or not the danger was apparent, or he had knowledge of it, were questions of fact. Besides, the burden of showing such knowledge was on the defendants below. 14 Am. & Eng. Enc. Law, p. 844. Again, if the fact was—and in support of the judgment, there being evidence to the point, we will assume the jury so found—that Saalfeldt performed this particular service by order of his employers, given through the foreman, and that it was outside the scope of his employment, then the risk would be one which he did not, by virtue of such employment, necessarily as-

sume. 2 Bailey, Master's Liability for Injuries to Servant, §§ 3476, 3502; 14 Am. & Eng. Enc. Law, pp. 856, 857; *Linderberg v. Crescent Min. Co.* 9 Utah, 163, 33 Pac. 632; *Pittsburgh, C. & St. L. R. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187, and in such case, although he had knowledge of the dangers attending the use of the elevator in its unsafe environment, he was not bound to disobey on pain of assuming the risk, but might perform the service, and hold his employers liable, unless the danger was such that an ordinarily prudent man would not encounter it. *Ibid.*; *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. 876.

However weak the plaintiff's case may have been upon the evidence, we are unable to find, as matter of law, that any fact necessary to a recovery has been found without evidence to support the finding.

The judgment must be affirmed.

A brakeman on a freight train is not guilty of negligence in attempting to make a coupling between two cars of unequal height with a misshapen link which he had been directed by the conductor to take from the ground and use, when, owing to darkness and storm, he did not discover the defect in the link in time to avoid an accident. *Denver, T. & G. R. Co. v. Simpson* (1891) 16 Colo. 55, 26 Pac. 339.

Where one gang of men engaged in raising a track by putting stone under it on the sudden approach of a train is ordered to take off some stone remaining on the track, and immediately attempts to do so, without opportunity to observe and calculate the distance to the train or its speed, he is not necessarily guilty of contributory negligence such as will defeat his recovery. *Stephens v. Hannibal & St. J. R. Co.* (1888) 96 Mo. 207, 9 S. W. 589. See also *Kain v. Smith* (1882) 89 N. Y. 375.

The converse principle is observable in the ruling that it was negligence *per se* to take unnecessarily a dangerous position without the excuse of an urgent command leaving no time for investigation. *Nolan v. Shickle* (1879) 69 Mo. 336; *Last Chance Min. & Mill. Co. v. Ames* (1896) 23 Colo. 167, 47 Pac. 382. See also *Wanner v. Kindel* (1893) 4 Colo. App. 168, 34 Pac. 1014 (employer not liable for an injury to an employee using a circular saw, merely by reason of an order that he shall not waste so much time in cleaning the logs before sawing them, when he does not in any wise so command him to proceed as to preclude him from the exercise of due care in putting the logs in proper condition to be cut up).

A shout by the gang foreman of "All aboard" is not an order of that peremptory character that justifies one of his subordinates in taking such a manifest risk as that of mounting a moving train. *Novock v. Michigan C. R. Co.* (1886) 63 Mich. 121, 29 N. W. 525.

This consideration has been held to excuse a servant's temporary forgetfulness of a danger the existence of which he had previously ascertained.

In *Lee v. Woolsey* (1885) 109 Pa. 124, where the master was personally directing the work, and giving emphatic orders to move quickly, the court said: "If an employee is, in haste, called upon to execute an order requiring prompt attention, he is not to be presumed necessarily to recollect a defect in machinery, or a particular danger connected with his employment, so as to avoid it. A prompt and faithful employee, suddenly called upon by a 48 L. R. A.

superior to do a particular act, cannot be supposed to remember at the moment a particular danger incident to its performance, of which he had previous knowledge; and it would be most unreasonable to demand of him the thought and care which might be exacted when there is more time for observation and deliberation" (servant failed to observe that planks had been removed over a space through which he was engaged with tackle and horse in hoisting timbers). See also *Greenleaf v. Illinois C. R. Co.* (1870) 29 Iowa, 14, 4 Am. Rep. 181 (brakeman not necessarily negligent in failing to remember that a car which he was about to uncouple had not the usual end ladder).

It is worth remarking, however, that, upon general principles, excusable forgetfulness of a known danger would not avail the servant, even if he acted under orders, supposing the defense of assumption of risks to have been relied upon by him (see *II. supra*), and also to have been offered in combination with the circumstances of a protest by the servant. The addition of the latter element, of course, furnishes an additional reason why the court should not declare him to be, as matter of law, culpably negligent. See *East Tennessee, V. & G. R. Co. v. Duffield* (1883) 12 Lea, 63, 47 Am. Rep. 319 (laborer, after protest, used defective hammer where there was need of quick action to get track ready for an expected train); *Chicago Anderson Pressed Brick Co. v. Sobkowiak* (1890) 38 Ill. App. 531 (servant ordered to proceed after he had objected to work on account of its danger).

But here, again, the servant would not be allowed to recover on this ground where the defense raised is an assumption of the risks. See *supra*, II.

d. Direct order tends to negative voluntariness of action.

The fact that the master urged or coerced the servant into danger is not infrequently mentioned as an exception cutting down the effect of the general rule that, if the servant continues in an employment with knowledge of abnormally dangerous conditions, he cannot recover for an injury caused by their existence. *Patterson v. Pittsburg & C. R. Co.* (1874) 76 Pa. 389, 18 Am. Rep. 412; *Pennsylvania Co. v. Lynch* (1878) 90 Ill. 333; *Chicago, R. I. & P. R. Co. v. Clark* (1882) 11 Ill. App. 104.

When a servant does not assert his judgment in opposition to the supposed better judgment

or stronger will of his master, the law usually allows a jury to determine whether he voluntarily assumed the risks, or acted in reliance upon the judgment of his master, or out of a constrained acquiescence in the rule of obedience which his relation as servant imposes. *Cullen v. Norton* (1889) 52 Hun, 9, 4 N. Y. Supp. 774 (set to work underneath an unexploded blast which went off).

The cases illustrating this exception from a positive standpoint are not numerous. Where the servant is of mature years, the compulsion which it contemplates will only be inferred in circumstances of a very unusual description. *Wells & F. Co. v. Gortorski* (1893) 50 Ill. App. 445 (laborer understanding only a foreign language, pushed into a position of danger by the foreman, and coerced to remain there by fear of the latter, superinduced by his language, actions, and position, which was greater than his fear of the danger of the place, and overcame his own judgment, may recover for injuries sustained).

The case of a young child is different. He cannot be expected to have the will power of a grown man in resisting his master's orders; and where the evidence tends to show coercive influence the opinion of the jury should be taken upon the question whether his compliance with the order was negligent.

In *Kehler v. Schwenk* (1892) 151 Pa. 505, 25 Atl. 130, where a boy of fourteen was injured, the court referred to *Patterson v. Pittsburg & C. R. Co.* (1874) 76 Pa. 389, 18 Am. Rep. 412, *supra*, and said: "The principle of this decision would exonerate the plaintiff in the present case from a charge of contributory negligence in engaging in a palpably dangerous service, even if he were a full-grown adult, because there was other testimony to the effect that the appliance might be used with safety although apparently dangerous; but when his youth and physical weakness are considered, and the fact that he was ordered to do this work, and that he objected to doing it, and went reluctantly to the service, it cannot be doubted that he is entirely free from any charge of contributory negligence, and also that the master became subject to all the risk of an accident. He was but little more than a child, either in years or in strength, and could not be expected to have the will power of a full-grown man in resisting his master's orders. He cannot be held, therefore, as one who voluntarily engages in a dangerous service, especially by a master who specifically directed him to do the hazardous work. On the contrary, the very fact of the plaintiff's youth and weakness is one of the elements that go to make up the charge of negligence on the part of the defendant in putting such a person upon such a service. It seems to us the master, in such circumstances, and not the servant, must be held to have assumed the risks of the service."

In *Tagg v. McGeorge* (1893) 155 Pa. 368, 26 Atl. 671, it was held that, where a foreman ordered a boy thirteen years old to hurry in his work of cleaning a dangerous machine in order that he might clean another machine which was ordinarily attended by another boy who was absent, and the boy was injured in the work, it is not improper for the court to charge that, if the boy was not aware of the danger, and his will was subjected to that of the foreman, and he obeyed him because he thought the foreman knew better, or because he was afraid to disobey, the jury might find for the plaintiff.

In some cases the fear of the servant that he may lose his situation if he disobeys the order is referred to as one of the factors in the case. *Brennan v. Front Street Cable R. Co.* 48 L. R. A.

(1894) 8 Wash. 363, 36 Pac. 272; *Fogus v. Chicago & A. R. Co.* (1892) 50 Mo. App. 250.

The authorities are divided upon the general question whether legal compulsion can be inferred from this circumstance (see note to *O'Maley v. South Boston Gaslight Co.* (Mass.) 47 L. R. A. 161, *Volenti non fit injuria as a defense to actions by injured servants*), and it seems doubtful whether its complexion can be altered by the fact that it is an element in a case in which a direct order was given.

VII. When direct orders will not justify the servant's obedience.

The general limits of the doctrine discussed in the preceding sections may be readily defined by giving an appropriate turn to the language employed in stating it. Thus, it is held that, although the servant may have been directly commanded or urged to undertake the work from which the injury resulted, he cannot claim an indemnity where the danger to be encountered was at once so obvious and so serious that no prudent man would have incurred it.

In *Patterson v. Pittsburg & C. R. Co.* (1874) 76 Pa. 389, 18 Am. Rep. 412, the court remarked: "We are not to forget that the servant is required to exercise ordinary prudence. If the instrumentality by which he is required to perform his service is so obviously and immediately dangerous that a man of common prudence would refuse to use it, the master cannot be held liable for the resulting damage. In such case the law adjudges the servant guilty of concurrent negligence, and will refuse him that aid to which he otherwise would be entitled."

Compare *Moline Plow Co. v. Anderson* (1885) 19 Ill. App. 417; *Shortel v. St. Joseph* (1891) 104 Mo. 114, 16 S. W. 397; *Southwestern Telegraph Co. v. Woughter* (1892) 56 Ark. 206, 19 S. W. 575; *McDermott v. Hannibal & St. J. R. Co.* (1885) 87 Mo. 285 (disapproving of an unqualified instruction to the effect that an act done in obedience to orders is not negligent).

The order, that is to say, must, if it is to serve as a justification, be in a matter with regard to which the servant has a right to rely on the superior judgment of the master. *East Tennessee, V. & G. R. Co. v. Duffield* (1883) 12 Lea, 69, 47 Am. Rep. 519.

The courts decline to lay down a rule of law purporting to define accurately how dangerous a proposed action would have to be before a servant receiving an order from his master to perform it would be required to disobey under pain of being chargeable with negligence. *Chicago Anderson Pressed Brick Co. v. Sobkowiak* (1890) 38 Ill. App. 531.

But when the servant's culpability is clear, they will not hesitate, as in other cases where the defense of contributory negligence is raised, to declare, as matter of law, that there can be no recovery where an employee undertakes to get upon an engine while it is running at the rate of from 6 to 12 miles an hour, as this is such a rash and dangerous attempt as to require a consult, although he was acting under orders. *Roul v. East Tennessee, V. & G. R. Co.* (1890) 85 Ga. 197, 11 S. E. 558.

To go to work in a dark cellar in which the servant knows there is a deep well hole, without ascertaining whether it is guarded or not, is culpable negligence which will prevent him from recovering for injuries caused by the want of a guard, even though he was ordered to "hurry up the work." *Taylor v. Carew Mfg. Co.* (1885) 140 Mass. 150, 3 N. E. 21.

A conductor who is injured by a collision

will be denied recovery where he consented to the starting of his train in violation of the rules of the road, without a word of formal protest, although he had, at the time, every reason to expect that he would meet another train traveling in the opposite direction on the same track. On the one hand, if it was ordinarily his duty to obey the orders of the despatcher, even though they were in violation of the company's rules, the order to start the train under such circumstances was so obviously wrong, and was likely to involve such frightful consequences, that it was manifestly negligent to act upon it without inquiring the reasons for it. *Wescott v. New York & N. E. R. Co.* (1891) 153 Mass. 460, 27 N. E. 10.

A section hand well acquainted with his duties is guilty of contributory negligence in attempting, in response to an order of the foreman, while seated on the rear of a hand-car rapidly descending a grade, to take hold of the rapidly moving brake handles, in the absence of a sudden emergency. *Jones v. Galveston, H. & S. A. R. Co.* (1895) 11 Tex. Civ. App. 39, 31 S. W. 706.

An order by the skip tender of a mine, whose duty it is under a rule of the mine to prevent more than six men from riding in the skip at once, to an employee to get on the skip after ten other persons are on, does not relieve such employee from contributory negligence where no emergency called for sudden action on his part. *Last Chance Min. & Mill. Co. v. Ames* (1896) 23 Colo. 167, 47 Pac. 382.

A section-hand is not bound to obey an order of the section-boss to get on to and help propel an obviously overcrowded hand-car, and no recovery can be had for his being thrown off and killed in consequence of his obeying the order. *Bradshaw v. Louisville & N. R. Co.* (1893) 14 Ky. L. Rep. 688, 21 S. W. 346.

Under the statutory doctrine prevailing in Kentucky as to the effect of the gross negligence of a superior servant, a railway company is not relieved from liability for injuries to a brakeman incurred in uncoupling cars in obedience to an order, caused by the gross negligence of the conductor or other superior employee in the control and management of the train, by the fact that the danger of going between the cars to uncouple them was open and visible. *Greer v. Louisville & N. R. Co.* (1893) 94 Ky. 169, 21 S. W. 649.

VIII. *Negligence in respect to the manner of carrying out the order.*

The doctrine discussed above is a protection to the servant *pro tanto*, only in so far as it relieves from the charge of culpability in the actual undertaking of the work which he was ordered to do. It does not relieve him of the duty of avoiding any particular danger incident to carrying out the order. *Cornwall v. Charlotte, C. & A. R. Co.* (1887) 97 N. C. 11, 2 S. E. 659; *Smith v. St. Paul & D. R. Co.* (1892) 51 Minn. 86, 52 N. W. 1008 (a charge to the effect that orders would not justify a servant in going into known dangers was held not to be prejudicial error); *East Tennessee, V. & G. R. Co. v. Bridges* (1893) 92 Ga. 399, 17 S. E. 645.

Where the master orders a thing to be done by a servant, he will not be exonerated from liability for injuries to the servant arising from doing the act merely because the servant does not do it in the particular way directed by the master. The question in every such case is whether the servant pursued the less dangerous course. *Citizens' Gaslight & Heating Co. v. O'Brien* (1886) 118 Ill. 174, 8 N. E. 310.
48 L. R. A.

IX. *Specific order no excuse unless the servant's act was induced by it.*

An action based on the theory that the servant was obeying an order will, upon general principles, fail unless the necessary legal connection between it and the act of the servant is established. The fact that an order was given and acted upon by the plaintiff's co-servants is wholly immaterial as an element where he did not hear it himself, but simply followed their example in doing what he did. *Norock v. Michigan C. R. Co.* (886) 63 Mich. 121, 29 N. W. 525.

A direction to a servant to "hurry up" her work is not a fact which can be supposed to distract her attention to affect her power of observation two hours afterwards. *Herold v. Pfister* (1896) 92 Wis. 417, 66 N. W. 355.

An angry summons from the master's representative, which the servant complies with so hurriedly that he inadvertently leaves the place of work in a dangerous condition, will not excuse him for shortly afterwards forgetting that condition, the consequence being that he suffers injury. *Brennan v. Front Street Cable R. Co.* (1894) 8 Wash. 363, 36 Pac. 272 (servant was late on the morning when the accident occurred, and was so hurried when he was called that he left open a manhole containing machinery, and stepped into it a short time afterwards, while performing his duties in great haste).

No such connection can be predicated where the injury occurs owing to the manner in which the servant executed a general order which left him free to choose his own methods of carrying it out, and might, so far as appears, have been safely performed by the selection of a different method.

When an employee has within his own control the manner of using an obviously defective tool, and the means of securing safety if he chooses to employ them, if he neglects the means of security to himself he elects to take the risk. In such a case, it cannot in reason be said that the employee has acted upon the confidence reposed in the employer, and that he is, therefore, entitled to remuneration. *Jenney Electric Light & P. Co. v. Murphy* (1888) 115 Ind. 568, 18 N. E. 30.

A jury would not be warranted in finding that an oath addressed to a sailor who knew what to do was sufficient to shift the responsibility for a misstep on the ground that it confused him and drove him forward into the danger, where the words accompanying the oath carried no specific or wrong direction as to the manner in which the plaintiff should act. *Williams v. Churchill* (1884) 137 Mass. 243, 50 Am. Rep. 304 (plaintiff became entangled in the loose end of a towrope while acting in obedience to the directions of the master, after he had just cried out with an oath "You won't get that rope fast").

The theory that the plaintiff's injury was caused by his obedience to an improper command is not sustainable where he was injured in jumping from a train while responding to a hasty summons to supper, but there was no command to jump from the train, and he determined for himself the particular manner in which the order should be carried out. *Piquet v. Chicago & G. T. R. Co.* (1883) 52 Mich. 44, 17 N. W. 232.

A foreman's order to splice a short rope to the winch end of a longer rope to make it reach a pile lying on the ground, which was to be hauled into position by a pile-driver, will not render the master liable for injuries to the employee ordered, where he undertook to make the splice in a manner not required either by the

order or the character of the work. *Wiggins Ferry Co. v. Heilig* (1892) 43 Ill. App. 238.

Hence, a servant who relies on the orders of his superior as an excuse for taking up a dangerous position must show, not merely that he was ordered generally to go to work, but that he was ordered to take up the particular position in which he was injured. *Songstad v. Burlington, C. R. & N. R. Co.* (1889) 5 Dak. 517, 41 S. W. 755.

In *Illick v. Flint & P. M. R. Co.* (1888) 67 Mich. 632, 35 N. W. 708, a verdict was held to have been rightly directed for the defendant where a brakeman, in complying with a signal to set brakes, undertook, of his own motion and without any special request, to reach the top of a car by climbing a side ladder, when the train was approaching a bridge, the timbers of which were only a little over 2 feet from the cars.

X. *By whose orders the master is bound.*

In nearly all the cases cited in the present chapter the servant giving the orders was one who, under the recognized exceptions to the doctrine of common employment, was actually a vice principal, either because he was a general representative of the master as respects the management of the whole business or the particular work to be done. *Kean v. Detroit Copper & Brass Rolling Mills* (1887) 66 Mich. 277, 33 N. W. 395 (superintendent); *Illinois Steel Co. v. Schymanowski* (1895) 59 Ill. App. 32 (superintendent); *Hawkins v. Johnson* (1886) 105 Ind. 55 Am. Rep. 169, 4 N. E. 172 (foreman of factory); *Shortel v. St. Joseph* (1891) 104 Mo. 114, 16 S. W. 397 (engineer in charge of construction); *Colorado Midland R. Co. v. O'Brien* (1891) 16 Colo. 219, 27 Pac. 701 (foreman in charge of construction); *Novock v. Michigan C. R. Co.* (1886) 63 Mich. 121, 29 N. W. 525 (superintendent of construction train); *Norfolk & W. R. Co. v. Ward* (1894) 90 Va. 687, 24 L. R. A. 717, 19 S. E. 849 (foreman in charge of work of excavation).

Or was in charge of a department of the business. *Indiana Car Co. v. Parker* (1884) 100 Ind. 181; *Rogers v. Overton* (1882) 87 Ind. 410 (orders of road master to trackman).

Or simply because he was a superior servant in a state where such superiority constitutes vice principalship at common law. (*Jones v. St. Louis, N. & P. Packet Co.* (1890) 43 Mo. App. 308 [second mate]. As in the following cases the order was given by a section master to a laborer: *Patton v. Western N. C. R. Co.* (1887) 96 N. C. 455, 1 S. E. 863; *East Tennessee, V. & G. R. Co. v. Duffield* (1893) 12 Lea, 63, 47 Am. Rep. 319; *Bradshaw v. Louisville & N. R. Co.* (1893) 14 Ky. L. Rep. 688, 21 S. W. 346; *Stephens v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 221; *Schroeder v. Chicago & A. R. Co.* (1891) 108 Mo. 322, 18 L. R. A. 827, 13 S. W. 1094. In others the order was given by a conductor to a brakeman. *Mason v. Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698; *Shadd v. Georgia, C. & N. R. Co.* (1895) 116 N. C. 968, 21 S. E. 554; *Richmond & D. R. Co. v. Rudd* (1892) 88 Va. 648, 14 S. E. 361; *Norfolk & W. R. Co. v. Ampey* (1896) 93 Va. 108, 25 S. E. 226; *Turner v. Norfolk & W. R. Co.* (1895) 40 W. Va. 675, 22 S. E. 83; *Greer v. Louisville & N. R. Co.* (1893) 94 Ky. 169, 21 S. W. 649); or is given that effect by statute (in these cases the order was that of a section foreman to a laborer: *Jones v. Galveston, H. & S. A. R. Co.* (1895) 11 Tex. Civ. App. 39, 31 S. W. 706; *Texas & P. R. Co. v. Lewis* (1894); *Tex. Civ. App.*) 26 S. W. 873). See also *Bjbjlan v. Woonsocket Rubber Co.* 48 L. R. A.

(1895) 164 Mass. 214, 41 N. E. 265 (fellow servant deputed to instruct a new employee as to the manner of doing work); *Last Chance Min. & Mill. Co. v. Ames* (1896) 23 Colo. 167, 47 Pac. 328 [order of ship-tender to minor]; or else the rights of the parties were controlled by a statute abolishing altogether the doctrine of common employment. *Central R. Co. v. De Bray* (1883) 71 Ga. 406; *For v. Chicago, St. P. & K. C. R. Co.* (1892) 86 Iowa, 368, 17 L. R. A. 289, 53 N. W. 259; *Strong v. Iowa C. R. Co.* (1895) 94 Iowa, 380, 62 N. W. 799; *Frandsen v. Chicago, R. I. & P. R. Co.* (1873) 30 Iowa, 372; *Smith v. St. Paul & D. R. Co.* (1892) 51 Minn. 86, 52 N. W. 1068.

These cases, therefore, do not enable us to say whether, for the purpose of principles discussed in the foregoing sections, the responsibility of the master for the order is determined by the analogy of the decisions, which have established the doctrine that, where the order required the servant to do something not within the scope of his original contract, the defense of coservice is not a bar to the action, the sole question being whether the servant giving the order had authority to give it. Nor has the particular point been raised in any case. In several instances, however, the bench and bar, by passing over this ground of defense under circumstances in which, judging from the views propounded in other decisions as to the doctrine of coservice, that doctrine would have prevented recovery if it had been deemed controlling, seem to have indirectly determined that this analogy holds.

In some of the following decisions the servant giving the order has been expressly decided by the same court not to be a vice principal. In others this view is a necessary deduction from the general tenor of the rulings of the court:

Order of the captain of a ship to a seaman. *Williams v. Churchill* (1884) 137 Mass. 243, 50 Am. Rep. 304.

Of the foreman of a gang of trackmen. *Cook v. St. Paul, M. & M. R. Co.* (1885) 34 Minn. 45, 24 N. W. 311.

Of a conductor to a brakeman. *Louisville, E. & St. L. Consol. R. Co. v. Utz* (1892) 133 Ind. 265, 32 N. E. 881; *Piquegno v. Chicago & G. T. R. Co.* (1883) 52 Mich. 44, 50 Am. Rep. 243, 17 N. W. 232; *Burlington & C. R. Co. v. Liehe* (1892) 17 Colo. 280, 29 Pac. 175; *Denver, T. & G. R. Co. v. Simpson* (1891) 16 Colo. 55, 26 Pac. 339.

A master cannot relieve himself of responsibility for an order which is apparently within the scope of the authority of the superior servant, by showing that no such authority was conferred by the rules framed for the regulation of the business.

The mere fact that the conductor of a train had, under the company's rules, no right to order a man off a moving train, is no defense to an action by a brakeman who is injured in obeying such an order. *Central R. Co. v. De Bray* (1883) 71 Ga. 406.

But he cannot be bound by the orders of a servant who, when he gave them, was plainly transcending his powers. *Nashville & C. R. Co. v. McDaniel* (1883) 12 Lea, 386 (agent whose duty it was to look after claims for cattle killed by trains has no right to order train hands to help to clear a tunnel of obstruction).

An order given by one superior servant to do an act in violation of rules will not excuse the servant for doing that act after he has passed under the control of another superior servant, who has never given him a similar direction. *Mason v. Richmond & D. R. Co.* (1894) 114 N. C. 718, 19 S. E. 362 (brakeman

injured while coupling cars with his hands instead of a stick). Referring to its former judgment in the case (1892) 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698, the court said: "We still adhere to the doctrine that a brakeman is not culpable for exposing himself, in obedience to the orders of the conductor in charge of the train, to peril to which his voluntary exposure of himself would constitute contributory negligence. Our ruling was founded both upon the principle that the conductor, as middleman, had on behalf of the company waived its express regulation, and upon the idea that the known relation between a conductor and a brakeman, running on the same train as his subordinate, was such as to subject him to a well-grounded fear of dismissal should he hesitate to obey such an order, and

thereby relieve him of legal culpability for conduct which, but for the fact of his acting under the fear of the consequences of disobedience, would constitute negligence. But we did not intimate that a brakeman would be warranted in assuming that another conductor, under whom he had served for several months without receiving any order modifying the written rule, would discharge him for failure to couple with his hands when a stick would not answer the purpose. And we do not think that the command of Guthrie to "hurry up," coupled with the testimony of the plaintiff that he thought Guthrie had seen him couple with his hands before that time, is tantamount to an express command, such as was given by Conductor Dick, who had previously been his superior."

C. B. L.

OREGON SUPREME COURT.

Ellen HENDERSON, *Respt.*,

v.

M. W. HENDERSON, *Appt.*

(.....Or.....)

1. **A contract by which a husband agrees to pay certain moneys to his wife** in discharge of his obligation to support her is not against public policy, when made, not for the purpose of a voluntary separation, but after a separation has actually occurred on account of the misconduct of one of the parties which justified it.
2. **A decree based on a post-nuptial agreement** by which a wife is given a certain sum per month for her maintenance constitutes a contract which cannot be modified by the court on account of a change in the husband's financial condition, so as to reduce the amount payable, without the wife's consent.

(March 26, 1900.)

A PPEAL by defendant from a judgment of the Circuit Court for Multnomah County refusing defendant's application to reduce the amount which he had been directed to pay as alimony in a divorce proceeding. *Affirmed.*

Statement by **Wolverton**, Ch. J.:

On February 4, 1894, the plaintiff was granted a divorce from the defendant, and in the decree therefor the defendant, among other things, was required to support and educate the minor child of the parties during his minority, and to pay to plaintiff during the term of her natural life the sum of \$150 per month. On January 6, 1897, defendant petitioned the court in which such decree was rendered to modify the same so that he should be required to pay the plaintiff only \$75 per month, alleging as reasons therefor that his business and property, and the income therefrom, had so decreased that he

was no longer able to meet and pay the sum decreed, or any greater amount than \$75 per month: that the plaintiff did not require, nor did she expend, more than that sum for her support, but had spent the remainder for purposes not beneficial to her. The plaintiff answered that defendant ought to be estopped from setting up that she did not require more than \$75 per month of the sum decreed, or that, by reason of adverse fortune, he is now unable to pay more, or to allege any matter whatsoever as a reason for a modification of the decree in the respect prayed for, for the reason that plaintiff and defendant, on or about January 15, 1894, made and entered into a postnuptial agreement settling and adjusting as between themselves their property rights, under and by the terms of which, among other things, the defendant, for himself, his heirs, executors, and administrators, in consideration of plaintiff's covenants, did covenant and agree to pay through the First National Bank, of Portland, Oregon, to the plaintiff, or order, the sum of \$150 on the 15th day of each month thereafter during the term of her natural life: that, as security for the payment of the same for the term of ten years from said date, the defendant agreed to join with the plaintiff in deeding block 22, in McMullen's addition to the city of East Portland, Oregon, to one Byron Z. Holmes, to be held by him in trust as security for the payment of said allowance for the term aforesaid: and it was further agreed that, in case the defendant should desire to sell or dispose of said property, then said Holmes was to furnish plaintiff good and sufficient surety for the payment of said allowance for the balance of said term, or invest the proceeds of the sale in a manner satisfactory to the attorneys for plaintiff and himself, and thereafter to hold said new investment as security for the payment of said allowance: that it was mutually agreed between the parties

NOTE.—As to validity of separation agreement between husband and wife, see also *Winn v. Sanford* (Mass.) 1 L. R. A. 512, and *note*; *Clark v. Fosdick* (N. Y.) 6 L. R. A. 132, and *note*; *Galusha v. Galusha* (N. Y.) 6 L. R. A. 48 L. R. A.

487, and *note*; and *Blank v. Nohl* (Mo.) 19 L. R. A. 350.

As to power of court to reduce alimony, see also *Wetmore v. Wetmore* (N. Y.) *ante*, 666, and cases cited in footnote thereto.

to said agreement that said property was not to be sold or disposed of for less than the amount required to pay the stipulated allowance until the expiration of the ten years; that the plaintiff, in consideration of said covenants and agreements, relinquished all her right and interest in and to the property of defendant, both real and personal, of every name, nature, and description whatsoever, and it was therein specially agreed that the defendant would properly clothe, maintain, and educate the said minor child of said parties; that said agreement was signed and delivered by the parties thereto, and thereupon, and contemporaneously with the execution thereof, the plaintiff and defendant did duly make, execute, and deliver a warranty deed for said block to the said Byron Z. Holmes, who accepted said trust, and thereupon as a part of the same transaction, Holmes entered into separate contracts with plaintiff and defendant, wherein he agreed to carry out and fulfill all of the covenants and terms of said agreement between plaintiff and defendant, and fully to carry out the trust imposed upon him; that at the time the first agreement referred to was made and entered into between plaintiff and defendant they were husband and wife; the said agreement was made for a valuable consideration, in order to adjust and settle the property rights between them, and to provide for the support and maintenance of plaintiff and the support and education of the minor child; that the terms of said agreement and the provisions for support therein contained were reasonable and just; that the agreement is in full force and effect, and all the terms and conditions thereof have been fully complied with by plaintiff; that the deed to Holmes was made in pursuance of said agreement, as well as with declarations of trust respecting the property; that thereafter the court rendered the said decree of February 4, 1894; and that the amount of alimony agreed upon between them in the adjustment of their property rights was embodied therein, and that the defendant has complied with the terms of said agreement up to the 15th day of September, 1897, but since then has wholly disregarded them. A demurrer interposed to this defense being overruled, a reply was filed, denying the estoppel only, and further alleging that the tendency of said agreement between the plaintiff and defendant was to interest the defendant in foregoing resistance to the suit of plaintiff against the defendant then pending for a dissolution of the bonds of matrimony between them, and that said agreement is contrary to public policy, and void. Thereupon a motion was filed by plaintiff for a decree upon the pleadings, which being allowed and the petition dismissed, the defendant appeals.

Messrs. Stott, Boise, & Stout for appellant.

Messrs. Charles J. Schnabel and Chamberlain & Thomas, for respondent:

The court had no power, under the statutes of L. R. A.

ute, to modify its decree for the payment of money under any circumstances.

Oregon Code, §§ 501, 502.

In the case of a decree of divorce *a vinculo*, the award of alimony is absolute, and cannot be altered after the expiration of the term or the time in which a new trial may be had, unless in the decree the court reserves the right to do so, or unless the power to subsequently modify the decree is given expressly by statute.

2 Am. & Eng. Enc. Law, 2d ed. p. 136.

Because of the matters set forth in the answer of the respondent, the appellant is estopped from asking for any modification of the decree.

The great weight of authority sustains the validity of such contracts between husband and wife where upon their face they are fair, and there is nothing to show that the contract was made to stimulate the divorce proceedings, even though made during the pendency of suit or action and before decree.

2 Bishop, Marr. & Div. § 702; *Dutton v. Dutton*, 30 Ind. 452; *Owen v. Yale*, 75 Mich. 256, 42 N. W. 817; *Randall v. Randall*, 37 Mich. 563; *Stokes v. Anderson*, 118 Ind. 552, 4 L. R. A. 313, 21 N. E. 331; *Martin v. Martin*, 65 Iowa, 255, 21 N. W. 595; *Calame v. Calame*, 25 N. J. Eq. 550; *Thomas v. Brown*, 10 Ohio St. 247; *Blake v. Blake*, 7 Iowa, 46; *Thrall v. Thrall*, 83 Hun, 189, 31 N. Y. Supp. 591; *Buck v. Buck*, 60 Ill. 241; *Storey v. Storey*, 125 Ill. 608, 1 L. R. A. 320, 18 N. E. 329; *Hamilton v. Hamilton*, 89 Ill. 349; *Jordan v. Westerman*, 62 Mich. 170, 28 N. W. 826; *Chapin v. Chapin*, 135 Mass. 393; *Senter v. Senter*, 70 Cal. 619, 11 Pac. 782; *Moon v. Baum*, 58 Ind. 194; *Packard v. Packard*, 34 Kan. 53, 7 Pac. 628; *Gray v. Gray*, 83 Mo. 106; *Born v. Horstmann*, 80 Cal. 452, 5 L. R. A. 577, 22 Pac. 169, 338; *Petersine v. Thomas*, 28 Ohio St. 596; *Cress v. Mooney*, 74 Mo. 26; *Emery v. Neighbour*, 7 N. J. L. 144, 11 Am. Dec. 541; *Fletcher v. Holmes*, 25 Ind. 458; *Miller v. Miller*, 64 Me. 484; *Morrison v. Morrison*, 49 N. H. 69; *Speck v. Dausman*, 7 Mo. App. 165; *Stratton v. Stratton*, 77 Me. 377, 52 Am. Rep. 779; *Carson v. Murray*, 3 Paige, 483.

Wolverton, Ch. J., delivered the opinion of the court:

We are now to determine whether the facts set up by the answer to the defendant's petition constitute a defense to a modification of the decree in so far as it provides for the maintenance of the divorced wife. The facts relied upon are set forth by way of estoppel to the defendant insisting upon the modification, it being urged that a valid and binding agreement based upon a sufficient consideration was entered into by and between the parties, and that, the decree having been given and rendered in pursuance thereof, neither party can now be heard, without the consent of the other, to deny its validity or binding force and effect. It is suggested, but not urged with great confidence, that a decree of divorce, whereby provision is made for the maintenance of one party by the other, is final; that all matters.

determined thereby have become *res judicata*, and cannot subsequently be questioned or modified. Such decrees are generally regarded as final, unless reservation has been made in the decree for further adjudication and determination, or the statute has made appropriate provision for such further action. No reservation was made by the decree itself in the case at bar, but the statute has made provision to the effect that, whenever a marriage shall be declared void or dissolved, the court shall have power to further decree, among other things, for the recovery of and from the party in fault such an amount of money in gross or in instalments as may be just and proper for such party to contribute to the maintenance of the other, and for the appointment of one or more trustees to manage in such manner as the court shall direct any sum of money decreed for the maintenance of the wife, and that at any time after a decree is given the court or judge thereof, upon the motion of the other party, shall have power to set aside, alter, or modify so much thereof as may provide for the appointment of trustees for the care and custody of the minor children, or their nurture, and education, or the maintenance of either party to the suit. Hill's Anno. Laws (Or.) § 501, subds. 3, 5; Id. § 502. Mr. Justice Moore, speaking of § 502 (in *Corder v. Speake* (Or.) 51 Pac. 647), says: "The statute authorizes the court, upon motion, to set aside, alter, or modify so much of a decree of divorce as relates to the maintenance of either party to the suit." This language is explicit, and is a rational and just interpretation of the statute; and, were it not for the contention of counsel that the question was not involved in that case, we should make no further comment. True, the provisions of the section are somewhat vague, but, when read in *pari materia*, as it should be, with the preceding section, it is manifest that the legislative intentment was to authorize a modification in that particular. Subdivision 1 of § 501, *supra*, provides for the care and custody of the minor children; subdivision 2 for the recovery of the party in fault, and not allowed the care and custody of the children, such an amount of money as may seem proper for such party to contribute towards their nurture and education; and then follow the provisions to which allusion has already been made, touching the maintenance of the party not in fault, and the appointment of trustees for the management of such sums as shall be decreed for the maintenance of the wife, or the nurture and education of the children committed to her care and custody. The modification contemplated comprises the subject-matter of these several subdivisions, respecting which the court is empowered to enter its decree in the first instance, and may be tersely enumerated (1) as it respects the appointment of trustees for the care and custody of the minor children, (2) as it respects the nurture and education thereof, and (3) as it pertains to the maintenance of either party to the suit. This latter provision plainly refers to subdivision 3 of the 48 L. R. A.

preceding section, whereby it is provided for the recovery of the party in fault of such an amount of money as may be proper for such party to contribute towards the maintenance of the other, and this comprehends the wife in the case at bar. Such is the construction usually accorded the latter section in the practice, and is, we are convinced, within the legitimate purpose and intendment of the legislature.

The maintenance provided for by statute is an enlargement upon the signification of the term "alimony" as used in the parlance of the common law. Alimony is an allowance which, by order of the court, the husband is compelled to pay the wife from the date he has been legally separated or divorced, for her support and maintenance. This is to be distinguished, in a general sense, from an allowance *pendente lite*, and proceeded from the recognition of the husband's common-law liability to support the wife. 2 Am. & Eng. Enc. Law, 2d ed. p. 92. But the statute contemplates an allowance out of the wife's estate in favor of the husband also, thereby extending the power to make an allowance in divorce proceedings; and the authority to modify the decree subsequent to the time of its rendition in respect to maintenance exists as well in the one case as the other,—that is to say, whether the allowance is made from the husband's estate for the maintenance of the wife, or *vice versa*. Although the right to have an allowance awarded for maintenance has been extended by the statute to the husband, the same reasons do not exist in support thereof which formerly induced the allowance of alimony proper. His right thereto is merely statutory, and, while her right is now sustained by the same authority, the statute is, as to her, declarative of that which formerly existed through usage and custom in so much that it had become the unwritten law. At common law the measure of the allowance was determined by the husband's "faculties," and this because of obligations growing out of the marriage relation to support his wife and offspring. But the rule which should regulate the measure of an allowance to the husband must stand upon an entirely different footing. Whatever that may be, it is unnecessary for us to discuss at this time. The more recent legislation has tended strongly to the removal of all disabilities of the wife which do not exist as to the husband, and she may now contract and incur liabilities and responsibilities to the same extent and in the same manner as if she were unmarried. Hill's Anno. Laws (Or.) § 2097. While this fact should not detract from the reasons which support an allowance for her benefit, yet it is a strong circumstance tending to the support of her contracts relative to her maintenance made with her husband, who has always been accounted *sui juris*.

It is urged that the contract in controversy is against public policy, and void. But this can hardly be said of it when examined in the light of adjudications uniformly adhered to for a long period of time. In *Walker v.*

Walker, 9 Wall. 743, *sub nom. Walker v. Beal*, 19 L. ed. 814, where the validity of a deed of separation between the husband and wife was called in question because it was thought to have been executed contrary to public policy, it was held to be valid, the consideration being apparent, and that it would be enforced in equity if it appeared that it was not made in contemplation of a future possible separation; but in respect to one which was to occur immediately, or for the continuance of one that had already taken place, especially was it said to be true if the separation was occasioned by the misconduct of the husband, and the provision for the wife's support was reasonable under the circumstances, and no more than the court would award for her as alimony should she seek such a remedy for her grievances. When the separation exists as a fact, and is not induced or occasioned by the agreement, the consideration for the husband's undertaking to pay alimony is his release from liability for the support of his wife. *Roll v. Roll*, 51 Minn. 353, 53 N. W. 716; *Pettit v. Pettit*, 107 N. Y. 677, 679, 14 N. E. 500. It may be stated, generally, that any contract or agreement between husband and wife, which, by its terms or effect, is conducive to a relaxation or a severance of the marital ties, is void, as contrary to public policy, and will not be upheld or maintained. But where a separation has been induced, not by collusion, but by the vicious conduct or disability of one of the parties, without inducement or fault of the other, and it has furnished just grounds for legal separation, then a contract looking to a settlement of property rights and the proper maintenance of the one not in fault is in no sense repugnant to public policy. *Randall v. Randall*, 37 Mich. 563. In Wisconsin it has been determined, in effect, under a statute authorizing the court from time to time, upon petition of either of the parties, to revise and alter the decree as it may respect alimony or an allowance for the wife and children, that, notwithstanding the parties may have entered into an agreement anterior to the decree touching the amount of such alimony, the terms of which were incorporated in the decree, yet that the court was authorized to subsequently modify the allowance. *Blake v. Blake*, 68 Wis. 303, 32 N. W. 48, 75 Wis. 339, 43 N. W. 144. The strong tendency of adjudications elsewhere, however, establishes a contrary doctrine,—that when parties have agreed between themselves touching the allowance, and the same is reasonable, and such as ought to be granted under the circumstances and conditions attending the divorce proceedings, having in view the station and capabilities of the parties to respond, and not being contrary to the policy of the law, such an agreement, subject to the approval of the court, is binding upon the parties thereto. In *Calame v. Calame*, 25 N. J. Eq. 548, the husband had deserted his wife, and while he was living in a state of wilful estrangement from her he offered in writing to turn over to her certain lands, and to pay her a sum

of money, which she accepted in writing. The court, in subsequently granting the wife a divorce, further decreed that she was entitled to the lands and money agreed upon. Under the statute of New Jersey, alimony could not be given in gross, nor in a portion of the real estate of the husband. It was held, however, notwithstanding the court could not enforce an agreement as between the parties to live apart, yet that it could and would enforce an agreement, in a proper case, for the payment of the sum intended for separate maintenance according to the stipulations, and this without the intervention of a trustee, although the husband and wife could not ordinarily enter into a binding contract with each other. Mr. Chief Justice Beasley, in concluding his opinion, said: "My deduction from these principles and decisions is that it was within the competency of equity to enforce, as a part of the decree of divorce, the agreement made, in lieu of alimony, between the complainant and defendant. I do not mean, however, that every agreement which is thus made will be supported. The court should undoubtedly look into these arrangements and their surroundings; but when it appears that the separation of the wife, forming the groundwork of the agreement, was justifiable, and the provision is suitable, to this extent it is, in my judgment, safe to say that the contract should be upheld." In *Stokes v. Anderson*, 118 Ind. 533, 552, 4 L. R. A. 313, 321, 21 N. E. 331, 338, it was said: "It may be that, if an action for divorce is pending, or if, in anticipation of such an action, the parties meet and agree upon the amount of alimony to be allowed to the wife in case a divorce is granted, and the arrangement is just and equitable, and confined strictly to the matter of alimony, it will be sustained. But if the agreement is broader in its terms, and its tendency is to interest the husband in procuring a divorce, or in foregoing resistance to an effort by his wife to that end, then it is contrary to public policy, and is void." *Everhart v. Puckett*, 73 Ind. 409. See also *Dutton v. Dutton*, 30 Ind. 452. In *Buck v. Buck*, 60 Ill. 241, a decree was granted the wife, reciting, among other things, that the husband was a man of large property; that alimony having been settled between the parties upon the basis therein stated, it was accordingly decreed that the husband pay to the wife \$12,000, and the further sum of \$1,000, the value of certain furniture and silverware, and that he should maintain and educate an adopted child. The case went to the supreme court, and as a ground of reversal it was urged that the alimony allowed by the court was excessive and oppressive. But it was held that the husband, having consented to the provisions of the decree, should have no relief against his own voluntary agreement; the court saying: "Whether the alimony is too high, or whether the court had any lawful authority to make provision for the maintenance of the adopted daughter without the consent of the plaintiff in error, it is not now necessary for us to express an opinion. It was competent for

the plaintiff in error to consent to such a decree, and, having done so, it must remain forever binding on him." So, in *Storey v. Storey*, 125 Ill. 608, 1 L. R. A. 320, 18 N. E. 329; it was held that, "while it is true that husband and wife cannot lawfully enter into an agreement for divorce, yet it is well settled that the amount of alimony which the husband is to pay to the wife, and the terms of the payment, and the length of time during which such payment is to continue, may be all arranged between them by consent." So a decree awarding alimony in gross or out of the husband's realty, based upon the agreement of the parties, even where the statutory provisions do not permit an allowance in that mode, has been upheld and enforced. *Crews v. Mooney*, 74 Mo. 26; *Russell v. Russell*, 4 G. Greene, 26, 61 Am. Dec. 112. As bearing upon the question, see also *Owen v. Yale*, 75 Mich. 256, 42 N. W. 817; *Petersine v. Thomas*, 28 Ohio St. 596; *Stratton v. Stratton*, 77 Me. 373, 52 Am. Rep. 779; *Morrison v. Morrison*, 49 N. H. 69. We conclude, therefore, in consonance with these latter authorities, that the better rule is that, notwithstanding the court has power and authority to modify its decree of divorce touching the awarding of a sum of money for the maintenance of either the husband or wife by the other subsequent to the entering of the decree, yet, nevertheless, they may agree in a proper case touching the amount of such sum and the manner of its payment, subject to the approval of the court as to its validity in good morals and as conformable to public policy, and in further consideration of the status and condition of the parties relating to the question of its fairness and equability of adjustment; but that, when such an agreement has been approved by the solemn decree of the court, it becomes forever binding, to the same degree and with like effect as ordinary contracts between parties admittedly *sui juris*, and is not subject to revocation or modification, except by the consent of the parties thereto.

In this view, the decree of the court below must be affirmed, and it is so ordered.

J. D. FENTON, *Respt.*,

v.

FIDELITY & CASUALTY COMPANY of
New York, *Appt.*

(.....Or.....)

1. Indemnity against liability for damages giving a cause of action as soon as the accident occurs, which may be assigned, although the assured is insolvent and cannot pay the claim, is created by a policy insuring an employer against liability for damage through injury to employees, which provides that the insurer shall have immediate notice

NOTE.—As to insurance against employer's liability, see *Anoka Lumber Co. v. Fidelity & C. Co.* (Minn.) 80 L. R. A. 689; *Hoven v. West Superior Iron & Steel Co.* (Wis.) 32 L. R. A. 388; and *Embler v. Hartford Steam Boiler Inspection & Ins. Co.* (N. Y.) 44 L. R. A. 512. 48 L. R. A.

of an accident and exclusive power to settle and adjust the claim.

2. The construction most favorable to the assured is to be adopted in case of doubt as to the proper construction of an insurance policy.
3. A clause in an employer's indemnity policy giving the insurer the right to defend actions in the name of the assured will not prevent the assured from assigning a claim for medical services to an injured employee before the same has been reduced to judgment, liability for which it incurred under a provision in the policy authorizing it to provide such immediate relief as may be imperative in case an accident occurs.

(April 24, 1899.)

APPEAL by defendant from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in an action brought to recover a liability alleged to be covered by a policy of insurance issued by defendant and to have been assigned to plaintiff. *Affirmed.*

Statement by Beam, J.:

This is an action upon a policy of insurance issued by the defendant company to the Willamette Steam-Mills Lumbering & Manufacturing Company, insuring it against liability for damages on account of injuries accidentally suffered by its employees. The portion of the policy material to the questions on this appeal is as follows: "In consideration of the warranties made in the application for this policy, and of four hundred and eighty dollars, the Fidelity and Casualty Co. of New York, hereinafter called the 'company' does hereby agree to indemnify the Willamette Steam-Mills Lumbering & Mfg. Co. of Portland, in the county of Multnomah and state of Oregon, hereinafter called the 'assured,' for the term of twelve months, beginning on the ninth day of October, 1895, at twelve o'clock noon, and ending on the ninth day of October, 1896, at twelve o'clock noon, standard time, against liability for damages on account of fatal or nonfatal injuries accidentally suffered by any employee or employees of the assured. . . . subject to the following agreements and conditions: (1) The company's liability for an accident resulting in injuries to, or the death of, one person, is limited to \$5,000.00, and subject to the same limit for each person. Its gross liability for a casualty resulting in injuries to, or the death of, several persons, is \$10,000.00. (2) The assured, upon the occurrence of an accident, and also upon receiving information of a claim on account of an accident, shall give immediate notice, in writing, of such accident or claim, with full particulars, to the company, at its office in New York city, or to the agent, if any, who shall have countersigned this policy. (3) If thereafter any legal proceedings are taken against the assured to enforce a claim for damages on account of such accident, the company will defend the same, at its own cost, in the name and on behalf of the assured. (4) The assured shall not, except at his own cost, settle

any claim, nor incur any expense, nor interfere in any negotiations for settlement with the injured person, nor in any legal proceedings, without the consent of the company previously given in writing; but he may provide such immediate surgical relief as may be imperative. The assured shall render to the company all reasonable aid in securing information and evidence, and in effecting settlements. (5) This policy does not cover liability . . . for injuries intentionally inflicted upon any person, nor any liability excepting that of the assured to the injured person himself, or his legal representatives, for damages on account of personal injuries." "(9) Any assignment of interest under this policy shall be void, unless the written consent of the company is first obtained." "(14) This policy, and the application for it, a copy of which application is indorsed hereupon, taken together, with all their respective declarations, stipulations, parts, and conditions, constitute a contract of insurance between the company and the assured; and, if a suit is brought on this contract, it must be construed accordingly, whether such suit is brought on the original contract, or on any renewal thereof." While this policy was in force, and on the 24th of October, 1895, O. Mathison, an employee of the mill company, was seriously injured while employed in its service; and, immediate surgical relief being imperative, the plaintiff, who is a physician and surgeon, was employed by the manager of the mill company to attend the injured man. Shortly thereafter the mill company became insolvent, and its property went into the hands of receivers, who, in pursuance of an order of the court, assigned and transferred to the plaintiff its claim against the defendant for the liability incurred in providing immediate surgical relief for Mathison, and he accepted the same in full payment and satisfaction of his claim against the mill company, and thereupon brought this action directly against the defendant to recover the sum of \$150, alleged to be the reasonable value of his services. The defendant, after denying the allegations of the complaint, alleges the insolvency of the mill company; that it had not paid, and would not be able to pay, any portion of plaintiff's claim. A demurrer was sustained to the new matter set up in the answer, and a trial, being had, resulted in a judgment in favor of the plaintiff for the sum of \$100, from which the defendant appeals.

Messrs. Cox, Cotton, Teal, & Minor and J. M. Long, for appellant:

The plaintiff proved no damage, and the appellant was entitled to a judgment upon the first cause of action set out in the complaint.

Weller v. Eames, 15 Minn. 461, Gil. 376, 2 Am. Rep. 150; *Churchill v. Hayes*, 3 Denio, 321; *Douglass v. Clark*, 14 Johns. 178; *Aberdeen v. Blackmar*, 6 Hill, 324; *Jeffers v. Johnson*, 21 N. J. L. 73; *Embler v. Hartford Steam Boiler Inspection & Ins. Co.* 8 App. Div. 186, 40 N. Y. Supp. 450; *Maloney v. Nelson*, 144 N. Y. 182, 39 N. E. 82; *Gil-*
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bert v. Wiman, 1 N. Y. 550, 49 Am. Dec. 359; *Wicker v. Hoppock*, 6 Wall. 94, 18 L. ed. 762; *Re Negus*, 7 Wend. 501; *Redfield v. Haight*, 27 Conn. 31; *Jones v. Childs*, 8 Nev. 121.

The plaintiff cannot sue at law alone on this cause of action.

State Ins. Co. v. Oregon R. & Nav. Co. 20 Or. 563, 26 Pac. 838; *Home Mut. Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 569, 26 Pac. 857.

The failure of the mill company to serve immediate notice of this claim lost all its rights under the policy, and the issuer is not bound to specify its defenses; nor does it waive those not specified.

Weidert v. State Ins. Co. 19 Or. 261, 24 Pac. 242.

At the time of the commencement of this action there was no right of action in the mill company for want of a breach and failure on the part of the mill company to comply with the policy as to notice and right to defend in its name; and there is no right of action in the assignee until after breach of the condition of the bond.

Hillman v. Shannahan, 4 Or. 163, 18 Am. Rep. 281.

The words "but he may provide such immediate surgical relief as may be imperative," when given the most favorable construction to the respondent and the mill company, would only make the appellant liable for indemnity against loss actually sustained.

French v. Via, 143 N. Y. 90, 37 N. E. 612; *Embler v. Hartford Steam Boiler Inspection & Ins. Co.* 8 App. Div. 186, 40 N. Y. Supp. 450; *Massachusetts Mut. L. Ins. Co. v. Robinson*, 98 Ill. 324; *Bailey v. New England Mut. L. Ins. Co.* 114 Mass. 177, 19 Am. Rep. 329; *Greenfield v. Massachusetts Mut. L. Ins. Co.* 47 N. Y. 430; *Grattan v. National L. Ins. Co.* 15 Hun, 74; *North American L. Ins. Co. v. Wilson*, 111 Mass. 542; *Flynn v. North American L. Ins. Co.* 115 Mass. 449; *Wise v. St. Louis Marine Ins. Co.* 23 Mo. 80; *Nims v. Ford*, 159 Mass. 575, 35 N. E. 100. **Messrs. Fenton, Bronaugh, & Muir,** for respondent:

The contract set out in the complaint, independently of the clause in subdivision 4 of the policy, upon which the plaintiff's first count is founded, is a contract to indemnify the mill company against liability. The particular words of the contract upon which the plaintiff's right to recover against the defendant rests amount to a direct authorization of the assured to incur the liability sued upon, and, if incurred, and not paid to the assured or the beneficiary, the contract is broken. The assured may recover without having paid the demand. Plaintiff could sue directly in his own name, treating the assured as the agent of the defendant to employ him to render the immediate surgical relief in the given case. There is a distinction between contracts of indemnity against damages, and contracts of indemnity against liability.

American Employers' Liability Ins. Co. v. Fordyce, 62 Ark. 562, 36 S. W. 1051; *Locke*

v. *Homer*, 131 Mass. 93, 41 Am. Rep. 199; *Jones v. Childs*, 8 Nev. 121; *Carson Opera House Asso. v. Miller*, 16 Nev. 327; *Smith v. Chicago & N. W. R. Co.* 18 Wis. 17; *Thompson v. Taylor*, 30 Wis. 68; *Trinity Church v. Higgins*, 48 N. Y. 532; *Gilbert v. Wiman*, 1 N. Y. 550, 49 Am. Dec. 359; *Wick-er v. Hoppock*, 6 Wall. 98, 18 L. ed. 752; *Anoka Lumber Co. v. Fidelity & C. Co.* 63 Minn. 286, 30 L. R. A. 689, 65 N. W. 353; *Grand Rapids Electric Light & P. Co. v. Fidelity & C. Co.* 111 Mich. 148, 69 N. W. 249; *Haas v. Dudley*, 30 Or. 355, 48 Pac. 168; *Fidelity & C. Co. v. Fordyce*, 64 Ark. 174, 41 S. W. 420; *Ross v. American Employers' Liability Ins. Co.* 56 N. J. Eq. 41, 38 Atl. 22; 10 Am. & Eng. Enc. Law, 415; *Belloni v. Freeborn*, 63 N. Y. 390; *Kohler v. Matlage*, 72 N. Y. 286; *National Bank v. Bigler*, 83 N. Y. 62; *Chace v. Hinman*, 8 Wend. 453, 24 Am. Dec. 39; *Solary v. Webster*, 35 Fla. 363, 17 So. 646; *Hoven v. Employers' Liability Assur. Corp.* 93 Wis. 201, 32 L. R. A. 388, 67 N. W. 46.

The assignment of the demand or claim of the mill company against the defendant to the plaintiff was in consideration of the release of the mill company by plaintiff, and operated as a payment by the mill company to plaintiff. Even if the defendant's contract should be deemed an indemnity against damage, instead of an indemnity against liability, so as to require a payment of the claim before it could recover against the defendant, then the plaintiff having satisfied his claim by accepting the assignment of the mill company's demand against the defendant, the latter is liable.

Bausman v. Credit Guarantees Co. 47 Minn. 377, 50 N. W. 496; *White v. French*, 15 Gray, 339; *Thompson v. Taylor*, 30 Wis. 75.

Bean, J., delivered the opinion of the court:

There are several assignments of error in the notice of appeal, but they are practically all based on the contention that the contract of the defendant with the mill company is one of indemnity against damages, and therefore no recovery can be had thereon unless actual damage is shown. There is a distinction made by the authorities between a contract of indemnity against liability for damages, and a simple contract of indemnity against damages. In the former case it has very generally been held that an action may be brought, and a recovery had, as soon as the liability is legally imposed, while in the latter there is no cause of action until there is actual damage. *Jones v. Childs*, 8 Nev. 121; 10 Am. & Eng. Enc. Law, 413; *Smith v. Chicago & N. W. R. Co.* 18 Wis. 21; *Thompson v. Taylor*, 30 Wis. 73; *Looke v. Homer*, 131 Mass. 93; *Trinity Church v. Higgins*, 48 N. Y. 532; *Weller v. Eames*, 15 Minn. 461, Gil. 376, 2 Am. Rep. 150. If, therefore, the policy upon which this action is based is a mere contract of indemnity, the payment by the mill company of the liability incurred by it for the services of the plaintiff is a condition precedent to the right of recovery. If, on the other hand, the con-

tract is one of indemnity against liability, a cause of action accrued thereunder as soon as the liability of the mill company to the plaintiff attached. Upon this question the policy must speak for itself; and its several provisions, in our opinion, indicate quite clearly that it is not merely an agreement to indemnify the mill company against such damage as it may suffer on account of injury to its employees, but that, in case of an accident to an employee whereby a cause of action arises against it, the insurance company will assume the liability on account thereof. By the express terms of the contract, it agrees to indemnify the mill company, not only against actual damage, but against liability for such damage. The policy provides that the defendant shall be immediately notified of an accident, and shall thereafter have exclusive right and power to settle and adjust any claim therefor, and control all legal proceedings in connection therewith. And the mill company is prohibited from settling any claim or incurring any expense without the written consent of the insurance company, except that in case of an accident it may provide such immediate surgical relief as may be imperative. It would, in our opinion, be inconsistent with the terms and provisions, as well as the object and purpose, of the policy, to hold that the assured must actually pay and discharge the claim or demand made against it on account of an injury to one of its employees, as a condition precedent to the maintenance of an action on the policy. This is the interpretation given to a similar contract by the supreme court of Minnesota in the case of *Anoka Lumber Co. v. Fidelity & C. Co.* 63 Minn. 286, 30 L. R. A. 689, 65 N. W. 353, and is in harmony with the construction of policies substantially the same by the courts of other states. *Hoven v. Employers' Liability Assur. Corp.* 93 Wis. 201, 32 L. R. A. 388, 67 N. W. 46; *Ross v. American Employers' Liability Ins. Co.* 56 N. J. Eq. 41, 38 Atl. 22; *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562, 36 S. W. 1051; *Fidelity & C. Co. v. Fordyce*, 64 Ark. 174, 41 S. W. 420. It is claimed by defendant's counsel that the policy under consideration in the Minnesota case was an indemnity against liability only, and therefore differs materially from the one now under consideration. The provisions of the policy are not quoted in the report of the case, but Mr. Justice Buck begins his opinion by saying that the action is brought on a policy "insuring the company, for twelve months, against liability for damages;" and, although he subsequently states that it was a case of insurance against liability, it seems reasonably certain, from the entire opinion, that the policy was the same as the one before us, and we regard the case as directly in point. If, however, the meaning of the policy is in doubt, and its language is fairly and reasonably susceptible of two constructions,—one favorable to the assured, and the other to the defendant,—the one is to be adopted which is the most favorable to the assured. This is the universal ruling in the

construction of insurance policies, because they are drawn by the attorneys, officers, and agents of the company, and it is but fair that, if there should be any ambiguity or uncertainty in the language used, it should be construed most strongly against the company. *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552; *Utter v. Travelers' Ins. Co.* 65 Mich. 545, 32 N. W. 812; *Grand Rapids Electric Light & P. Co. v. Fidelity & C. Co.* 111 Mich. 148, 69 N. W. 249.

It is also contended that the mill company is prohibited from assigning its rights under the policy, prior to the rendition of a judgment against it on account of some liability covered thereby. The contention is based on the provision that the insurance company shall have the right to defend any action, at its own cost, in the name and on behalf of the assured. But this provision has, in our

opinion, reference to an undetermined claim for damages, and not to liabilities incurred under what may be determined the emergency clause in the policy, which authorizes the assured, in case of an accident, to provide such immediate relief as may be imperative. In the case of a claim for damages on account of an accident, the question of liability is unsettled so long as the matter is being contested in the courts; but, for imperative surgical relief furnished, the liability of the mill company, and its corresponding right of action against the insurance company, are fixed and determined as soon as such surgical relief is provided, and therefore there can be no reason for the insurance company defending any action brought thereon in the name and on behalf of the assured.

Judgment affirmed.

RHODE ISLAND SUPREME COURT.

Paul WOODS

v.

Walter G. NICHOLS.

(.....R. I.....)

1. A purchaser of property in good faith from a person who holds it under an agreement by which a third person has retained the title thereto, if he sells the property again, is liable for conversion, although he is not in possession of the property.

2. The damages recoverable in trover by one who has retained title to the property as security for purchase money are limited to the balance due him thereon, less any depreciation in its value by the use which he had authorized.

(February 14, 1900.)

PETITION for new trial of an action in which a verdict had been rendered at a Trial Term in Providence County in favor of plaintiff in a proceeding to recover damages for the conversion of a buggy. *Granted*.

The facts are stated in the opinion.

Mr. Henry Marsh, Jr., for plaintiff:

Under the lease agreement between the plaintiff and Barnes the payment was a condition precedent, and Barnes, having failed to comply with it, acquired no title to the buggy, and had no authority to sell it.

Fosdick v. Schall, 99 U. S. 250, 25 L. ed. 341; *Rogers v. Whitehouse*, 71 Me. 222; *Holt v. Holt*, 58 N. H. 276; *Manwoll v. Briggs*, 17 Vt. 176; *Burnell v. Marvin*, 44 Vt. 277; *Sargent v. Metcalf*, 5 Gray, 306, 66 Am. Dec.

368; *Salomon v. Hathaway*, 126 Mass. 482; *George v. Stubbs*, 26 Me. 243; *Luey v. Bundy*, 9 N. H. 298, 32 Am. Dec. 359; *Weeks v. Pike*, 60 N. H. 447; *Root v. Lord*, 23 Vt. 568; *Coggill v. Hartford & N. H. R. Co.* 3 Gray, 545; *Benner v. Puffer*, 114 Mass. 376; *Goodell v. Fairbrother*, 12 R. I. 233, 34 Am. Rep. 631; *Skelton v. Manchester*, 12 R. I. 326; *Brown v. Fitch*, 43 Conn. 512; *Hine v. Roberts*, 48 Conn. 267, 40 Am. Rep. 170; 6 Am. & Eng. Enc. Law, 2d ed. p. 453; 2 Kent, Com. 492; *Ullman v. Barnard*, 7 Gray, 554.

In taking the buggy from Barnes, who had no authority to dispose of it, and applying it to his own use, the defendant, Nichols, was guilty of a conversion, and is liable to this plaintiff in this action.

M'Combie v. Davies, 6 East, 540; *Baldwin v. Cole*, 6 Mod. 212; *West Jersey R. Co. v. Trenton Car Works Co.* 32 N. J. L. 517.

In purchasing from Barnes who had no title, or authority to sell the buggy, the defendant, Nichols, acquired no title as against the plaintiff.

6 Am. & Eng. Enc. Law, 2d ed. p. 486; *Story, Sales*, *313; 2 Kent, Com. 497; *Coggill v. Hartford & N. H. R. Co.* 3 Gray, 545; *Singer Mfg. Co. v. Graham*, 8 Or. 17, 34 Am. Rep. 572; *Deahon v. Bigelow*, 8 Gray, 159; *Heckle v. Lurvey*, 101 Mass. 344, 3 Am. Rep. 366; *Hoffman v. Carow*, 20 Wend. 21, 22 Wend. 285; *Robinson v. Skipworth*, 23 Ind. 311; *Freeman v. Underwood*, 66 Me. 229.

The defendant, Nichols, having purchased the buggy from Barnes, who had no power to sell, and having resold the buggy, even

NOTE.—For conversion by purchaser in good faith, see also *Omaha & G. Smelting & Ref. Co. v. Tabor* (Colo.) 5 L. R. A. 236.

As to measure of damages in case of conversion, see also *Cramton v. Valido Marble Co.* (Vt.) 1 L. R. A. 120; *Wright v. Bank of the Metropolis* (N. Y.) 1 L. R. A. 289; *Hayes v. Massachusetts Mut. L. Ins. Co.* (Ill.) 1 L. R. A. 48 L. R. A.

A. 303, and *note*; *Haas v. Sackett* (Minn.) 2 L. R. A. 449, and *note*; *Chauvin v. Vallton* (Mont.) 3 L. R. A. 104; *Allen v. South Boston R. Co.* (Mass.) 5 L. R. A. 710; *Griggs v. Day* (N. Y.) 18 L. R. A. 120; *White v. Yawkey* (Ala.) 32 L. R. A. 190; *Langford v. Rivinus* (C. C. App. 2d C.) 33 L. R. A. 250.

though he acted in good faith, is liable to the plaintiff for conversion.

West Jersey R. Co. v. Trenton Car Works Co. 32 N. J. L. 517; *Hoffman v. Carow*, 20 Wend. 21, 22 Wend. 285; *Morrill v. Moulton*, 40 Vt. 242; *Carter v. Kingman*, 103 Mass. 517; *Robinson v. Way*, 163 Mass. 212, 39 N. E. 1009; *Robinson v. Bird*, 158 Mass. 357, 33 N. E. 391; *Hyde v. Noble*, 13 N. H. 494, 38 Am. Dec. 508; *Abbott v. May*, 50 Ala. 97; *Hamet v. Letcher*, 37 Ohio St. 357, 41 Am. Rep. 519; *Terry v. Bamberger*, 44 Conn. 558.

And no demand was necessary.

Curme, D. & Co. v. Rauh, 100 Ind. 251; *Courtis v. Cane*, 32 Vt. 232, 76 Am. Dec. 174; *Hoffman v. Carow*, 20 Wend. 21, 22 Wend. 285; *Hyde v. Noble*, 13 N. H. 494, 38 Am. Dec. 508; *Baker v. Lothrop*, 155 Mass. 376, 29 N. E. 643.

This action of trover is maintainable against the defendant, Nichols, even though he had resold the buggy, and did not, at the time the action was brought, have it in his power to give up the buggy.

Carter v. Kingman, 103 Mass. 517; *Robinson v. Way*, 163 Mass. 212, 39 N. E. 1009; *Robinson v. Bird*, 158 Mass. 357, 33 N. E. 391; *Hoffman v. Carow*, 20 Wend. 21, 22 Wend. 285; *Morrill v. Moulton*, 40 Vt. 242.

The measure of damages in an action of conversion against a third person is the whole value of the property with interest from the time of the conversion.

Angier v. Taunton Paper Mfg. Co. 1 Gray, 621, 61 Am. Dec. 436; *Colcord v. McDonald*, 128 Mass. 470; *Brown v. Haynes*, 52 Me. 578.

The value should be estimated according to the market value at the place of conversion.

26 Am. & Eng. Enc. Law, 1st ed. 826; *Mo-Avoy v. Wright*, 137 Mass. 207.

Messrs. F. P. Owen and John P. Beagan for defendant.

Stiness, J., delivered the opinion of the court:

The plaintiff sued in trover for the conversion of a buggy, January 2, 1899. He leased the buggy to Waldo E. Barnes, Jr., by a written agreement, which stipulated that Barnes might have possession of it for thirty days for \$155, paying \$50 cash on that day, and the balance (\$105) on February 1, 1899; that he should not assign, underlet, or part with possession of the buggy without the written consent of the plaintiff; and that the property in the buggy was to remain in the plaintiff until the payment of the full sum, at or before the expiration of said time. Barnes paid \$25 down, and gave a check for \$25, which was protested, and has not been paid. The plaintiff shipped the buggy to Barnes, who sold it, January 4, 1899, to the defendant for \$90. About January 13, 1899, the defendant sold the buggy to Charles C. Ballou, who took it into his possession, and afterwards left it at the defendant's stable temporarily, where it was seen by the plaintiff's son on January 18, 1899. The defense rested upon the ground that, as the defend-

ant had bought the buggy of Barnes for value and without knowledge of the plaintiff's claim, and so sold it to Ballou, who had bought in equal good faith, the defendant not having possession of the buggy, could not be held liable in trover. Such a defense is not sufficient. It ignores the rule *caveat emptor*. It is clear that Barnes had no title to sell, and hence neither Nichols nor Ballou acquired any by their purchases. The law, as stated in Cooley, Torts, *451, which is well supported by authority, is as follows: "One who buys property must, at his peril, ascertain the ownership, and, if he buys of one who has no authority to sell, his taking possession, in denial of the owner's right, is a conversion. . . . So, it is no protection to one who has received property and disposed of it in the usual course of trade that he did so in good faith, and in the belief that the person from whom he took it was the owner, if in fact the possession of the latter was tortious."

The mere possession by Barnes under the agreement was not tortious, but possession with an intention to sell, contrary to the agreement, was tortious. Under the agreement, he had no right to sell. The law in England and in this country is in harmony on the question before us. In *Hollins v. Fowler*, L. R. 7 H. L. 757, the subject was most exhaustively considered, and it may be taken as a definitive statement of the law in England. The case holds that any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion.

In that case the defendants were brokers, who had bought cotton from another broker in ignorance of any fraud on his part, and had sold it to spinners, who had made it into yarn. The defendants were held liable in trover. In *Gilmore v. Newton*, 9 Allen, 171, 85 Am. Dec. 749, the owner of a horse let it to another, who sold it to the defendant. The latter let it to a person who took it away, and neither he nor the horse had since been seen. The defendant was held liable for a conversion, based upon his letting to the latter, as an act of dominion over the property. In *Carter v. Kingman*, 103 Mass. 517, a person had received goods from the owner, with the right to use them and to become the owner of them on fulfillment of conditions, but until then he should not sell or remove them without the owner's consent, and they should not become his till paid for. He sold them to a third person, who removed and resold them. It was held that the third person was liable to the owner of the goods for their conversion, although he had acted in good faith, and had parted with them before any demand upon him. In *Robinson v. Bird*, 158 Mass. 357, 33 N. E. 391, Holmes, J., said: "The defendant is an auctioneer who has sold personal property belonging to the plaintiffs. Therefore he is liable for a conversion unless he can show some other excuse or justification than his good faith and his ignorance of the plaintiffs' title,"—citing

Coles v. Clark, 3 Cush. 399; *Hoffman v. Carow*, 22 Wend. 285; *Cochrane v. Rymill*, 40 L. T. N. S. 744; *Hollins v. Fowler*, L. R. 7 H. L. 757. See also *Tuttle v. Campbell*, 74 Mich. 652, 42 N. W. 384; *Terry v. Bamberger*, 44 Conn. 558; *Morrill v. Moulton*, 40 Vt. 242. Many more cases might be cited to the same effect, and doubtless there are others which are more or less in conflict with them. These, however, are sufficient to establish the rule which we have stated, because they rest upon the sound principle that one cannot be deprived of his property without his consent, and that a purchaser of property, except negotiable instruments, has no better title to it than the vendor from whom he buys it. Such was the decision of this court in *Goodell v. Fairbrother*, 12 R. I. 233, 34 Am. Rep. 631. The case at bar showed title in the plaintiff, and a conversion by the defendant in the act of selling. The plaintiff was therefore entitled to a verdict in his favor.

As to the damages, the general rule is that the measure is the value of the property at the time of the conversion. If the buggy had depreciated in value, by the use which the plaintiff had authorized, of course he is subject to that loss. But, if it had not depreciated, then, under the terms of the agreement, on a sale by him, he was to receive only the balance of \$155, the stipulated price, which had not then been paid. Within these limits, the damages are open to assessment, and for this purpose a new trial is necessary.

Petition for new trial granted, and case remitted.

STATE of Rhode Island

v.

Benjamin DALTON.

(.....R. I.....)

A statute which prohibits a person who sells an article from giving to the purchaser as part of the same transaction a stamp, coupon, or other device which will entitle him to receive from a third person some other well-defined article in addition to the one sold is an unwarrantable interference with individual liberty guaranteed by Const. art. 1, § 10, and U. S. Const. 14th Amend. § 1.

(May 2, 1900.)

TRANSFER by the District Court for the Eighth Judicial District for the opinion of the Appellate Division of constitutional questions arising upon trial of defendant charged with issuing trading stamps contrary to the provisions of the statute. *Judgment for defendant.*

The facts are stated in the opinion.

Mr. A. L. Churchill, for plaintiff:

A court will not declare an act unconsti-

tutional unless the act is directly antagonistic to some specific provision of the Constitution of the state or of the United States.

Cooley, Const. Lim. 6th ed. 204, cases in note 1.

A court will not declare an act void unless it is clear beyond a doubt that it is in violation of the Constitution.

Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; 7 Harvard L. Rev. 129, 143, 144; *Sinking-Fund Cases*, 99 U. S. 700, *sub nom.* *Union P. R. Co. v. United States*, 25 L. ed. 496; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Taylor v. Place*, 4 R. I. 324; *State v. Narragansett*, 16 R. I. 424, 3 L. R. A. 295, 16 Atl. 901; Cooley, Const. Lim. 6th ed. 216.

The legislature of a state has sovereign power, unless limitations have been placed on that power by the Constitution of the state or of the United States.

Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625; *People ex rel. Wood v. Draper*, 15 N. Y. 532; Cooley, Const. Lim. 6th ed. 102-106, 205, 206.

The Constitution of the United States does not limit the state in the exercise of its police power.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Cum. v. Alger*, 7 Cush. 53; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *New York v. Miln*, 11 Pet. 102, 9 L. ed. 648; The Federalist, Dawson's ed. 23.

The 14th Amendment to the Constitution of the United States, and the clause thereof providing that "no state shall deprive any person of life, liberty, or property without due process of law," was not intended to, and does not, make any change in respect to the police power of the states.

Slaughter-House Cases, 16 Wall. 36, *sub nom.* *Butchers' Benev. Asso. v. Crescent City L. S. L. & S. H. Co.*, 21 L. ed. 394; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 15 Sup. Ct. Rep. 207; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

The right to carry on a particular business, occupation, or calling, and the correlative right of contract, are not rights guaranteed by the 14th Amendment against the exercise of the police power by the state.

Slaughter-House Cases, 16 Wall. 36, *sub nom.* *Butchers' Benev. Asso. v. Crescent City L. S. L. & S. H. Co.*, 21 L. ed. 394; *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 15 Sup. Ct. Rep. 207; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Patapsco*

NOTE.—The only prior authority on the subject of trading stamps seems to be the case of *Lansburgh v. District of Columbia*, 11 App. D. C. 512, which is commented upon by the court in the present case.

Guano Co. v. North Carolina Bd. of Agri. 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; *Algeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 18 Sup. Ct. Rep. 427; *Bert-holf v. O'Reilly*, 74 N. Y. 515, 30 Am. Rep. 323; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *Live Stock Dealers' & B. Asso. v. Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 398, Fed. Cas. No. 8,408.

The test to which every act is brought is this: Did the legislature enact the measure in the exercise of a reasonable discretion? Has the act any relation to the objects it purported to attain? In other words, can a valid reason be given for the legislation? If the court finds in the affirmative the act will stand.

Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257.

Only in a case of the most plain exercise of arbitrary power will the court pronounce an act without reasonable foundation.

Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Soon Hing v. Crowley*, 113 U. S. 705, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Patapaco Guano Co. v. North Carolina Bd. of Agri.* 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

The act in question is a valid exercise of the police power for the reason that it prohibits schemes which are in the nature of a lottery or gift enterprise, and are open to the same objections.

A lottery has been defined as "a scheme for the distribution of prizes and for the obtaining of goods or money by chance."

People v. Noelke, 94 N. Y. 137, 46 Am. Rep. 128; *Wilkinson v. Gill*, 74 N. Y. 63, 30 Am. Rep. 264.

The fact that a scheme has an element of certainty does not operate to purge it of its taint as a lottery where the element of chance is present.

Horner v. United States, 147 U. S. 449, 37 L. ed. 237, 13 Sup. Ct. Rep. 409; *Dunn v. People*, 40 Ill. 465; *Taylor v. Smetten*, L. R. 11 Q. B. Div. 207; *Reg. v. Harris*, 10 Cox, C. C. 352; *Davenport v. Ottowa*, 54 Kan. 711, 39 Pac. 708; *State v. Lumsden*, 89 N. C. 573; *Lynch v. Rosenthal*, 144 Ind. 86, 31 L. R. A. 835, 42 N. E. 1103.

It is the element of chance, the hope of getting something for nothing, and the appeal to the gambling instinct that constitutes the evil of lottery transactions.

Lansburgh v. District of Columbia, 11 App. D. C. 512; *Humes v. Fort Smith*, 93 Fed. Rep. 857.

So far as an act is to protect the morals and advance the welfare of the people by 48 L. R. A.

prohibiting every scheme and device bearing any semblance to a lottery or gambling, it would be a valid exercise of power, and citation of authorities is not necessary to sustain a proposition so well settled.

Long v. State, 74 Md. 565, 12 L. R. A. 425, 22 Atl. 4; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Phalen v. Virginia*, 8 How. 163, 12 L. ed. 1030.

Even if no intentional element of chance is involved the act is constitutional as forbidding a scheme in its nature demoralizing to legitimate business.

Lansburgh v. District of Columbia, 11 App. D. C. 512; *Humes v. Fort Smith*, 93 Fed. Rep. 857.

If the successful maintenance of the business depends, as it would seem to, in part, on the gross over-valuation of the premiums, the legislature has a clear right to protect the people from imposition by prohibiting the business altogether.

Patapaco Guano Co. v. North Carolina Bd. of Agri. 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344; *Steiner v. Ray*, 84 Ala. 93, 4 So. 172; *State v. Corbett*, 57 Minn. 345, 24 L. R. A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317; *Cooley, Const. Lim.* 6th ed. 740-744.

The means used in the acquisition and disposition of property are subject to the control of the state. That liberty in the use of property or liberty of contract are curtailed by an act is not an objection to the constitutionality thereof.

State v. Brown & S. Mfg. Co. 18 R. I. 16, 17 L. R. A. 856, 25 Atl. 246; *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759; *Com. v. Roswell*, 173 Mass. 119, 53 N. E. 132; *Singer v. State*, 72 Md. 464, 8 L. R. A. 551, 19 Atl. 1044; *State v. Corbett*, 57 Minn. 345, 24 L. R. A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317; *Com. v. Gardner*, 133 Pa. 284, 7 L. R. A. 666, 19 Atl. 550; *Shelton v. Mobile*, 30 Ala. 540, 68 Am. Dec. 143.

The act in question does not deny to the defendant the equal protection of the laws, since all persons in the inhibited class—that is, all persons issuing or redeeming stamps or coupons redeemable in merchandise—are under the same liability.

Slaughter-House Cases, 16 Wall. 36, sub nom. *Butchers' Benev. Asso. v. Crescent City L. S. L. & S. H. Co.* 21 L. ed. 394; *Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 664; *Barbier v. Connolly*, 113 U. S. 27, 23 L. ed. 923, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Beekwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

The state may distinguish, select, and classify objects of legislation, and in this has a wide discretion.

Kentucky Railroad Tax Cases, 115 U. S. 321, sub nom. *Cincinnati, N. O. & T. P. R.*

Co. v. *Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *State v. Brown & S. Mfg. Co.* 18 R. I. 16, 17 L. R. A. 856, 25 Atl. 246.

The fact that an act does not include all branches of one general business in its scope, but selects a certain branch thereof, does not open the legislation to the charge of unconstitutional class legislation.

Slaughter-House Cases, 16 Wall. 36, sub nom. *Butchers' Benev. Assn. v. Crescent City L. S. L. & S. H. Co.* 21 L. ed. 394; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Cotting v. Kansas City Stock-Yards Co.* 79 Fed. Rep. 679; *State v. Broadbelt*, 89 Md. 565, 45 L. R. A. 433, 43 Atl. 771; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

Messrs. Tillinghast & Murdock, for defendant:

When the validity of a statute is under consideration, it is always open to the courts to consider whether the regulation has a reasonable relation to some public purpose, or simply aids a particular class in unjust discrimination against another class.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29.

The act in question must, if sustained, rest upon the police power of the legislature.

To justify a statute passed under the police power, it must have a clear relation to the public health, morals, or safety.

Guthrie, 14th Amendment, pp. 73, 74, 75, 76; 1 Thayer, *Cases on Const. Law*, p. 693; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

The law under which defendant is prosecuted deprives him of his liberty and property without due process of law, and is therefore in conflict with the 14th Amendment to the Constitution of the United States.

Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Alleyger v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 18 Sup. Ct. Rep. 428; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147.

This sort of legislation has been attempted before, as there is always a class in the community which flies to the legislature 48 L. R. A.

when any business interferes with them in any way.

People v. Gillson, 109 N. Y. 389, 17 N. E. 343.

A lottery has been defined to be: "A scheme by which, on one's paying money or some other thing of value, he obtains the contingent right to have something of greater value, if an appeal to chance, by lot or otherwise, under the direction of the manager of the scheme, should decide in his favor."

Horner v. United States, 147 U. S. 449, 37 L. ed. 237, 13 Sup. Ct. Rep. 409; *Bishop, Statutory Crimes*, 449, § 952; *Bouvier, Law Dict.* 281.

The method under consideration contains none of the elements of a lottery.

When a state statute interferes, even remotely, with the interstate commerce clause of the Constitution, the court will go to almost any extreme to declare it unconstitutional.

Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Colins v. New Hampshire*, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; *Slaughter-House Cases*, 16 Wall. 36, sub nom. *Butchers' Benev. Assn. v. Crescent City L. S. L. & S. H. Co.* 21 L. ed. 394; *Smythe v. Ames*, 169 U. S. 406, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257.

If the defendant's business is not ruined, but his profits are decreased even by one cent because of this legislation, he has the same right to complain as though a million were involved.

Guthrie, 14th Amendment, 39, 40; *Sentell v. New Orleans & C. R. Co.* 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693; *Long v. State*, 74 Md. 565, 12 L. R. A. 425, 22 Atl. 4.

The act in question is unconstitutional because it deprives the defendant of the equal protection of the laws.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Railroad Commission Cases*, 116 U. S. 307, sub nom. *Stone v. Farmers' Loan & T. Co.* 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 780, 22 S. W. 350; *Fraser v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *State v. Brown & S. Mfg. Co.* 18 R. I. 16, 17 L. R. A. 856, 25 Atl. 246; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281.

Tillinghast, J., delivered the opinion of the court:

On the 13th day of November, 1899, the

defendant was arraigned before the district court of the eighth judicial district upon a complaint and warrant charging "that on the 28th day of October, 1899, with force and arms, Benjamin Dalton, of Johnston, did sell to one Frederick W. Perkins certain articles of merchandise, to wit, three pieces of tobacco, and did then and there give and distribute to said Frederick W. Perkins three stamps, commonly called 'trading stamps,' which said stamps did then and there entitle the said Frederick W. Perkins to demand and receive certain articles of merchandise from Sperry & Hutchinson, at their store; said Sperry & Hutchinson being persons other than the vendor of said three pieces of tobacco." The defendant filed a motion that the complaint be quashed, for the following reasons: (1) Because chapter 652 of the Public Laws of the state of Rhode Island, and especially the 1st section thereof, on which said complaint is founded, is in conflict with the 1st section of the 14th Amendment to the Constitution of the United States, because it deprives the defendant of his liberty and property without due process of law. (2) Because said chapter further conflicts with the 1st section of the 14th Amendment to the Constitution of the United States, because it deprives the defendant of the equal protection of the laws, in this: That stamps or coupons redeemable in money and merchandise or property, given by the vendor as a bonus in addition to the article purchased, are not included within the prohibition of the chapter; and (3) because said act is in conflict with article 1, § 10, of the Constitution of the state of Rhode Island. This motion was overruled by the court. The defendant thereupon pleaded, "Not guilty," but was adjudged probably guilty, whereupon the case was certified to this court upon the question of the constitutionality of the act under which said complaint was made. Said act reads as follows:

"Sec. 1. It shall be unlawful for any person or corporation to sell, give, or distribute any stamp, coupon, or other device which shall entitle the purchaser of property to demand or receive from any person or corporation other than the vendor any article of merchandise other than that actually sold to said purchaser; and for any person or corporation other than the vendor to deliver to any person any article of merchandise other than that actually sold upon presentation of any such stamp, coupon, or other device; provided, however, that this act shall not affect any existing contract.

"Sec. 2. Whoever shall violate any provision of this act shall be deemed guilty of a misdemeanor, and for each offense shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment for a term not exceeding three months."

It is contended on the part of the state that the act in question is sustainable as a valid exercise of the police power of the state, and also that the Constitution of the 48 L. R. A.

United States does not limit the state in the exercise of such power.

It would be presumptuous for any court to attempt to formulate an exact definition of the term "the police power of the state." Legal definitions do not sum themselves up in single sentences. They are, and of necessity must be, more or less general and elastic, in order that the courts may apply them to the infinite variety of circumstances which may arise in the relations and affairs of mankind in civilized society. But for all practical purposes the police power of the state may be shortly defined to be the power of the legislature to make such regulations relating to personal and property rights as appertain to the public health, the public safety, and the public morals. In *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357, it is referred to as the "power to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." Further and more elaborate definitions may be found in *State v. Fitzpatrick*, 16 R. I. 54, 1 Inters. Com. Rep. 713, 11 Atl. 767; *Harrington v. Providence*, 20 R. I. 233, 38 L. R. A. 305, 38 Atl. 1; *Lawton v. Steele*, 152 U. S. 136, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; *Stone v. Mississippi*, 101 U. S. 818, 25 L. ed. 1079; *Com. v. Alger*, 7 Cush. 53. Under these general and comprehensive definitions, it is evident that the general assembly is clothed with very large powers, and may exercise a broad discretion in the passage of laws pertaining to the internal affairs of the state. But, while the power is large, it is not without limit, and like all other powers of the general assembly, must be so exercised as not to violate the constitutional rights of the people. In *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, the court, in referring to the police power, says that it "has never yet been fully described nor its extent plainly limited, further, at least, than this: It is not above the Constitution, but it is bounded by its provisions; and if any liberty or franchise is expressly protected by any constitutional provision, it cannot be destroyed by any valid exercise by the legislature or the executive of the police power." See also *Re Jacobs*, 98 N. Y. 107, 50 Am. Rep. 636; Guthrie on the Fourteenth Amendment, 76-89, and note by Prof. Thayer; *Stekmeyer v. Charleston*, 53 S. C. 259, 31 S. E. 322. Again, when the validity of a statute of this sort is under consideration, it is always open to the court to consider, among other things, whether the act bears any reasonable relation to the public purpose sought to be accomplished, and a forced or strained relation is not enough. Thus, in *Lawton v. Steele*, 152 U. S. 136, 38 L. ed. 388, 14 Sup. Ct. Rep. 499, Mr. Justice Brown, in delivering the opinion of the court, said: "To justify the state in thus interposing its authority in behalf of the public, it must appear—First, that the interests of the public generally, as distin-

guished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts." See *United States ex rel. Kerr v. Ross*, 5 App. D. C. 249. And then, after instancing various enactments which have been held not to be within the police power of the states, the court further says: "In all these cases the acts were held to be invalid, as involving an unnecessary invasion of the rights of property, and a practical inhibition of certain occupations, harmless in themselves, and which might be carried on without detriment to the public interests." See also *Fick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29. Of course, it is always to be presumed that all acts of the general assembly are passed in the utmost good faith, and also that they are conformable to the Constitution. *Powell v. Pennsylvania*, 127 U. S. 678-685, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257. And it is not until the unconstitutionality of a given act is plainly made to appear that the court is called upon to declare it void. *State v. Narragansett*, 16 R. I. 424, 3 L. R. A. 295, 16 Atl. 901; *Carr v. Brown*, 20 R. I. 215, 38 L. R. A. 294, 38 Atl. 9. But after indulging every possible presumption and intentment in favor of the validity of a statute, and being unable to find that it can be sustained as a constitutional exercise of the legislative power, it becomes the duty of the court to declare it void. *Taylor v. Place*, 4 R. I. 324; *Carr v. Brown*, 20 R. I. 223, 38 L. R. A. 294, 38 Atl. 9; *Mugler v. Kansas*, 123 U. S. 661, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862.

We come, then, to the question whether the act before us is one which falls within the police power of the legislature; for, if it is not, it is clearly an unlawful interference with private right. We will endeavor to test this question by the simple process of elimination. First, then, Does said act look to or in any manner concern the public health? No one claims that it does, and no one could for a moment claim, with any basis of reason, that it has, or was intended to have, even the remotest bearing thereon. Second, Does the act look to or tend to promote the public safety? Nothing of this sort, either, is claimed in its favor, and we fail to see that anything could be, for it bears no relation whatsoever thereto. Having thus eliminated two of the general grounds upon which said act must be supported as being a valid exercise of the police power, we come to the third and last is L. R. A.

one, which raises the question whether the act relates to or tends to promote the public morals. The counsel in behalf of the state vigorously contends that it does, on the ground that it prohibits schemes which are in the nature of a lottery or gift enterprise, and hence, whether technically a lottery or not, are open to the same objection. He argues, substantially, that it is the element of chance, the hope of getting something for nothing, and the appeal to the gambling instinct, that constitutes the evil of lottery transactions; that it is clear that the scheme contemplated by the act and prohibited therein is, in effect, a lottery; and that, as an inducement to purchase, the promise of a premium to be given by a third person is held out, and the precise nature of the premium and its value are unknown at the time of purchasing, and thus a subtle appeal is made to the gambling instinct; and, moreover, that a demoralizing element is introduced into legitimate business. If this contention is well founded, the act in question is undoubtedly a valid and legitimate exercise of the police power. Is the method of doing business which is prohibited by the act, then, in the nature of a lottery? A lottery is a scheme for the distribution of prizes by chance. *Governors of Alms House v. American Art-Union*, 7 N. Y. 228; *Thomas v. People*, 59 Ill. 160. Or, to state it with more fullness, "It is a scheme by which a result is reached by some action or means taken, in which result man's choice or will has no part, and which human reason, foresight, sagacity, or design cannot enable him to know or determine until the same has been accomplished." 2 Bouvier, Law Dict. 281; *People v. Elliott*, 74 Mich. 264, 3 L. R. A. 403, 41 N. W. 916. "The word 'lottery' embraces the elements of procuring, through lot or chance, by the investment of money or something of value, some greater amount of money or thing of greater value." *United States v. Wallis*, 58 Fed. Rep. 942. The method of doing business which the act prohibits is the giving by a vendor, in connection with the sale by him of any article or articles, of any stamp or other device which shall entitle the vendee to obtain from some other person some article of merchandise in addition to that actually sold. It is to be observed that the act does not prohibit the vendor himself from giving or "throwing in," as it is sometimes termed, in common parlance, some other article in addition to that sold, but only prohibits the seller from giving anything in the nature of a check or order upon some other person which shall entitle the holder thereof to obtain from such other person some article of merchandise in addition to the thing sold. In other words, the act recognizes the right of a person to give away an article of merchandise in connection with, and as an inducement to the making of, a sale of some other article, but provides, in effect, that the giving of such additional article must be done by him directly, and not through a third person. We fail to see that there is any substantial difference in principle between the two meth-

ods, or that either bears any resemblance to a lottery. The element of chance, which is the basal principle of every scheme in the nature of a lottery, is wholly wanting. To illustrate: A buys of B 20 pounds of sugar for a dollar, and is given with the purchase an order, check, stamp, token, or some kind of device,—no matter what,—which, upon presentation to C entitles A to some other specific article of merchandise in addition to the sugar. How does such a transaction differ in principle from one where A receives the premium for making the purchase—for such it really is—directly from B himself? In other words, how is it changed into a gambling transaction by the fact that the premium is received through the agency of C, instead of being received directly from B? We cannot see that it is thus changed. The thing sought to be accomplished by the vendor is the sale of his goods by means of the inducement held out to the purchaser in the form of a premium, and if he may himself give and deliver the premium, as he clearly may, he may also give it through a third person. As to the argument before referred to, that the scheme is in the nature of a lottery because the precise nature and value of the premium are unknown to the purchaser, it is enough to reply that nothing appears in the act or in the record before us to show this. The prohibition is that the purchaser shall not receive from any person other than the vendor "any article of merchandise other than that actually sold to said purchaser;" thereby implying that the parties to the transaction would be dealing with reference to some particular article, or at any rate to some one of a given class of articles in the possession of the third person, the nature and value of which were well understood. To illustrate again: A buys of B a suit of clothes for \$20, and receives a check or stamp which entitles him to receive from C a pair of shoes worth \$2, a hat worth \$2, or a pair of gloves worth \$2. It is true that A has not seen these articles at the time of purchasing the clothes, but as he knows that he is to receive one of the articles mentioned, as he may elect, we cannot see that there is anything so uncertain about the transaction as to appeal to the gambling instinct. At any rate, it does not in any real sense partake of the nature of a lottery. It is simply one of the infinite variety of devices which are resorted to by trades people, in these days of sharp competition, to promote the sale of their goods. The complaint in the case before us expressly sets out that the stamps which were given by the defendant in connection with the sale entitled Perkins, the purchaser of the tobacco, to receive "certain articles of merchandise from Sperry & Hutchinson at their store;" thereby showing by a fair inference, we think, that it was well understood between the parties to the transaction what the articles were. It is to be further observed that the act does not prohibit the sale of merchandise, and the giving, in connection with and as an inducement to the purchase thereof, of trading stamps, redeemable in cash by a third per-

son, nor does it prohibit the giving of stamps redeemable by the vendor himself, either in cash or merchandise, so that the use of trading stamps is not prohibited, but only limited. And it would seem that the legislature could not have considered the scheme which the act prohibits as being in the nature of a lottery, for if they had, they would not have exempted the cash-stamp business from the operation of the law.

Referring again to the act in question, our view thereof may be stated thus: The act, as we construe it, prohibits a person from selling a given article, and at the same time, and as a part of the transaction, giving to the purchaser a stamp, coupon, or other device which will entitle him to receive from some third person some other well-defined article in addition to the one sold. This is equivalent to declaring that it is illegal for a man to give away one article as a premium to the buyer for having purchased another; for, as already intimated, it can make no possible difference that the article given away with the sale is delivered to the purchaser by a third person, instead of the seller himself. We think it is clear that such a prohibition is an unwarranted interference with the individual liberty which is guaranteed to every citizen both by our state Constitution and also by the 14th Amendment to the Constitution of the United States. The term "liberty," as used in the Constitution, is a very broad and comprehensive one. It does not mean freedom from physical restraint, simply, but embraces the right of each individual "to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare." In the terse language of Peckham, J., in *People v. Gilson*, 100 N. Y. 399, 17 N. E. 345, "Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." See also *Fraser v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Alleyer v. Louisiana*, 165 U. S. 589, 590, 41 L. ed. 836, 17 Sup. Ct. Rep. 427; Guthrie, on the Fourteenth Amendment, 109. This inalienable right is trenchanted upon and impaired whenever the legislature prohibits a man from carrying on his business in his own way, provided, always, of course, that the business and the mode of carrying it on are not injurious to the public, and provided, also, that it is not a business which is affected with a public use or interest. Now, it was certainly within the constitutional right of the defendant in this case to sell tobacco,—it being presumed, of course, that he had obtained the necessary authority to deal in that article; and, as an inducement to people to trade with him, it was also his right to give to each purchaser of a certain quantity of tobacco, either directly or through a third person, some other designated arti-

de of value, by way of premium. The statute in question, however, steps in to prevent him from adopting such a course to procure trade, and from it to secure an income and livelihood; and he is thus restrained in the free enjoyment of his faculties to which he is constitutionally entitled, unless such restraint is necessary for the common welfare, in one of the ways heretofore mentioned, and we cannot see that it is. In other words, the statute says that A shall not sell to B a barrel of flour, and, in connection with and as a part of the contract of sale, give to B a coupon which will entitle him to receive from C a pound of tea, a pitcher, a lamp, a clock, a door mat, or some other specified article of merchandise. If the act had prohibited the giving away of any stamp or device in connection with the sale of an article, which would entitle the holder to receive, either directly from the vendor, or indirectly through another person, some indefinite and undescribed article, the nature and value of which were unknown to the purchaser, there would then be introduced into the prohibited transaction enough of the element of uncertainty and chance to condemn it as being in the nature of a lottery.

But it is further argued in support of the statute that the scheme aimed at is one which is demoralizing to legitimate business, and hence within the police power of the state to prohibit. Just what is meant by this general characterization of the scheme is not clear. If, however, as we presume, the language is intended to refer to the methods employed by trading-stamp companies in their dealings with merchants, as revealed in *Lansburgh v. District of Columbia*, 11 App. D. C. 512, it is simply another way of saying that the scheme is a gift enterprise, partaking of the nature of a lottery, and hence may be prohibited by the state. But, as already intimated, we fail to see that, even conceding that the scheme which is sought to be prohibited may properly be denominated a "gift enterprise," it partakes of the nature of a lottery, and hence is demoralizing to legitimate business, in the sense of being a scheme to cheat and defraud purchasers. In other words, a gift enterprise is not necessarily a lottery. *Long v. State*, 74 Md. 565, 12 L. R. A. 425, 22 Atl. 4. In this connection it is pertinent to observe that it is not enough to warrant the state in absolutely prohibiting a given business that it is conducted by methods which do not meet with general approval. There must be something in the methods employed which renders it injurious to the public in some one of the ways before mentioned, in order to warrant the state in interfering therewith. Nor is it enough to bring a given business within the prohibitory power of the state that it is so conducted as to seriously interfere with or even destroy the business of others. Take for illustration the great department stores in our large cities. By reason of the almost infinite variety of goods which they carry, they furnish greater facilities to customers, and can offer them greater inducements in the way of trade, 48 L. R. A.

than can those stores which carry but a single line of goods. The result is, as everybody knows, that very many small traders have been crushed out and obliged to abandon their business entirely, while the owners of the mammoth establishments, which supply almost everything which we eat, drink, wear, use, need, or desire, whether useful or ornamental, are prosperous and successful in a remarkable degree. But, while the result of this method of doing business is injurious to those who employ the more primitive one, can it be said that a law prohibiting a department store would be a valid exercise of the police power? Clearly not. A case decided no longer ago than December last holds that such a law is invalid. We refer to the case of *Chicago v. Netcher*, 183 Ill. 104, ante, 261, 183 Ill. 104, 55 N. E. 707, in which it was held that an ordinance prohibiting a person, firm, or corporation from exposing for sale or selling any meat, fish, butter, or other provisions in any place of business in the city where dry goods, clothing, or drugs are sold tends in no way to protect the safety, health, or morals of the public, or to accomplish an object falling within the police power. It was also held that such an ordinance contravenes the provisions of both the Constitution of the United States and of the state, insuring to every person liberty and the protection of his property rights, and providing that he shall not be deprived of life, liberty, or property without due process of law. In *State ex rel. Wyatt v. Ashbrook* (Mo.) 55 S. W. 627, decided in February last, the supreme court of Missouri strongly condemns legislation which attempts to abridge or hamper the right of a citizen to pursue any lawful calling or avocation which he may choose without unreasonable regulation or molestation. It may be demoralizing to legitimate business for two great rival dry-goods houses to cut prices in the attempt to undersell each other or for two competing railway lines to sell tickets at half price in the attempt of each to get an advantage over the other, yet probably no one would claim that such competition could be prohibited by law. "Bargain sales" and "bargain counters" may be demoralizing to business, but probably no one would claim that they can be abolished by law. The invention of labor-saving machinery may be said to demoralize business, and so may numerous other modern innovations in manufacturing and industrial pursuits whereby old methods have to be abandoned and new ones adopted. But whatever demoralization results therefrom is incidental to that principle of evolution which is everywhere manifest in the mercantile and industrial as well as in the physical world. The great law of competition invites and promotes this sort of demoralization, and the remedy for one who is injured by it lies, not in legislation, but in being able to keep pace with the changed, if not always improved, methods.

But it is further argued that the fact that a given scheme has an element of certainty does not operate to purge it of its

taint as a lottery, where the element of chance is present; and in support of this contention several cases are relied on, to which we will briefly refer. *Dunn v. People*, 40 Ill. 465, is widely different from the case at bar. There the evidence showed that the defendant, who was indicted under a statute making the vending of lottery tickets a penal offense, was conducting what he termed a "gift-sale establishment;" that he kept upon his desk a box filled with envelopes, upon each of which was printed an advertisement purporting that it contained valuable recipes and popular songs, and also a card descriptive of some article in an "immense stock of over 250,000 pianos, watches, sewing machines, jewelry, etc., worth \$1,500,000, all to be sold for \$1 each, without regard to value, and not to be paid for until you know what you are to receive." An advertisement was displayed at the store, which gave a list of a great variety of articles, and stated that some of them were represented by the card in the envelope. A card might represent a grand piano or a finger ring, but whatever article the purchaser might find specified upon the card in the envelope bought by him he would be entitled to purchase for \$1. The price of the envelope was 25 cents. It was strenuously argued by counsel for the plaintiff in error that the sale of one of these envelopes, with its contents, was not the sale of a lottery ticket, because there was no element of chance in the transaction; that the card or ticket representing an article of merchandise to be bought for \$1 conferred simply a right to buy, which the holder could exercise or not, at his option; and that, if he bought, he did so with his eyes open, and with the opportunity of knowing the value of what he purchased. But the court held that, while the element of chance did not lie in what the holder of the envelope might knowingly do with his card after he had purchased the envelope, it did lie in the purchase of the envelope itself, which, it was represented by the advertisement, might contain a ticket that would give him the right to buy for \$1 an article worth hundreds of dollars, or it might contain one which would only give him the right to buy something so valueless as not to be worth buying at any price. Such a scheme was very clearly a lottery, within any of the definitions hereinbefore given. *Horner v. United States*, 147 U. S. 449, 37 L. ed. 237, 13 Sup. Ct. Rep. 409, was also a case in which the element of certainty went hand in hand with the element of chance, and the court held that the former did not destroy the existence or effect of the latter. *Taylor v. Smetten*, L. R. 11 Q. B. Div. 207, was a case where the defendant sold packets, each containing a pound of tea, at 2s. 6d. a packet. In each packet was a coupon entitling the purchaser to a prize, and this was publicly stated by the defendant before the sale; but the purchasers did not know until after the sale what prizes they were entitled to, and the prizes varied in character and value. It was held that the transaction amounted to a lottery, under Stat. 42 Geo. 48 L. R. A.

III. chap. 119, § 2. In that case it clearly appears that the purchaser bought the tea, coupled with the chance of getting something of value by way of a prize, but without any knowledge of what the prize might be. "In making his purchase," as said by the court, "he exercised no choice—what he got, he got without any option or action of his own will, but as the result of mere chance or accident." In *Reg. v. Harris*, 10 Cox, C. C. 352, the element of chance was manifestly present. In *State v. Lumsden*, 89 N. C. 572, the defendant sold to customers small boxes of candy, of trifling value, for the chance or opportunity of designating one of certain pictures, conveniently arranged in his place of business, behind some of which were small sums of money, and behind others a card on which was the title "C," the purchaser getting either the money or the card, according as he might select; but, if he got a card, he became entitled to another box of candy. This was held, as undoubtedly it should have been, to constitute a lottery. *Lynch v. Rosenthal*, 144 Ind. 86, 31 L. R. A. 835, 42 N. E. 1103, and *Davenport v. Ottawa*, 54 Kan. 711, 39 Pac. 708, are cases where the element of chance is so manifestly present and controlling as to require no comment. *Lansburgh v. District of Columbia*, 11 App. D. C. 512, is more nearly in point than any of the others relied on in support of the act, but is not controlling. The statute under which that case was brought prohibited any gift enterprise in the District, and the court held that dealing in trading stamps in the manner shown by the evidence brought the acts of the defendant within the statutory definition of a gift enterprise. The court suggested, however, that it was possible that the statute might not be operative in a case where the sale of a lawful article was accompanied by a gift of something specific and certain, not attended with any element of chance, and where the gift was not the real object of the sale, in an attempt to evade acts regulating or prohibiting a particular traffic. In so far as the opinion—which is a very vigorous one—condemns the trading-stamp business it describes, we are not disposed to differ therefrom. *Humes v. Fort Smith*, 93 Fed. Rep. 857, holds that the state may provide that gift enterprises shall be licensed, or may, under the police power, prohibit them altogether. The case is similar to and follows the *Lansburgh Case*, 11 App. D. C. 512. Among the cases to which we have been referred by defendant's counsel as supporting their contention that the transaction prohibited by the act is not in the nature of a lottery, those of *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 916, and *Long v. State*, 74 Md. 565, 12 L. R. A. 425, 22 Atl. 4, are most nearly in point, and, on principle, sustain the position we have taken.

Having thus come to the conclusion that the act cannot be sustained as being a valid exercise of the police power, it becomes unnecessary to consider the other point taken by the defendant, namely, that the act is

obnoxious to the 14th Amendment, as being class legislation.

In order that we may not be misunderstood in the position which we feel compelled to take regarding the case before us, we deem it proper to say that we do not approve of the trading-stamp business, as some of the cases above referred to inform us it is conducted, although there is no evidence before us concerning it; nor do we decide that it is not competent for the general assembly to prohibit it. What we do decide is that the statute in question is so broad as to interfere with the right of an individual to deal with his own property in his own way,—that is to say, to make such contracts regarding the sale and disposition thereof as he shall see fit,—so long as he observes the rule that each one shall so use and enjoy his own property as not to injure that of another person, and also the further rule that his use of it shall not be injurious to the community, and hence is not a valid exercise of the legislative power.

Alice S. PITTS *et al.*

v.

RHODE ISLAND HOSPITAL TRUST COMPANY.

(.....R. I.....)

An allowance necessary for the maintenance of an infant may be ordered by a court of equity out of the income of a trust in the residue of an estate, created by a will giving the trustee discretion to apply a portion of such income to the education of the infant, but making no provision for his maintenance, where the mother of the infant is the only other person entitled to any part of the income, and she joins in a request for the allowance.

(February 9, 1900.)

BILL to obtain an allowance for the maintenance of an infant out of an estate created for his benefit. *Granted.*

The facts are stated in the opinion.

Mr. George T. Brown, for complainants:

The law favors vesting, and if the intention be doubtful, a legacy will, if possible, be held to be vested rather than contingent.

Rogers v. Rogers, 11 R. I. 38; *Wengerd's Estate*, 143 Pa. 615, 13 L. R. A. 360, 22 Atl. 869.

The fact that the testator allows the child the interest on the general fund for his education at once, in the discretion of the trustee, and the principal thereof when he attains certain ages, and both the principal and interest of the \$3,500 fund when he arrives

NOTE.—For jurisdiction of court of equity to sell infant's lands, see *Roche v. Waters* (Md.) 7 L. R. A. 533; *Wilson v. Hughes* (W. Va.) 39 L. R. A. 292; *Richards v. East Tennessee, V. & G. R. Co.* (Ga.) 45 L. R. A. 712.

For jurisdiction to authorize mortgage of infant's property, see *Warren v. Union Bank* (N. Y.) 43 L. R. A. 256.
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at the age of fourteen, shows he recognizes him as the owner of the whole fund.

Rogers v. Rogers, 11 R. I. 38; *Popham v. Banfield*, 1 Salk. 236; *Albee v. Carpenter*, 12 Cush. 382.

Where a gift over of personal estate has been maintained, it is where the gift to the first taker is by the terms of the bequest not exceeding a gift for life.

Jackson ex dem. Brewster v. Bull, 10 Johns. 19.

If an absolute property is given to the first taker by the express or implied terms of the will, the limitation over is void.

Hall v. Palmer, 87 Va. 354, 11 L. R. A. 610; *Ramsdell v. Ramsdell*, 21 Me. 288; *Stowell v. Hastings*, 59 Vt. 494, 59 Am. Rep. 748, 8 Atl. 738; *Jaureche v. Proctor*, 48 Pa. 466; *Ide v. Ide*, 5 Mass. 500; *Bacon v. Woodward*, 12 Gray, 376; *Woodrum v. Kirkpatrick*, 2 Swan, 218; *Atty. Gen. v. Hall*, Fitzgibbons, 314; 2 Story, Eq. Jur. § 1067a.

The gift over is void for uncertainty.

2 Story, Eq. Jur. § 1073.

Messrs. Tillinghast & Tillinghast for respondent.

Matteson, Ch. J., delivered the opinion of the court:

The purpose of the bill is to obtain an allowance for the maintenance of an infant out of his estate. The case is as follows: Charles F. Pitts died in Providence on September 20, 1894, leaving a will, which was duly admitted to probate. The complainants, Alice S. Pitts and William Franklin Pitts, are, respectively, the widow of the deceased and his only child, now about 6½ years of age, and the former is also guardian of the person and estate of the latter. By the third clause of the will, certain unimproved real estate was devised to the widow, which she has sold, so far as she has been able, and the proceeds of which amount to \$1,785. This sum she has expended in the necessary support of herself and child. Besides this unimproved real estate devised to the widow in fee, certain other improved real estate, situated in Providence and Cranston, was devised to her for life, with a remainder in fee to the child. This estate is valued at \$12,000, and the income therefrom, when fully rented, amounts to \$600 per annum, but by reason of the fact that some of the tenements have been vacant a part of the time, the payment of taxes and water rates, assessments for curbing and concreting of the sidewalks, the laying of drains, plumbing, piping, and other expenses for repairs and improvements on the property, its income has been wholly inadequate for the support of the complainants, and they were unable to pay the taxes assessed against the property in Providence, including an assessment for curbing for the year 1898; and portions of this real estate were in June, 1899, sold for the payment of such tax and the tax assessed against the same for the year 1899, and the water rates for the same year are now in arrears, and the collector of taxes of the city of Providence threatens to levy on

the estate, and to cut off the water supply, unless the tax and water rates are paid. The complainants allege that they have exhausted their resources to support themselves and to pay these taxes and expenses, and to this end the said Alice has mortgaged her household furniture, and the mortgagee has threatened to foreclose the mortgage. The respondent, the Rhode Island Hospital Trust Company, was, by the will, appointed trustee of the estate of the minor, except the fee in the real estate, which was subject to the widow's life estate; and under the seventh clause of the will there is now in its hands as trustee the sum of \$3,500, and also the net accumulated income to this time, amounting to \$374.52, which fund and accumulated interest is directed by the will to be applied from time to time, in the discretion of the president for the time being of the trustee, for the necessary maintenance and proper education of said child after he shall have attained the age of fourteen years. The respondent also holds as trustee the residue of the estate and property given to it by the will, the principal of which, at the present estimated value of the investments thereof, amounts to \$16,910.14. The income of this second fund under the provisions of the will may be applied, in the discretion of the trustee, for the education of the child, but there is no provision for its application to his maintenance. From the income of the second fund the trustee has paid over from time to time to the complainant Alice, as guardian of the infant William, \$50 annually to be applied to the proper education of the infant, as by the will directed; this sum being, in the discretion of the trustees and officers of the respondent under the trusts of the will, a liberal allowance for the purpose, considering the age of the infant. The respondent and its officers do not consider that it has or they have any right or discretion to apply the income of the second fund to any other purpose than the education of the infant, though, had they deemed that they had such right or discretion, the respondent admits that in the straitened circumstances of the complainants, as from time to time represented to its officers, it and they would have gladly applied the residue of the income of the second fund to the relief of the complainants. The accumulated net income of this portion of the estate now in the possession of the respondent is \$528.85. By the eighth clause of the will the principal of the trust estate in the hands of the respondent, except the fund of \$3,500, is to be kept intact until distributed as follows: One tenth of the principal, with the accumulations thereof, to the said child when he shall have attained the age of twenty-one years; one tenth when he shall have attained the age of twenty-five years; one tenth when he shall have attained the age of thirty years; and the remainder when he shall have attained the age of thirty-five years. By the third clause of the will, in the event of the decease of the child during the lifetime of the widow, and before attaining the age specified, the entire income of the estate is given to the

widow during her natural life. Subject to these dispositions of his estate, the testator, in the event of the death of his son before attaining the specified age of thirty-five, leaving no issue surviving, gives and devises the principal of the residue of his estate to Mabel Ingalls, and, in the event that she has deceased, to his heirs at law. The bill prays that the trustee may be decreed to pay over to the guardian of the infant, for his proper support, maintenance, and education, the total amount of the accrued interest in the estate in its hands, and also to pay over to her such interest as shall accrue in the future, and such portions of the principal of the trust fund for the same purpose as to the court shall seem meet, and for general relief.

To provide for the maintenance of infants out of their personal and the income of their real estate is an old and well-recognized branch of equity jurisdiction. Maintenance may be allowed, not only in cases in which the will does not authorize an allowance, as in the present instance, but also where it expressly directs an accumulation of the income. It is essential, however, to the granting of the application, that the infant should have such an absolute title or interest in the property or its income that the right of no other person will be affected by the allowance. Unless he has such an interest, the consent of any person entitled in remainder, whose estate may be diminished in value by the allowance, must be had before the application will be entertained. *Greenwell v. Greenwell*, 5 Ves. Jr. 195; *Ex parte Kebble*, 11 Ves. Jr. 606; *Errington v. Chapman*, 12 Ves. Jr. 20; *Errat v. Barlow*, 14 Ves. Jr. 202; *Marshall v. Holloway*, 2 Swanst. 439; *Macpherson, Infants*, *232-234; *Beach*, Tr. §§ 356, 357; *Allowances for Maintenance of Infants*, 11 Alb. L. J. 205. In view of these principles, we have reached the conclusion, after some hesitancy, that the bill makes a case for relief in so far as it asks for an allowance for the maintenance of the infant out of the income of the residue of the estate in the hands of the respondent. It was the evident intent of the testator that the income, at least, of this fund should be applied—First, to the benefit of his son, so far as it might be needed for his education; and, second, in case of his death before attaining the ages specified, when he was to receive the principal, the entire income should be paid to the widow, if living, during her life. No one else is entitled to any part of the income; for the gifts over, which are made expressly subject to the prior provisions for the benefit of the son and widow, are limited to the principal of the residue, thereby clearly excluding the accumulations of income. The widow, then, is the only person besides the son whose interest will be affected by any allowance to be made, and she has joined in the bill asking for the allowance. Though the will limits the application of the income of the residue of the estate to the education of the son, it is difficult to see how it can be made available for that purpose unless it be also applied to his maintenance. The

other provisions of the will which the testator made for the support of his widow and son not being adequate,—as he doubtless supposed they would be,—this income must be applied to the son's maintenance as well

as his education; for, unless he can be properly supported, he will be in no condition to be profited by the education. We will hear the parties further as to the extent of the allowance to be made.

SOUTH DAKOTA SUPREME COURT.

NATIONAL LIFE INSURANCE COMPANY of Montpelier, Vermont, Appt.,

v.

Corwin D. MEAD, Treasurer of Pierre, Resp't.

(.....S. D.....)

1. The issuance of bonds to fund the floating indebtedness of a city, where the electors have voted therefor, is authorized by Laws 1890, chap. 37, art. 5, § 1, authorizing a city council to borrow money on the city's credit for municipal purposes, and issue bonds therefor on a majority vote of the electors.
2. Certificates signed by the mayor, auditor, and attorney of a city, stating what steps had been taken preliminary to the issuing of certain bonds and as to the financial condition of the city, though used by the person who negotiated the bonds, are inadmissible in an action thereon to create an estoppel against the city's asserting that the bonds were in excess of the limit of the city's indebtedness, when the making of such a statement was not within the scope of the official duty of the officers making it.
3. A recital in city bonds as to the amount of indebtedness of the city does not create an estoppel against showing that the indebtedness was greater, when the statutes require the public records of the city to show the amount of the existing indebtedness as well as the amount of the taxable property.
4. Bonds issued for the purpose of refunding an existing indebtedness are not to be regarded as creating any new or additional indebtedness, and should not be considered in determining whether or not a city had reached or exceeded its constitutional debt limit.

(March 2, 1900.)

APPEAL by plaintiff from a judgment of the Circuit Court for Hughes County in favor of defendant in a mandamus proceeding to compel the payment of certain interest coupons on bonds issued by the city of Pierre. *Reversed.*

The facts are stated in the opinion.

Messrs. Horner & Stewart for appellant.

Messrs. Dillon & Sutherland, and *Ivan W. Goodner*, for respondent:

A purchaser of bonds was charged with the duty of examining the records of indebtedness, in order to ascertain whether the bonds were lawfully issued.

NOTE.—As to change of form of indebtedness as constituting a new debt, see note to *Beard v. Hopkinsville* (Ky.) 23 L. R. A. on page 407. 18 L. R. A.

Sutliff v. Lake County Comrs. 147 U. S. 230, 37 L. ed. 145, 13 Sup. Ct. Rep. 318; *Brown v. Bon Homme County*, 1 S. D. 210, 46 N. W. 173; *Swan v. Arkansas City*, 61 Fed. Rep. 478.

There must be express authority, granted by the legislature, to issue them, before the city can issue bonds of any character.

Such purposes, and such only, as are germane to the object of the welfare of the municipality, at least such as have a legitimate connection with their objects, are corporate purposes.

People ex rel. Cairo & St. L. R. Co. v. Dupuyt, 71 Ill. 651; *People ex rel. Cairo & St. L. R. Co. v. Trustees of Schools*, 78 Ill. 136.

Municipal corporations possess only such powers as are expressly given, or implied because essential to carry into effect such as are expressly granted.

Burnett v. Denison, 145 U. S. 135, 36 L. ed. 652, 12 Sup. Ct. Rep. 819; *Ottawa v. Carey*, 108 U. S. 121, 27 L. ed. 674, 2 Sup. Ct. Rep. 361; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 25 S. W. 75; *Brenham v. German American Bank*, 144 U. S. 173, 36 L. ed. 390, 12 Sup. Ct. Rep. 559; *Hill v. Memphis*, 134 U. S. 198, 33 L. ed. 887, 10 Sup. Ct. Rep. 562.

The city is not estopped by the recitals in the bonds.

Doon Twp. v. Cummins, 142 U. S. 366, 35 L. ed. 1044, 12 Sup. Ct. Rep. 220; *Sutliff v. Lake County Comrs.* 147 U. S. 230, 37 L. ed. 145, 13 Sup. Ct. Rep. 318; *Lake County v. Graham*, 130 U. S. 674, 32 L. ed. 1065, 9 Sup. Ct. Rep. 654; *Hedges v. Dixon County*, 150 U. S. 192, 37 L. ed. 1044, 14 Sup. Ct. Rep. 71; *Lake County v. Rollins*, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; *Dixon County v. Field*, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. Rep. 315; *Swan v. Arkansas City*, 61 Fed. Rep. 478; *Brown v. Bon Homme County*, 1 S. D. 216, 46 N. W. 173; *Burnett v. Denison*, 145 U. S. 135, 36 L. ed. 652, 12 Sup. Ct. Rep. 819; *National Bank of Commerce v. Granada*, 10 U. S. App. 692, 54 Fed. Rep. 100, 4 C. C. A. 212; *Shaw v. Independent School Dist.* 77 Fed. Rep. 277, 40 U. S. App. 475, 23 C. C. A. 169; *Litchfield v. Ballou*, 114 U. S. 100, 29 L. ed. 132, 5 Sup. Ct. Rep. 820; *Buchanan v. Litchfield*, 102 U. S. 279, 26 L. ed. 138; *Flagg v. School Dist. No. 70*, 4 N. D. 30, 25 L. R. A. 363, 58 N. W. 504.

By the issue of the bonds the debt was increased to the amount of the bonds.

Doon Twp. v. Cummins, 142 U. S. 366, 35 L. ed. 1044, 12 Sup. Ct. Rep. 220; *State ex rel. Marinette, T. & W. R. Co. v. Tomahawk*,

96 Wis. 73, 71 N. W. 86; *Birkholz v. Din-
nie*, 6 N. D. 511, 72 N. W. 931.

The bonds are not only invalid because they exceed the constitutional limit, but are a nullity also because they are not in the terms of the ordinance upon which they are based.

Risley v. Howell, 57 Fed. Rep. 544.

Even bona fide purchasers of negotiable municipal securities are charged with knowledge of all the requirements of the statute under which the securities were issued.

People ex rel. Kern County v. Baker, 83 Cal. 149, 23 Pac. 364, 1112.

On petition for rehearing.

The indebtedness of the board of education should be included as a part of the city's debt in arriving at the total amount of the city indebtedness.

When the Constitution of a state imposes upon the municipal corporations within it a limitation of their power to incur debts, it is not within the power of the legislature of the state to dispense with that limitation, either directly or indirectly.

Lake County v. Graham, 130 U. S. 674, 32 L. ed. 1065, 9 Sup. Ct. Rep. 654; *Dill. Mun. Corp.* 4th ed. § 529a; *Hainer*, *Modern Law of Municipal Securities* (1898) § 227; *Litchfield v. Ballou*, 114 U. S. 192, 29 L. ed. 133, 5 Sup. Ct. Rep. 821; *Doon Twp. v. Cummins*, 142 U. S. 366, 35 L. ed. 1044, 12 Sup. Ct. Rep. 220.

The board of education is a mere incident of the city, and not a separate political entity, exercising the powers of government independently of the city.

State ex rel. Power v. Power, 5 S. D. 627, 59 N. W. 1090; *Atchison Bd. of Edu. v. DeKay*, 148 U. S. 591, 37 L. ed. 573, 13 Sup. Ct. Rep. 706; *Orris v. Des Moines Park Comrs.* 88 Iowa, 674, 56 N. W. 294; *Kelly v. Minneapolis*, 63 Minn. 125, 30 L. R. A. 281, 65 N. W. 117; *McGurn v. Chicago Bd. of Edu.* 133 Ill. 135, 24 N. E. 529; *McGovern v. Fairchild*, 2 Wash. 479, 27 Pac. 173; *Wilcoxon v. Bluffton*, 153 Ind. 267, 54 N. E. 110.

Haney, J., delivered the opinion of the court:

This proceeding was instituted to compel defendant, as treasurer of the city of Pierre, to pay certain interest coupons. A trial, by the court, of the issues raised by an alternative writ of mandamus and answer, resulted in a judgment of dismissal, and the plaintiff appealed. October 1, 1890, the city, for value received, executed and delivered to various parties 200 funding bonds, each for \$500, numbered consecutively from 1 to 200, inclusive, with interest coupons attached, containing the following recitals: "This bond is one of a series of bonds, amounting to one hundred thousand dollars, issued for the purpose of funding the outstanding indebtedness of the city, in pursuance of the general incorporation laws of the state of South Dakota, approved March sixth, 1890, adopted by said city, and an ordinance of said city of Pierre entitled 'An Ordinance to Issue Bonds for the Purpose of Funding and

Paying the Outstanding Indebtedness of the City of Pierre,' approved August fifth, 1890, and a vote of the electors in favor of issuing said bonds, by a majority of the legal votes cast at a special election duly held in said city on the sixteenth day of September, 1890."

October 1, 1891, the city, for value received, executed and delivered to various parties 300 funding bonds, each for \$500, numbered consecutively from 1 to 300, inclusive, with interest coupons attached, containing the following recitals: "This bond is one of a series of bonds amounting to one hundred and fifty thousand dollars, issued for the purpose of funding and paying the outstanding indebtedness of the city, in pursuance of the general incorporation laws of the state of South Dakota and an ordinance of said city of Pierre entitled 'An Ordinance to Issue Bonds for the Purpose of Funding and Paying the Outstanding Indebtedness of the City of Pierre, South Dakota,' approved July twenty-eighth, 1891, and a vote of the electors in favor of issuing said bonds, by a majority of the legal votes cast at a special election duly held in the said city on the eighth day of September, 1891."

Plaintiff is the bona fide holder of coupons cut from bonds belonging to both issues. Collection is resisted on the ground that the city was without power to issue funding bonds, and that when these were issued the city debt exceeded the constitutional limit. The statute referred to in the bonds gave the city council power: "To borrow money on the credit of the corporation for corporate purposes, and issue bonds therefor, in such amounts and forms, and on such conditions as it shall prescribe, but shall not become indebted in any manner or for any purpose to any amount including existing indebtedness, in the aggregate to exceed five (5) per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; and before or at the time of incurring any indebtedness, shall provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years after contracting the same: provided, no bonds shall be issued by the said city council under the provisions of this act either for general or special purposes unless at an election after twenty days' notice in a newspaper published in the city, stating the purpose for which said bonds are to be issued and the amount thereof, the legal voters of said city by a majority shall be determined in favor of issuing said bonds." Laws 1890, chap 37, art. 5, § 1.

It will be observed that this law gives express power to borrow money by issuing bonds for corporate purposes. Did this confer power to issue bonds for the purpose of funding floating indebtedness? An affirmative answer to this inquiry is supported by the following decisions: *Morris v. Taylor*, 31 Or. 62, 49 Pac. 660; *Huron v. Second*

Ward Sav. Bank, 57 U. S. App. 593, 86 Fed. Rep. 272, 30 C. C. A. 38; *Portland Sav. Bank v. Evansville*, 25 Fed. Rep. 389. The authorities cited by defendant's counsel do not sustain a different view. In *Brenham v. German American Bank*, 144 U. S. 173, 36 L. ed. 390, 12 Sup. Ct. Rep. 559, there was only express power to borrow for corporate purposes, and a majority of the court held that power to issue negotiable bonds could not be implied. So, in *Hill v. Memphis*, 134 U. S. 198, 33 L. ed. 887, 10 Sup. Ct. Rep. 562, express power to issue bonds was wanting, and the court decided that the power did not exist by implication. Here, however, the statute expressly makes the power to issue bonds coextensive with the power to borrow money. Either may be exercised for any corporate purpose; and the payment of legal municipal debts is clearly a corporate purpose. If a city has power to borrow money by issuing bonds, for the purpose of lighting its streets, it clearly has power to borrow money in the same manner to pay an indebtedness incurred for the same purpose. Had the legislature contemplated there would be no floating indebtedness under any circumstances, cities would have been authorized to borrow only for the purpose of paying outstanding bonds. We think the city was authorized to issue bonds for the purpose of funding its indebtedness.

Evidence was received upon the trial tending to prove that the person employed by the city to dispose of these bonds was furnished with certain statements of fact, or certificates, concerning its action preceding their execution, and its financial condition at that time, signed by its mayor, auditor, and attorney. This evidence was properly disregarded by the trial court in making its decision. If such statements or certificates were used, the city would not be estopped from pleading an indebtedness in excess of the statutory or constitutional limitation, because the execution of such certificates was without the line of official duty and beyond the scope of official authority. The certificate of a public officer not authorized by law to make it has no more effect than that of a private person. *Meyer v. School Dist. No. 31*, 4 S. D. 420, 57 N. W. 68. The distinction between bonds which contain no reference to the Constitution, or any statement that the constitutional requirements were observed, and those which expressly recite that its limitation of indebtedness has not been passed, has been plainly pointed out by the United States Supreme Court. *Lake County v. Graham*, 130 U. S. 674, 32 L. ed. 1065, 9 Sup. Ct. Rep. 654; *Chaffee County v. Potter*, 142 U. S. 355, 35 L. ed. 1040, 12 Sup. Ct. Rep. 216. The bonds in this case contain no reference to the Constitution, but they do recite that they are issued "in pursuance of"—that is, in accordance with—"the general incorporation laws approved March sixth, 1890," the limitations of which, as to indebtedness, are as broad as the limitations of the Constitution. Therefore the recitals are in legal effect equivalent to a representation, on the part of the city

officers, that the indebtedness incurred, including that then existing, did not exceed the 5 per centum prescribed by both the statute and Constitution (Laws 1890, *supra*; Const. art. 13, § 4; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138); and it becomes proper to determine to what extent the city is estopped by such recitals, as against a purchaser in good faith and for value. The rule is well settled that a purchaser of negotiable municipal bonds is held to know the constitutional and statutory provisions and restrictions bearing on the authority to issue them; also the recitals of the bonds he buys; while, on the other hand, if he act in good faith and pay value, he is entitled to be protected by the recital of any fact the existence of which the officers who executed them were authorized and required to ascertain and determine before issuing the bonds. *Dixon County v. Field*, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. Rep. 315; *Lake County v. Graham*, 130 U. S. 674, 32 L. ed. 1065, 9 Sup. Ct. Rep. 654; *Sutcliffe v. Lake County Comrs.* 147 U. S. 230, 37 L. ed. 145, 13 Sup. Ct. Rep. 318; *Gunnison County Comrs. v. E. H. Rollins & Sons*, 173 U. S. 255, 43 L. ed. 689, 19 Sup. Ct. Rep. 390. Applying this rule to the issue of 1890, the plaintiff, although a purchaser in good faith and for value, was bound to know that the city was without power to become indebted in any manner, or for any purpose, to any amount, including existing indebtedness, in the aggregate to exceed 5 per centum on the value of the taxable property therein; he was also bound to know from the recitals of each bond that the entire issue aggregated \$100,000; and he was bound to know the value of taxable property in the city, as ascertained by the 1890 assessment, for state and county taxes. *Dixon County v. Field*, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. Rep. 315; *Laws 1890, supra*. The amount of bonds and the assessed value of taxable property being known, the ratio between the two is fixed by an arithmetical calculation, and the only remaining factor is the amount of existing indebtedness. Although the territorial boundaries of the city and school districts are coincident, the debts of the latter cannot be included in determining whether the debts of the former exceed the statutory or constitutional limit. *Wilson v. Hugon Bd. of Edu.* (S. D.) 81 N. W. 952. Five per centum on the value of the taxable property in the city was \$161,144.40; therefore the bonds did not in themselves exceed the limit. Construing the bonds as in effect reciting that there was not sufficient existing indebtedness to make the aggregate exceed the limitation, the question arises whether defendant is estopped thereby from showing the amount of actual existing indebtedness. The number of cases, involving the law of recitals in municipal bonds, which constantly reach the courts of last resort, both state and Federal, indicate that the principles applicable to such paper have not, so far, been determined with satisfactory certainty. An examination of the adjudications will show that one of the chief causes of contention has

resulted from the failure or inability of the courts to clearly define the distinction between those facts of the existence of which the person must take notice and those the existence of which is conclusively established by recitals. The doctrine announced in *Dixon County v. Field*, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. Rep. 315, a leading case on the subject, has been frequently reaffirmed by the Federal Supreme Court, and followed by state courts in numerous decisions. It is not modified by *Chaffee County v. Potter*, 142 U. S. 355, 35 L. ed. 1040, 12 Sup. Ct. Rep. 216, because in that case the statute, in terms, gave to the commissioners the determination of the amount of indebtedness. *Gunnison County Comrs. v. E. H. Rollins & Sons*, 173 U. S. 255, 43 L. ed. 689, 19 Sup. Ct. Rep. 390. In *Sutliff v. Lake County Comrs.* 147 U. S. 230, 37 L. ed. 145, 13 Sup. Ct. Rep. 318, where the statute made it the duty of the county commissioners to publish and to cause to be entered on their records, open to the inspection of the public, semiannual statements exhibiting in detail the debts, expenditures, and receipts of the county for the preceding six months, and striking the balance, so as to show the amount of any deficit, and the balance in the treasury, the Federal Supreme Court says: "In those cases in which this court has held a municipal corporation to be estopped by recitals in its bonds to assert that they were issued in excess of the limit imposed by the Constitution or statutes of the state, the statutes, as construed by the court, left it to the officers issuing the bonds to determine whether the facts existed which constituted the statutory or constitutional condition precedent, and did not require those facts to be made a matter of public record. *Marcy v. Oscego Twp.* 92 U. S. 637, 23 L. ed. 748; *Humboldt Twp. v. Long*, 92 U. S. 642, 23 L. ed. 752; *Dixon County v. Field*, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. Rep. 315; *Lake County v. Graham*, 130 U. S. 674, 682, 32 L. ed. 1065, 1067, 9 Sup. Ct. Rep. 654; *Chaffee County v. Potter*, 142 U. S. 355, 363, 35 L. ed. 1040, 1043, 12 Sup. Ct. Rep. 216. But if the statute expressly requires those facts to be made a matter of public record, open to the inspection of everyone, there can be no implication that it was intended to leave that matter to be determined and concluded, contrary to the facts so recorded, by the officers charged with the duty of issuing the bonds."

The statute under which the bonds in suit were issued provides that the city auditor shall keep regular books of account, in which he shall enter all indebtedness of the city, which shall at all times show the financial condition of the city, the amount of bonds, orders, certificates, or other evidences of indebtedness issued by the city council; the amount of all bonds, orders, certificates, or other evidences of indebtedness which had been redeemed, and the amount of each outstanding; that he shall countersign all bonds, orders, or other evidences of indebtedness of the city, and keep accurate accounts thereof, stating to whom and for 48 L. R. A.

what purpose issued, and the amount thereof; that he shall report to the city council on the first days of March and September of each year the receipts and expenses and financial condition of the city, which report shall be published within thirty days thereafter in the official paper of the city, or such other paper as the council may direct; that the books so required to be kept shall be open to the inspection of all parties interested. Therefore, in the case at bar, as in *Sutliff v. Lake County Comrs.* 147 U. S. 230, 37 L. ed. 145, 13 Sup. Ct. Rep. 318, there were two facts required by the statute to be entered on the public records of the city, of which all the world is bound to take notice, and as to which the city cannot be concluded by any recitals in the bonds, namely, the value of the taxable property and the amount of existing indebtedness. As found by the trial court, the existing indebtedness on October 1, 1890, exclusive of school debt and bonds issued on that day, consisted of the following items: Bonds issued September 1, 1885, \$5,000; bonds issued June 1, 1889, \$15,000; bonds issued July 1, 1889, \$25,000; and warrants \$178,000,—aggregating \$223,000. But plaintiff contends that whereas, the bonds in suit were issued for the purpose of funding and paying existing indebtedness, no new or additional debt was incurred, and that therefore such bonds are valid. Regarding the disposal of the 1890 bonds the court below finds that they were made, executed, and delivered to various parties, for value received, on the day they bear date. As the burden of proof was upon defendant to show illegality, we should infer that they were exchanged for an equal amount of outstanding indebtedness, if such inference is required to sustain their validity; "delivery to various parties for value received" being entirely consistent with such a conclusion. But, as it might appear upon a retrial that they were not disposed of in that manner, it is proper to consider the other and more frequent method of funding existing indebtedness. It has been held by the courts of last resort in Wyoming, Montana, California, Kansas, Maine, Indiana, New York, and perhaps other states, that, where bonds are sold for the purpose of applying the proceeds to the payment of pre-existing indebtedness, there is merely a change in the evidences of such indebtedness and no increase thereof. *Miller v. School Dist. No. 3* (Wyo.) 39 Pac. 879; *Palmer v. Helena*, 19 Mont. 61, 47 Pac. 209; *Los Angeles v. Teed*, 112 Cal. 319, 44 Pac. 580; *Marion County Comrs. v. Harvey County Comrs.* 26 Kan. 181; *Opinion of the Justices*, 81 Me. 603, 18 Atl. 291; *Powell v. Madison*, 107 Ind. 106, 8 N. E. 31; *Poughkeepsie v. Quintard*, 136 N. Y. 275, 32 N. E. 764. On the other hand, the Supreme Court of the United States distinguishes the two methods, and holds that, where the bonds are sold for the purpose of applying the proceeds, there is an increase of indebtedness to the extent of the new issue. Justices Brown, Harlan, and Brewer dissenting. *Doon Twp. v. Cummins*, 142 U. S. 366, 35 L. ed. 1044, 12 Sup. Ct.

Rep. 220. North Dakota follows this decision, while California expressly declines to do so, and the United States circuit court of appeals in the eighth circuit says: "The distinction seems to be more nice than real, and, in view of the vigorous dissent which is recorded with the opinion, we may be permitted to doubt whether it will ever be made again." *Huron v. Second Ward Sav. Bank*, 57 U. S. App. 593, 86 Fed. 272, 30 C. C. A. 38; *Los Angeles v. Teed*, 112 Cal. 319, 44 Pac. 580; *Birkholz v. Dinnie*, 6 N. D. 511, 72 N. W. 931.

Doubtless the constitutional provision under discussion was designed to confine municipal indebtedness within prescribed limits, but it could hardly have been intended or expected to prevent embezzlement or misappropriation of public funds. In ascertaining its scope and purpose, courts are not required to assume that municipal officers are always, or even usually, dishonest. The contrary should be presumed. Where the proceeds of funding bonds are properly applied, the transaction may in form be a borrowing of money, but in substance it is not different from what it would be had there been an exchange of bonds for other evidences of debt. The contemplated purpose and actual result are the same. The municipal liability is not increased, but merely suffered to remain. *Poughkeepsie v. Quintard*, 136 N. Y. 275, 32 N. E. 764. The argument that the indebtedness is instantly increased by the delivery of funding bonds, unless an equal amount of outstanding obligations is thereby extinguished, is without force where, as in this jurisdiction, available resources or assets may be considered in determining when additional indebtedness is created. *Re State Warrants*, 6 S. D. 518, 62 N. W. 101; *Western Taconic Co. v. Lane*, 7 S. D. 599, 65 N. W. 17. The delivery of funding bonds, when sold at par, operates as an exchange of paper promises to pay for an equal amount of money instantly available for the extinguishment of an equal amount of other promises to pay. Assuming that this money remains in the treasury until used for the purpose intended, there is no moment of time when the financial condition of the city is in any substantial manner affected. Notice to holders of matured obligations stops the running of interest, and the city, with the proceeds of its funding bonds on hand, is in as good position as it would be if in possession of the evidences of its paid obligations duly canceled. If the proceeds be misapplied, of course the debt will be increased, provided the bonds be held valid. May not the other method produce equally serious consequences? Should the officer authorized to exchange new for old bonds, disregarding his official duty, accept money instead of outstanding obligations, and should the bonds thus placed upon the market fall into the hands of bona fide purchasers, the city debt would be increased or innocent parties made to suffer. Extravagant or corrupt officers may successfully employ either method to increase taxation or defraud bona fide creditors. Such creditors should never be made

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to suffer by reason of the misappropriation of funds actually received by officers of the municipality. The legitimate object of issuing funding bonds is to meet the demands of creditors entitled to payment, or to reduce the interest on fundable obligations. By terms of such obligations the city may have a right to pay, but cannot compel an exchange for bonds bearing a less rate of interest, and where the constitutional limit has been reached or passed, if the exchange method only is permitted, a reduction of interest is impossible. Although the proposition is not free from difficulty, we are inclined to hold that the issuing of funding bonds should not be regarded as creating any new or additional indebtedness, within the meaning of the statutory or constitutional limitation applicable to this action. While the decision of this court in *Mitchell v. Smith* (S. D.) 80 N. W. 1077, does not extend so far as we go in this case, the result reached therein is in harmony with the views now expressed, after a more careful and thorough examination of the questions involved. Assuming, as we must, from the record in this case, that the city was owing legal, fundable debts to an amount in excess of the bonds issued October 1, 1890, it having authority to issue such bonds for the purpose of funding such indebtedness, and the issuing of such bonds not having created any new or additional indebtedness, within the meaning of the statutory or constitutional limitation, the conclusion follows that such bonds are valid; and the defendant, having sufficient funds on hand collected for that purpose, should be commanded to pay the amount due to plaintiff upon his coupons cut from the 1890 bonds. The bonds of 1891 contained substantially the same recitals, were issued under the same authority, and negotiated in the same manner as those of 1890. On October 1, 1891, 5 per centum on the value of taxable property within the city was \$301,104.20. The indebtedness, exclusive of school debt, consisted of these items: Bonds issued September 1, 1885, \$5,000; bonds issued June 1, 1889, \$15,000; bonds issued July 1, 1890, \$25,000; bonds issued October 1, 1890 (heretofore considered), \$100,000; and warrants \$212,128.48,—making a total indebtedness of \$357,128.48. As the city had authority to fund its floating indebtedness, as it does not affirmatively appear that any of the outstanding warrants were illegal, as the amount of such warrants exceeded the amount of bonds issued on that day, and as the bonds then issued did not create any new or additional indebtedness, within the meaning of the statutory or constitutional limitation, it follows that such bonds are valid; and the defendant, having on hand sufficient funds collected by taxation for that purpose, should be commanded to pay the amount due plaintiff upon his coupons cut from such bonds.

The judgment of the Circuit Court is reversed, and a new trial ordered.

Opinion adhered to, after rehearing.

UTAH SUPREME COURT.

UNION REFRIGERATOR TRANSIT COMPANY, Appt.,
v.

Stephen H. LYNCH, Treasurer of Salt Lake County, Resp't.

(18 Utah, 378.)

- *1. **Railway cars owned by a Kentucky corporation** having no place of business in this state, leased to various shippers, but coming into or passing through, and doing business in, this state, have, for the purposes of taxation, a situs in this state.
2. **Section 2, art. 13, of the state Constitution, and §§ 1, 55, and 56 of an act of the legislature approved April 5, 1896** (Sess. Laws 1896, p. 423), authorize a tax upon such property found within the jurisdiction of this state; and, although the cars may have been employed in interstate commerce, the tax is not a regulation of interstate commerce, and is not prohibited by the Constitution or laws of the United States.
3. **The true meaning and intent of a statute** are to be ascertained from the whole purview, and, to ascertain such meaning and intent, the court will punctuate, or disregard punctuation, as may be necessary.

(December 10, 1898.)

APPPEAL by plaintiff from a judgment of the District Court for Salt Lake County in favor of defendant in an action brought to recover back money paid under protest as taxes assessed against plaintiff's property. *Affirmed.*

Statement by Barch, J.:

This action was brought by the Union Refrigerator Transit Company against the collector of taxes for Salt Lake county to recover a certain sum of money paid him, as tax, under protest; the company claiming that the tax was illegal. It was alleged in the complaint that the plaintiff is a corporation organized under the laws of the state of Kentucky, having its principal office and place of business in the city of Louisville, in that state, and engaged exclusively in the business of furnishing to shippers refrigerator cars for the transportation of perishable freight over various lines of railroad throughout the United States; that its cars have not been, during any of the time in which it has been engaged in business, let, leased, run, or furnished under contract with any railroad company or carrier of freight, or run on any particular lines of railroad, or confined to any particular routes or trains, or at any specified or agreed times, but have been run indiscriminately over the lines of railroad which the consignors of freight

shipped in them chose to route them in shipping; that the business in which the cars were engaged was exclusively interstate commerce; that the plaintiff has not, and had not at any time, an office or place of business within the state of Utah; that all the freight transported in the cars into and through this state was transported from points in another state, within the United States, to points within this state, or *vice versa*, or between points none of which were within the state of Utah, the cars merely passing through this state; that the cars were in this state at no regular intervals and in no regular number, and when within this state were only within it in transit, except to load and unload freight shipped from within out of the state, or coming into the state from places without the same, or in the transportation of freight entirely through or across it; that at all such times said cars were only transiently present for the said purposes, having at no time had a situs within this state; that the plaintiff has not at any time had other property of any description located within the state of Utah; that, notwithstanding these facts, the board of equalization of the state of Utah for the year 1897 assessed and valued ten cars, the property of the plaintiff, for taxation, the aggregate assessment thereof being \$2,600, and also apportioned said assessment between the several counties in this state through which the lines of railroad pass, and through which the cars might be transported; that the board apportioned to Salt Lake county, of the said aggregate assessment, the sum of \$210; that taxes were levied upon the assessed valuation of the property so apportioned to said Salt Lake county aggregating \$5.76; that said tax is illegal and void; that to avoid the seizure and sale of its property, and to prevent incurring the penalties provided by law, the plaintiff on the 18th day of November, 1897, paid said taxes under protest to defendant, as treasurer of said county and collector of taxes; and that, at the time of payment, notice was given defendant of the plaintiff's claim that the taxes were illegal, and that suit would be brought to recover the same. To this complaint a general demurrer was interposed, which, upon hearing, was sustained by the court; and, the plaintiff electing to stand upon its complaint, and refusing to amend, the action was dismissed. This appeal is from the judgment of dismissal.

Mr. Parley L. Williams, for appellant:

Personal property follows the person of its owner, and is taxable only at the owner's domicile.

Property such as is described in the complaint, and used only as therein stated, when present within the borders of this state under such circumstances as are set forth, is on'y transiently here, merely by virtue of such use in interstate commerce, and cannot and

*Headnotes by BARTCH, J.

NOTE.—As to situs of railroad rolling stock for taxation, see *Atlantic & P. R. Co. v. Le-sueur* (Ariz.) 1 L. R. A. 244; *Bain v. Richmond & D. R. Co.* (N. C.) 8 L. R. A. 299; *Cleveland C. & St. L. R. Co. v. Backus* (Ind.) 18 L. R. A. 723.
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does not thereby acquire a situs within the state.

Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745; *Moore v. Wilkins*, 10 N. H. 452; *Robinson v. Longley*, 18 Nev. 71, 1 Pac. 377.

A state cannot tax property not being located or having a situs within its limits.

McCulloch v. Maryland, 4 Wheat. 429, 4 L. ed. 607; *State Freight Tax*, 15 Wall. 232, sub nom. *Philadelphia & R.R. Co. v. Pennsylvania*, 21 L. ed. 146; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Connecticut River Lumber Co. v. Columbia*, 62 N. H. 286; *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303; *Hays v. Pacific Mail S. S. Co.* 17 How. 506, 15 L. ed. 254; *St. Louis v. Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192; *Pullman Southern Car Co. v. Nolan*, 22 Fed. Rep. 276; *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Central R. Co. v. State Bd. of Assessors*, 49 N. J. L. 1, 7 Atl. 306; *Bain v. Richmond & D. R. Co.* 105 N. C. 363, 8 L. R. A. 299, 3 Inters. Com. Rep. 149, 11 S. E. 311.

The tax imposed is a regulation of interstate commerce.

Bain v. Richmond & D. R. Co. 105 N. C. 363, 8 L. R. A. 299, 3 Inters. Com. Rep. 149, 11 S. E. 311; *Philadelphia & S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; *Erie R. Co. v. State*, 31 N. J. L. 531; *Central R. Co. v. State Bd. of Assessors*, 49 N. J. L. 20, 7 Atl. 306; *Passenger Cases*, 7 How. 459, 12 L. ed. 776.

No appropriate provision of law has been enacted authorizing a tax upon this property.

Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 221, 41 L. ed. 977, 17 Sup. Ct. Rep. 604.

It is a strained and unnatural construction of the language used by the legislature to attempt to apply it to cars used only as those of the appellant.

Marye v. Baltimore & O. R. Co. 127 U. S. 117, 32 L. ed. 94, 8 Sup. Ct. Rep. 1037.

Messrs. Waldemar Van Cott, Graham F. Putnam, and Ray Van Cott, for respondent:

Counsel for appellant seriously errs in not distinguishing between a tax on commerce and a tax on property employed in commerce.

Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Marye v. Baltimore & O. R. Co.* 127 U. S. 117, 32 L. ed. 94, 8 Sup. Ct. Rep. 1037; *Pullman's Palace Car Co. v. Board of Assessors*, 55 Fed. Rep. 206; *Hall v. American Refrigerator Transit Co.* 24 Colo. 291, 51 Pac. 421.

The tax imposed is not a regulation of interstate commerce.

Philadelphia & S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 25, 35 L. ed. 617, 3 Inters. Com. Rep. 48 L. R. A.

595, 11 Sup. Ct. Rep. 876; *Hall v. American Refrigerator Transit Co.* 24 Colo. 291, 51 Pac. 421.

Bartch, J., delivered the opinion of the court:

The appellant has challenged the power of the state to levy and collect the tax in question, in the first instance, upon the ground that the cars, being only transiently within the state from time to time, acquired no such situs within its borders as to give it jurisdiction over them for the purposes of taxation.

The power to tax is founded in necessity. It is an incident of sovereignty, possessed by the government, even though not expressly conferred by the people. A tax is a contribution imposed by the government upon the people for the service of the state. In return for such contribution the state affords protection to life, liberty, and property; and this is essential to civilization, and the very existence of the state. The assessment and collection of taxes, therefore, are among the highest acts of the supreme power of the government. The power of taxation is a legislative power, and no principle of law is better settled than that such power extends to all property, whether real or personal, tangible or intangible, within the borders of the state, not exempt under the Constitution and laws of the United States; and, except so far as the comity of the state permits, such property, for the purposes of taxation, is not affected by the laws of any other state. Therefore, in order that property may be subjected to taxation, it is not a requisite that the owner should reside in the state; and this is true as to personal property, tangible or intangible, as well as to real. Regardless of where the owner's domicile may be, it is the duty of the state to furnish protection to his property; and, in turn, the property must bear a just proportion of the burdens of the government. The ancient rule indicated by the maxim, *Mobilia sequuntur personam*, that personal property is to be regarded as subject to the *lex domicilii*, has never been of universal application in this country, and in modern times has seldom interfered with the power to levy taxes upon such property. The origin of that doctrine dates from an ancient time, when jewels and gold principally constituted the movable property, and that could be taken by the owner from one place to another; but such has not been the case in recent times, since, in the continued progress of the world, the accumulated wealth consists in large proportions of personal property, including, not only jewels and gold, but also a great variety of other personal property, much of which is intangible, as franchises, privileges, etc., but nevertheless property representing value, and none of which is immediately connected with the person of the owner, yet over all of which it is incumbent upon government to extend its protection. The constantly increasing variety of such property, perceptible and imperceptible, tangible and intangible, has caused the ancient rule expressed in the maxim to yield more

and more to the *lex situs*; and while it is true that, for many purposes, personal property is subject to the law of the place of the owner's domicile, still the law is well settled that for the purposes of taxation, and for other purposes, such property has its actual situs where it has been brought and used by its owner, and is subject to the law of that place. Hence, if the owner reside in one state, and his movables are taken to another, and used there, they may become the subject of taxation in the latter state. Such property may be separated from its owner, and he may be taxed because of it at the place where it is found, although not the place of his domicile.

In his Commentaries on the Conflict of Laws (§ 550), Mr. Justice Story, discussing jurisdiction as regards property, observed that, "although movables are for many purposes to be deemed to have no situs, except that of the domicile of the owner, yet, this being but a legal fiction, it yields whenever it is necessary for the purpose of justice that the actual situs of the thing should be examined. A nation within whose territory any personal property is actually situate has as entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there." *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876. The power to tax being inherent in the government, the state unquestionably has the right, through the legislature, to exercise that power over all property which may be found within its borders, whether brought there temporarily or otherwise, for the purposes of business or for trade or convenience, unless restrained or limited by constitutional provision; and courts cannot control the exercise of such power, except when it conflicts with constitutional limitations. In *McCulloch v. Maryland*, 4 Wheat. 316, 429, 4 L. ed. 579, 607, Mr. Chief Justice Marshall, delivering the opinion of the court, after defining the nature and extent of the original right of taxation which remains with the states, said: "It may be objected to this definition that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction. This is true. But to what source do we trace this right? It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident. The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission." So, in *Wheeling, P. & C. Transp. Co. v. Wheeling*, 99 U. S. 273, 25 L. ed. 412, Mr. Justice Clifford, delivering the opinion of the court, after citing authorities to the proposition that the power to tax for the support of the state government exists in the state independently of the national

government, and that it may well be assumed that where there is no cession of contradictory or inconsistent jurisdiction in the United States, nor any restraining compact in the Constitution, the power in the states to tax for the support of the state authority reaches all the property within the state which is not properly regarded as the instruments or means of the Federal government, observed: "Beyond question, these authorities show that all subjects over which the sovereign power of a state extends are objects of taxation, the rule being that the sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission, except those means which are employed by Congress to carry into execution the powers given by the people to the Federal government, whose laws, made in pursuance of the Constitution, are supreme."

From the foregoing considerations, it is clear that the power of this state to tax the personal property in question herein is not affected by the fact that the Union Refrigerator Transit Company is a creature of another state, in which it has its domicile, nor because of the fact that the cars were only transiently in this state, or were furnished for transportation of perishable freight over various lines of railroad throughout the United States. It is therefore evident that this state has power to tax such cars, when brought within its territory or jurisdiction, and found there; but whether, by apt legislation, it has exercised its authority in this case, is a question to be hereinafter determined.

Counsel for the appellant has cited numerous cases to support the contention respecting the question of situs above considered. *Crandall v. Nevada*, 6 Wall. 35, 18 L. ed. 745, the first case cited, was one where a statute providing for the levy of a "tax of \$1 upon every person leaving the state by railroad, stage coach, or other vehicle" engaged in the business of transporting passengers, was held unconstitutional and void. *Moore v. Wilkins*, 10 N. H. 452, simply decides that an individual is to be taxed in the place where he is residing, and not in another town, where he has gone for a temporary purpose only; both places being in the same state. So, in *Robinson v. Longley*, 18 Nev. 71, 1 Pac. 377, it was held that a traveling circus and menagerie, owned by a nonresident, and brought into the state, to be exhibited at various places, and then taken into and through other states for the same purpose, was not subject to taxation in the state of Nevada. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, was a case where a tax imposed by the state of Maryland on a branch of the Bank of the United States located in that state was held unconstitutional; but clearly that case does not militate against the principles hereinbefore considered. The tax imposed being on property over which the United States had jurisdiction. In the case of the *State Freight Tax*, 15 Wall. 232, *sub nom. Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 146, it

was held that a statute of a state imposing a tax upon freight taken up within the state and carried out of it, or taken up without the state and brought within it, is repugnant to the Constitution of the United States; a tax upon freight transported from state to state being a regulation of commerce among the states. In *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, it was decided that goods on their way through a state, from a place outside thereof to another place outside thereof, are subjects of interstate or foreign commerce, and are not taxable by the state through which they pass. In *Connecticut River Lumber Co. v. Columbia*, 62 N. H. 286, it was held that logs temporarily in a river, awaiting transportation from one state to another, were exempt from state taxation. *Pullman Southern Car Co. v. Nolan*, 22 Fed. Rep. 276, is a case where the state of Tennessee attempted by statute to impose a "privilege tax" on sleeping cars in the transportation of interstate passengers, and the court held that the cars had no situs in that state for such purpose. This was not a tax based on value, but was an arbitrary, fixed charge on the business, without regard to the articles employed. Likewise as to *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635, which holds the same act of Tennessee void so far as it applies to the interstate transportation of passengers.

Reliance is also placed by the appellant, to sustain the proposition that the cars in question had no situs in this state for the purpose of taxation, upon *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303; *Hays v. Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254; and *St. Louis v. Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192. But those are cases where ships or vessels were engaged in interstate or foreign commerce upon the high seas, and were registered at their home ports under the laws of the United States, at the owner's domicile, and were therefore held not to be subjects of taxation in another state, at whose ports they temporarily touched for the purpose of delivering or receiving passengers or freight. The distinction between ships and vessels, having their situs fixed by Congress, sailing on the high seas, only temporarily and incidentally touching ports, and cars and other vehicles not having their situs so fixed, and used for transportation on land only, is marked and obvious. Mr. Justice Bradley, in *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456, 22 L. ed. 678, speaking of transportation on land and water, observed: "Commerce on land between the different states is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the state and Federal governments. No doubt, commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial

roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that state interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land. This, when the Constitution was adopted, was entirely performed on common roads, and in vehicles drawn by animal power. No one at that day imagined that the roads and bridges of the country (except when the latter crossed navigable streams) were not entirely subject, both as to their construction, repair, and management, to state regulation and control."

So, it will be noticed, upon examination, that the case at bar may be distinguished from each of the cases cited by the appellant on the question of situs, and thus far considered. Each one presented different facts and different questions, and none of them can be regarded as authority here. There have been cited, however, on this same point, the cases of *Central R. Co. v. State Bd. of Assessors*, 49 N. J. L. 1, 7 Atl. 306, and *Bain v. Richmond & D. R. Co.* 105 N. C. 363, 8 L. R. A. 299, 3 Inters. Com. Rep. 149, 11 S. E. 311; and these, it must be admitted, support the contention of the appellant, and some of the cases above distinguished are therein cited as authority. We do not think those decisions are in harmony with the weight of authority, and they are clearly opposed to the latest decisions of the Supreme Court of the United States upon this subject, as appears from the cases of *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, and 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604. We conclude that the cars in question had, for the purposes of taxation, a situs in this state.

Nor do we think the tax imposed is a regulation of interstate commerce. It is not a tax on persons or freight in transit through this state to other states or countries, nor on the right of transit or transportation; nor is it a license or privilege tax, or tax on business or occupation, or on property of the United States located in this state. It is essentially a tax on property found and used in this state, and valued, for the purpose of taxation, like other personal property within the jurisdiction of the state; and, although the cars may have been employed in interstate commerce, the state is not prohibited by the Constitution or laws of the United States from taxing them as other personal property within its jurisdiction. This has been so declared by the Supreme Court of the United States. In *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, §

Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876, where the question was whether Pullman cars could be taxed in Pennsylvania,—the corporation being a creature of the state of Illinois, having its home there, and itself not operating any railroad, but merely furnishing cars to the various railroad lines, which cars were simply run into Pennsylvania, and out again, in the ordinary course of business,—Mr. Justice Gray delivering the opinion of the court, after stating that, for the purposes of taxation, it had been repeatedly affirmed by that court that personal property might be separated from its owner, and that he might be taxed, on its account, at the place where it was, although not in the place of his own domicile, and even if he were not a resident of the state imposing the tax, said: "It is equally well settled that there is nothing in the Constitution . . . which prevents a state from taxing personal property employed in interstate or foreign commerce like other personal property within its jurisdiction." Again he observed: "The cars of this company within the state of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the state, and the state has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the state could tax them, like other property, within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot affect the power of the state to levy a tax upon them. The state, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the state, particular cars may not remain within the state; but the company has at all times substantially the same number of cars within the state, and continuously and constantly uses there a portion of its property." In *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, Mr. Chief Justice Fuller, speaking for the court, said: "Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation, yet property belonging to corporations or companies engaged in such commerce may be; and, whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments 48 L. R. A.

under whose protection they conduct their operations, and taxation on property, collectable by the ordinary means, does not affect interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of government." So, in *Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 185, 41 L. ed. 985, 17 Sup. Ct. Rep. 604, Mr. Justice Brewer, delivering the opinion of the court on rehearing, said: "Again and again has this court affirmed the proposition that no state can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce. And it has as often affirmed that such restriction upon the power of a state to interfere with interstate commerce does not in the least degree abridge the right of a state to tax at their full value all the instrumentalities used for such commerce." *Postal Tele. Cable Co. v. Adams*, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; *Marye v. Baltimore & O. R. Co.* 127 U. S. 117, 32 L. ed. 94, 8 Sup. Ct. Rep. 1037; *Western U. Tele. Co. v. Atty. Gen. of Massachusetts*, 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; *Massachusetts v. Western U. Tele. Co.* 141 U. S. 40, 35 L. ed. 628, 11 Sup. Ct. Rep. 889.

We come now to the remaining question,—whether there are any provisions of law which authorize a tax upon such property when found within the jurisdiction of the state. The appellant, it seems, contends that our laws respecting taxation were only intended to apply to car lines, or car companies owning and operating car lines, within this state, and to such property connected with such lines as abides and has its actual situs within the state, and that there is no language employed in any of the provisions of law which contemplates the taxation of cars belonging to an owner residing in a foreign state, and used in interstate commerce, although in such use such cars may for a portion of the time be within the jurisdiction of this state. In § 2 of article 13 of the state Constitution it is provided: "All property in the state, not exempt under the laws of the United States, or under this Constitution, shall be taxed in proportion to its value, to be ascertained as provided by law." This is an express constitutional provision, and is adequate to impose a tax upon all property which has a situs within the state for such purpose, except property exempt under the laws of the United States or under the Constitution of this state. It is therefore apparent that there is an apt provision in the fundamental law under which the appellant's cars could be taxed; they, as we have seen, having a situs in the state for such purpose, and not falling within the exemption. Substantially the same provision is contained in § 1 of the act of the legislature approved April 5, 1896 (Sess. Laws, p. 423): and what has been said respecting the constitutional provision above quoted, in the main, applies

with equal force to that section of the statute. The value of all property, however, for the purposes of taxation, is "to be ascertained as provided by law." The manner of ascertaining the value being thus referred to the legislature, it in the same act (Sess. Laws 1896, § 55) provided: "The president, secretary, or managing agent, or such other officer as the state board of equalization may designate, of any corporation, and each person or association of persons owning or operating any railroad, street railway car, telegraph or telephone line or railway depot in this state, must, on or before the first Monday in March in each year, furnish the said board a statement signed and sworn to by one of such officers, or by the person or one of the persons forming such association, showing in detail for the year ending on the first Monday in March in each year; all the property, real, personal, or otherwise, owned by said corporation, person, or association of persons in the state, including a statement of mileage in each county, as valued on the first Monday of March of the same year and such other information as the board may require. Any officer of a railroad company, street railway, telegraph or telephone line, railway depot, or car company, failing on demand to furnish the statement required of him, shall be subject to the penalty provided in subdivision 2, § 18, of this act." This section makes it incumbent upon certain officers of railway, car, telegraph, and telephone lines to furnish the state board of equalization statements of property as therein provided, and, for failure to do so subjects them to certain penalties. These statements were doubtless intended as a convenience for the board in making the assessment which is expressly provided for in § 56, as follows: "The state board of equalization must meet at the state capitol, or at such other places in the state as the board may determine, on the second Monday in July, and continue in open session from day to day, Sundays and legal holidays excepted, until the third Monday in August, and later, if the business of the board requires it. At such meetings the board must assess all property and franchises of railroad, car, street railway, railway depot, telephone and telegraph companies, but franchises derived from the United States must not be assessed. All such property must be assessed in the name of the person, corporation, or association owning, leasing, or using the same. Between the first and third Mondays of August, the board must apportion the total assessment of all property and franchises of such companies to the several counties in proportion to the value of such property in each county." This section authorizes, as will be observed, the assessment by the board of all the property referred to in the preceding section, and declares that all such property shall be assessed in the "name of the person, corporation, or association owning, leasing, or using the same." The manifest intention of the legislature in the enactment of these provisions of statute was that all such property should be taxed, whether owned by a resident of this state or

not, if the same was used within the state by the owner, or by some person or corporation to whom the owner intrusted it for such use. Counsel for the appellant, however, called attention to the fact that in § 55 there is no punctuation between the words "street railway" and "car," while the word "car" is punctuated by a comma in § 56, and insists that the real intention of the legislature was to treat the owners of car lines the same as owners of railroads, street railways, telegraph, or telephone lines, and that, where it used the word "car" in each section, it meant car lines or car companies having, owning, operating, and using such car lines within the state,—in other words, that a "car line" means a physical line, or a line having a physical unity, as the realty composing a line of railroad between definite places; that, in order for the state to tax such property, there must be a physical unity, instead of a unity of use and management, as was the case in respect to the cars in question. We cannot assent to this contention. The question of punctuation cannot be allowed to control in the construction of these provisions of the statute, against, as we think, the manifest intent of the legislature. It would be a most fallible standard by which to construe them. In the interpretation of statutes the true meaning of the lawmaker must be ascertained from the whole purview, and when that is manifest from a judicial inspection the court will not permit punctuation to change it. To ascertain the real intention and meaning of the statute, the court will punctuate, or disregard punctuation, as may be necessary. Punctuation may, when the meaning is uncertain, furnish some indication of it, and in such case may even decide what the meaning is; but, when the intention of the legislature is apparent from a reading of the statute, such intention must prevail, regardless of punctuation. *Sutherland, Stat. Constr. § 232.* In this case we think the statute should be read with a comma between the words "street railway" and "car," and, when so read, the terms used mean "street railway line," "car line," etc.; and "car line," in the sense employed in the several enactments, may mean a considerable number of cars operated by a car company, as a car line, without, as in the case at bar, the actual realty, over which the rolling stock runs, being owned by the owner of the cars. Evidently such line has a unity of use and management, and the several constitutional and statutory provisions are adequate to tax the cars when so employed and found within the jurisdiction of the state. The same question here involved was, under similar legislation, before the supreme court of Colorado in *Hall v. American Refrigerator Transit Co.* 24 Colo. 291, 51 Pac. 421, where Mr. Justice Goddard, delivering the opinion of the court, said: "It is clearly manifest that the purpose of these constitutional and statutory provisions is to subject all property owned or used by a railway or other corporation within the territorial limits of the state to taxation according to its value, regardless of the domicile of its owner;

and in so doing they exercise a well-recognized function of legislation." Legislation which is claimed to grant immunity from taxation will be strictly interpreted against the exemption. "In such cases the rule of strict construction applies, and, in order to relieve any species of property from its due and just proportion of the burdens of the government, the language relied on as creating the exemption should be so clear as not to admit of reasonable controversy about its meaning, for all doubts must be resolved against the exemption. The power to tax rests upon necessity, and is essential to the existence of the state." *Judge v. Spencer*, 15 Utah, 242, 48 Pac. 1097; *Sutherland. Stat. Constr. § 364*. Counsel for the appellant has cited, on this question, *Marye v. Baltimore & O. R. Co.* 127 U. S. 117, 32 L. ed. 94,

8 Sup. Ct. Rep. 1037; but that case cannot be regarded as controlling authority in this, because the legislation therein considered was entirely different from that considered herein, the same applying to domestic corporations only.

No point is made in this case concerning the apportionment of the tax among the several counties of the state. We are of the opinion that the tax in question is lawful, and that the court properly dismissed the action.

The judgment is affirmed, with costs.

Zane, Ch. J., and Miner, J., concur.

Affirmed by Supreme Court of United States April 9, 1900.

MINNESOTA SUPREME COURT.

Lewis H. OLSON, *Respt.*,
v.

MINNEAPOLIS & ST. LOUIS RAILROAD
COMPANY, *Appt.*

(76 Minn. 149.)

*From the evidence in this action it appeared that on arriving at a terminal yard as a brakeman on one of defendant's incoming freight trains, plaintiff, in accordance with a well-established custom among brakemen, changed his clothing, leaving his working suit in the caboose or way car, although he knew that it was not at all probable that said caboose would be attached to the outgoing train to which he would next be as-

signed for duty. Assuming that because of such custom plaintiff would have a right, as a licensee, to return to the yard and to the caboose for the purpose of obtaining his clothes, it is held that this licensee would not justify him in going upon a caboose attached to a moving train, in search of his clothing, or in jumping from one of the platforms of said caboose, when through with the search. While engaged in these acts he was not in the service of defendant in the line of his employment, nor was he acting within the scope of his license. He had no cause of action against defendant for an injury caused by his coming in contact with a defectively constructed switch stand when jumping from the caboose.

*Headnote by COLLINS, J.

(May 2, 1899.)

NOTE.—*Liability for injuries received by the servant in the performance of duties outside the scope of his original contract.*

- I. Introductory.
- II. No recovery where servant undertakes new functions *proprio motu* and without master's acquiescence.
- III. When negligence is predicated of a command to do work outside the scope of the original contract.
- IV. Risks of work outside scope of employment, when deemed to be assumed.
- V. Doctrine of common employment qualified as regards servants working outside the scope of their employment.
- VI. Contributory negligence as a defense.
- VII. Absence of compulsion, an essential element of assumption of risks and contributory negligence.
 - a. Generally.
 - b. Protest or objection by servant.
 - c. Fear of losing position.

I. Introductory.

The risks of servants which most commonly come in question fall into two categories, viz., those ordinarily incident to the employment, and those which are extraordinary in the sense that they would not have existed if the master had not been derelict in regard to his specific duties to furnish reasonably safe appliances 48 L. R. A.

and see that they are used according to a proper system. In the present note it is intended to collect the decisions relating to injuries caused by another class of extraordinary risks, viz., those which fall under that category, for the reason that, being incident to work which was not within the scope of the original contract of hiring, they are not among those which he expected to encounter.

The hazards incident to the new work may be considered extra hazardous as being outside of the regular employment, and additional to the risks thereof. *Consolidated Coal Co. v. Haenni* (1893) 146 Ill. 614, 35 N. E. 162.

That the element of non-anticipation is the connecting link between cases involving this and the other classes of extraordinary risks is clearly brought out in the arguments of several cases. See, especially, *Union P. R. Co. v. Fort* (1873) 17 Wall. 553, 21 L. ed. 739, as quoted *infra*; *Northern P. Coal Co. v. Richmond* (1893) 15 U. S. App. 262, 58 Fed. Rep. 756, 7 C. C. A. 485.

It should be noted that the doctrines developed in the cases cited in this note have no application where the duties in which the servant was engaged, at the time of the accident, were being performed under a contract entirely distinct from that under which he first entered the employment. The same general reasons as those which are deemed to justify the doctrine of the assumption of the ordinary risks of an employment necessarily require the inference

A PPEAL by defendant from an order of the District Court for Hennepin County denying a motion for new trial after verdict for plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. Albert E. Clarke for appellant.

Messrs. Jackson & Lancaster for respondent.

Collins, J., delivered the opinion of the court:

Appeal from an order denying defendant's motion for a new trial in a personal-injury action. Taking plaintiff's statement as true (and the jury must have so found), the only facts which we deem important in disposing of the case are as follows: Plain-

that the servant cannot recover for injuries due to the ordinary risks of such work although they may be greater than those which he incurred in his former capacity. *Rooney v. Carson* (1894) 161 Pa. 26, 28 Atl. 996 (one employed as a weaver had been laid off until a new mill was started up, and was meantime employed to assist in moving into the new mill and making alterations).

II. No recovery where servant undertakes new functions proprio motu and without master's acquiescence.

That a servant who is acting as a mere volunteer in undertaking duties not originally contracted for cannot claim an indemnity if he is injured, is well settled. This doctrine may be referred to the conception that a servant who voluntarily and without directions from the master, and without his acquiescence, goes into hazardous work outside of his contract of hiring, may be regarded as putting himself beyond the protection of his master's implied undertaking. *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151, 5 N. E. 187.

In *Goff v. Chippewa River & M. R. Co.* (1893) 86 Wis. 237, 56 N. W. 465, the court, in holding that a neglect of the duty to furnish a safe place of work could not be relied upon as a ground of action where the servant, without the knowledge, authority, privity, or consent of his employer, and of his own volition, occupied an unsafe and dangerous place, even though the same service had been performed at other times by other employees for the employer in the same place, said: "The employer is responsible only for his express or implied direction to an employee to work in an unsafe or dangerous place. The work of the employer is to be under his own control, and under the responsibility which the law places upon him; and it is for him or his lawful agent to give such orders or directions as he may judge discreet in respect to the place where his employees shall work, having in view their skill, prudence, and experience. He, or his rightful agent, may assume the risk in any given case, but the employee cannot of his own mere unauthorized motion take the risk, and hold the employer responsible for disastrous consequences. The liability does not exist unless the employer or his agent knows, or has good reason to believe, that the employee is serving him in a dangerous place or position; for, without such knowledge, the duty of warning or protecting the employee does not arise, and 48 L. R. A.

tiff had been in defendant's service as a brakeman upon freight trains for over one year when the injuries were received. There were two freight train yards at Minneapolis, the northern terminus of the road,—one known as the "Cedar Lake Yard," where outgoing trains were made up, and from which they started; and the other, about 40 rods southerly, called the "Kenwood Yards," the end of the trip for all incoming freight trains. On the day in question plaintiff came into the yard last mentioned as a brakeman on train numbered 57 (conductor, Williams), arriving at 2:50 P. M., or within one hour thereafter. Just before the train reached the yard, plaintiff changed his clothes, leaving, as seems to have been a custom among brakemen, his working suit in the caboose or way car. He left the train at or near the yard, and, after going to his

will not exist, for the plain reason that the liability is not absolute, but relative, and is founded solely on the employer's negligence, which cannot be affirmed without knowledge or notice of duty in the particular instance, such as would warn the employer and afford him a fair opportunity to discharge it."

See also *McMahon v. O'Donnell* (1891) 82 Neb. 27, 48 N. W. 824 (girl, hired to do household work, undertook to work a straw cutter).

A similar situation exists where a person who has never been in the service of the person charged with negligence undertakes to do work for him, and is injured. See note to *Evarts v. St. Paul, M. & M. R. Co.* (Minn.) 22 L. R. A. 603, on assumption of risks of service by volunteer.

Or his conduct may be viewed as betokening contributory negligence. *Honor v. Albrighton* (1890) 93 Pa. 475 (plaintiff went on an errand wholly outside the servant's line of duty at the call of a co-servant); *Sears v. Central B. & Bkg. Co.* (1875) 53 Ga. 630 (conductor of freight train negligent if he couples or uncouples cars except in case of a pressing emergency, of the existence of which the jury must judge); *Central R. & Bkg. Co. v. Chapman* (1893) 96 Ga. 769, 22 S. E. 273 (servant undertook to operate a defective machine outside the scope of his regular employment; no emergency to justify it); *Alabama G. S. R. Co. v. Hall* (1894) 105 Ala. 599, 17 So. 176 (brakeman voluntarily, and without orders from anyone having authority over him, undertook to perform the duties of a fireman).

See also *Indiana Car Co. v. Parker* (1885) 100 Ind. 181 (*arguendo*, p. 198); *Daley v. American Printing Co.* (1891) 152 Mass. 581, 26 N. E. 135.

The inference of negligence is, of course, conclusive, where the change of duties was in direct violation of orders. *Brown v. Byroads* (1874) 47 Ind. 435 (catcher in stove factory undertook to act as sawyer, and was struck by piece of a band-wheel which broke).

Or his contractual assumption of the new risks may be inferred.

In *Kirk v. Atlanta & C. Air-Line R. Co.* (1886) 94 N. C. 625, 55 Am. Rep. 621, the contention that the defense of co-service was not available was thus disposed of: "Nor do we give force to the argument that places the plaintiff's service in the duty of the inspector, outside of those which he assumed as a carpenter. He made no objection to the service, had a dozen times before, as he himself states, undertaken it as incident to his employment, and voluntarily. He therefore stands upon the

boarding house, near by, visited the train master's office, to see if he had been bulletined for his next trip. He found no orders, went away, and about 7 P. M. returned to the office. He then asked for a pass to Albert Lea, his home, to be used upon passenger train No. 6, which left Minneapolis that evening, his object being to go home on business. The train master stated that his next trip out would be at 5:20 next morning, on No. 34, but if he would go out and find another brakeman, by the name of Gilson, and induce him to go out on No. 34, next morning, the pass would be furnished, and he could go to Albert Lea. Plaintiff returned in a short time with Gilson, but meantime the train master had been informed of the sickness of a brakeman who was bulletined to go out at 10:40 P. M. on train No. 32 (conductor, Campbell), and therefore de-

clined to issue the pass. After some conversation it was agreed that plaintiff should go to Albert Lea that night as a brakeman on No. 32, while Gilson should go out next morning on No. 34. During this conversation plaintiff stated to the train master that he was tired and sleepy, having been on duty the previous night, and before going out would have to get his working clothes out of Conductor Williams's caboose, which, as he well knew, had, in accordance with the custom, been moved up into the Cedar Lake yard. At this the train master informed plaintiff that he could go out to the yard and sleep in Conductor Campbell's caboose until the train started, and for this purpose gave him a note to the other brakeman, there being at least two on each train, which required the latter to do certain preparatory work so that plaintiff could "sleep in the ca-

same footing as if this service was within the scope of his agreement. One who volunteers to act with other employees becomes one himself, so far as to introduce between them the same rule of legal responsibility."

Lastly (though no decisions to this effect have been found by the present writer), it seems manifest, upon general principles, that the servant under such circumstances would bring himself within the operation of the doctrine expressed in the maxim, *Volenti non fit injuria*. See note to *O'Maley v. South Boston Gaslight Co.* (Mass.) 47 L. R. A. 161.

The scope of a servant's duties for the purpose of this rule is to be defined by what he was employed to perform, and by what, with the knowledge and approval of his employer, he actually did perform, rather than by the mere verbal designation of his position. *Rum-mell v. Dillworth* (1885) 111 Pa. 343, 2 Atl. 355 (verdict finding servant not to be a mere volunteer, upheld).

When there is evidence that servants used an elevator as they had occasion; that there was no one to take charge of it; that the belt by which it was operated was liable to come off; that various employees were in the habit of putting it on; and that there were no rules of the employer forbidding or regulating the putting on of the belt,—it cannot be said, as a matter of law, that an employee injured while putting on the belt in the usual manner was acting negligently and without the scope of his employment, and that the employer was free from negligence. *Daley v. American Printing Co.* (1891) 152 Mass. 581, 26 N. E. 135.

An employee required to remove work from a mangle as it comes through, who is directed by her employer, as he sees her standing idle, to assist in putting wet clothes through the machine, is not a volunteer in subsequently putting dry clothes through the machine while the one employed for that purpose is absent. *Fitzhenry v. Lamson* (1897) 19 App. Div. 54, 45 N. Y. Supp. 875.

Nor will the fact that an injured servant was engaged in other than his regular work at the time of injury destroy the employer's liability for such injury, when it is shown that work other than the regular assigned duties was customary among servants of such employer. *East Line & R. River R. Co. v. Scott* (1887) 68 Tex. 694, 5 S. W. 501.

III. When negligence is predicated of a command to do work outside the scope of the original contract.

When a servant of mature years, and of or 48 L. R. A.

ordinary intelligence and experience, is directed to do a temporary work outside of the business he had engaged to do, and consents to do such work, without objection on account of his want of knowledge, skill, or experience in doing such work, no negligence on the part of the employer can be predicated upon that state of facts alone. *Cole v. Chicago & N. W. R. Co.* (1888) 71 Wis. 114, 37 N. W. 84. This case was approved in *Hogan v. Northern P. R. Co.* (1892) 53 Fed. Rep. 519, which was followed in *Richmond & D. R. Co. v. Finley* (1894) 25 U. S. App. 16, 63 Fed. Rep. 228, 12 C. C. A. 595. See also *Garigan v. Lake Shore & M. S. R. Co.* (1896) 110 Mich. 71, 67 N. W. 1097, where the rule of the Wisconsin case is quoted, *arguendo*.

In *Reed v. Stockmeyer* (1896) 34 U. S. App. 727, 74 Fed. Rep. 186, 20 C. C. A. 381, the court said that the proposition of plaintiff's counsel, that there was liability because the vice principal, acting for the master, directed the servant to engage in an employment other than that for which he was engaged, and which was more hazardous, and therein there was a breach of positive duty by the master, could not be sustained in the broad language in which it was asserted, and that the liability did not arise from the direction, but from failure to give proper warning of the risks attendant upon the employment.

In *Jones v. Lake Shore & M. S. R. Co.* (1885) 49 Mich. 573, 14 N. W. 551, it was laid down that where a servant signs a contract which binds him to obey all orders, rules, and regulations, but in which the general language applies equally to all classes of employees, the agreement to obey all orders must be construed to apply to all which are issued to him in the line of duty in which he is employed, and that it does not empower the company to assign him to other duties wholly disconnected therewith and differing therefrom.

This ruling may, perhaps, be regarded as specifically based upon an application of the maxim, *Epressio unius est exclusio alterius*, to the special agreement under construction. Otherwise it is difficult to reconcile it with the other decision in the same state, referred to *infra*, which seems to require some additional element over and above the mere order itself, before the master can be held liable as for a breach of duty.

The same remark is applicable to *Harrison v. Detroit, L. & N. R. Co.* (1890) 79 Mich. 408, 7 L. R. A. 623, 44 N. W. 1034, where it was said, *arguendo*, that when the offending servant, having general power and authority to

boose as long as possible,—till leaving time." Taking this note, plaintiff, accompanied by Gilson, went to one or two places in the city, and then to the Cedar Lake yard, where they found the caboose which was to go out on No. 32 (conductor, Campbell), and delivered the note to the other brakeman, Tyler, to whom it was addressed. It should be stated here that all freight-train men were shifted about from train to train, but that each conductor retained his own caboose; so that it was very improbable that plaintiff, or any other brakeman, would go out with the conductor in charge when he came in, and of course equally as improbable that the caboose attached to the outbound train would be that brought in with the incoming train. The plaintiff understood this thoroughly, for he had changed conductors and cabooses, as well as trains, nearly every trip during his

term of service. Plaintiff and Gilson left the caboose which was to go out with No. 32, to search for the one in which the clothes had been left. It was then dark. They went to several without finding the one they were looking for. Finally the plaintiff saw a train moving out of the yard,—No. 58,—which was due to leave at 8:45 P. M., and, thinking that the caboose attached might be the one he was looking for, stepped up on the rear platform, and entered, with Gilson. It was not the Williams caboose. After exchanging a few words with one of the trainmen, who happened to be in the caboose, plaintiff passed out upon the front platform, and attempted to step down upon the ground. According to his version of the affair, his foot caught under the throw bar of a switch, negligently located near the track and improperly constructed. He was thrown

employ and discharge servants, and having authority to direct and control the injured servant, orders him to do an act not within the scope of the injured servant's employment, whereby he is exposed to danger not contemplated in his contract of service, and he is injured in so doing, the master is held liable for injuries received while acting under the order of the superior servant.

In Indiana a doctrine has been laid down which subjects the master to a rule of liability even more stringent than that rejected in the text, by making him virtually an insurer of the servant's safety. *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151, 5 N. E. 187.

Compare *Cincinnati, H. & I. R. Co. v. Madden* (1893) 134 Ind. 462, 34 N. E. 227, where negligence seems to be implied from the mere giving of an order to perform new duties. The position of the court apparently is that the extra risks are not assumed, and this fact of itself implies that the act of the master which was the immediate occasion of the servant's being exposed to them must have been negligent. This view is plausible, but the theory of the courts which favor the opposite view, however, obviously is that the relations of the master and servant, at the time when the direction to undertake the new duties is given, are virtually the same as if a new contract of hiring were being proposed to the servant which he has the right to accept or reject as he pleases. The antagonistic conceptions of the master's liability cannot be reconciled as long as this radical difference of standpoints stands behind them.

To enable the servant to recover on this ground, there must be evidence showing that the transfer of the servant to the new duties was imprudent for some specific reason.

In *Galveston Oil Co. v. Thompson* (1890) 70 Tex. 235, 13 S. W. 60, it was held proper to charge the jury "that the plaintiff would be entitled to recover if the superintendent ordered plaintiff to perform a service which was dangerous, not within the purview of his employment, if in this the superintendent did not use due care, provided plaintiff was injured while attempting, in the exercise of due care, to obey the command."

The question of the master's negligence must depend upon the circumstances in the particular case, where a servant is ordered into a service which he did not undertake to perform (*Consolidated Coal Co. v. Haenni* (1893) 146 Ill. 614, 35 N. E. 162, affirming (1892) 48 Ill. App. 115; *Cole v. Chicago & N. W. R. Co.* (1888) 71 Wis. 114, 37 N. W. 84), as where the

servant, to the knowledge of the master, or of the servant who gives the order, is unfitted, by reason of his tender years, physical or mental weakness, or lack of experience, for the work to be done.

If the particular work ordered to be done is of a dangerous character, and one which requires particular skill in its performance, and the person directed to perform such work has not the requisite knowledge or skill for doing the work with safety, and such want of skill or knowledge is known, or might be reasonably supposed to be known, to the employer, in that case the direction of the employer to do the work might be justly held to be a violation of a duty which he owes to his employee, even though the employee undertook to do the work without objection or protest upon his part. None of the cases go further than this, and we can see no reason for holding a stricter rule. *Cole v. Chicago & N. W. R. Co.* (1888) 71 Wis. 114, 37 N. W. 84.

For cases in which the servant's action was sustained, for the reason that the person giving the order understood, or ought to have understood, the unfitness of the servant to do the work required, see *Union P. R. Co. v. Fort* (1873) 17 Wall. 553, 21 L. ed. 739 (foreman ordered a young, inexperienced boy who had previously worked as a helper at a moulding machine, or a common hand on the floor of a railway shop, to ascend a ladder and adjust displaced machinery while a shaft close by was rapidly revolving); *Jones v. Old Dominion Cotton Mills* (1886) 82 Va. 140 (boy of thirteen years hired to "sweep, carry water, and fill buckets with quills," ordered to mend a broken belt, in a position which required him to stand on a step-ladder near four belts in rapid motion); *Lalor v. Chicago, B. & Q. R. Co.* (1889) 32 Ill. 401, 4 Am. Rep. 616 (laborer known to be inexperienced was ordered to couple cars—company held liable); *Foley v. California Horseshoe Co.* (1896) 115 Cal. 184, 47 Pac. 42 (boy of fourteen years, employed to operate a punching machine, ordered to assist in screwing on a misplaced nut, had his sleeve caught in a cog-wheel); *Erickson v. Milwaukee, L. S. & W. R. Co.* (1890) 83 Mich. 281, 47 N. W. 237 (common laborer ordered to uncouple cars, and injured by the fireman's negligence in letting off brakes without warning); *Orman v. Mannix* (1882) 17 Colo. 564, 17 L. R. A. 602, 30 Pac. 1037 (gang boss negligent in ordering a boy fourteen or fifteen years of age to run and throw away an ignited stick of giant powder); *Brazil Block Coal Co. v. Gaffney* (1889) 119 Ind. 455, 4 L. R. A. 850, 21 N. E. 1102 (in-

against the switch stand, and from there upon the ground in such a position that the rear wheels of the caboose ran over his left arm.

We shall assume, for the purposes of this case, that if, on these facts, plaintiff is entitled to recover, there exists no other ground for a reversal of the order appealed from, and the verdict in plaintiff's favor cannot be set aside. We shall also assume that the evidence as to the custom prevailing among brakemen to change clothing as they approach terminals, and to leave their working clothes in the cabooses at the end of trips was of such a nature as to warrant the jury in finding that such brakemen were licensed by defendant to do this very thing,—to leave their clothing in any caboose which happened to be attached to the train on which they had made a trip, and without regard

to what was almost a certainty that with the next train to which they were assigned there would be another conductor, and a different caboose. Assuming this, it would seem to be true that these brakemen had the right to subsequently visit these cabooses for the purpose of obtaining their clothing, and in so doing again became licensees. Counsel for defendant concedes this. But it does not follow from the fact that they were licensed to remove their clothing from the cabooses that the right could be exercised at all times and under all circumstances, or that an unreasonable use of this license could be made. It is elementary that the defendant company owed no duty to plaintiff if he was not, when injured, engaged in serving it in the line or within the scope of his employment. Although he was in its general service, the defendant could not be liable for

experienced boy of ten years ordered to leave his ordinary work and assist in switching coal cars; *Kehler v. Schwenk* (1892) 151 Pa. 519, 25 Atl. 130 (boy of fourteen, employed as slate picker, ordered, against his will, to drive a dump car).

A trial judge in a Federal court charged the jury that a higher degree of care is required of the master in the case of a minor employee than in the case of an adult, especially in seeing that he does not assume risks without the scope of his employment. *Robertson v. Cornelson* (1888) 34 Fed. Rep. 716.

In *Chicago & N. W. R. Co. v. Bayfield* (1877) 37 Mich. 205, the court upheld an instruction to the effect that, if they found that the deceased, at the time he was employed by the defendant, was a lad of seventeen or eighteen years of age, inexperienced in the handling of brakes, and that he was unfitted for that work by reason of his unskillfulness, inexperience, and youth, and this was known to Smith, his foreman, and that he was employed at the time of his death and for some months previous thereto in the capacity of a common laborer only, and was ordered by the foreman to brake on said train out of the line of his duty as such common laborer, and that, while attempting to obey such order, he fell from the cars and was killed, without negligence on his part, the case of the plaintiff was established.

Or where the superior who gives the order directly augments, by a wrongful act amounting to an abuse of his power, the perils of the new duties.

In *Rodman v. Michigan C. R. Co.* (1884) 55 Mich. 57, 54 Am. Rep. 348, 20 N. W. 788, the court was equally divided upon the question whether a brakeman could recover for an injury caused by the conductor's undertaking to manage an engine in the absence of the engineer. This division of opinion was due simply to a divergence of views as to the principle which should control the case, and not to any difference of opinion concerning the doctrine stated in the text. *Champlin, J.*, took the ground that it was implied, as part of the contract between the plaintiff and defendant, that the engine should be operated by a competent engineer, and that the plaintiff did not assume the risk which would be incident to the employment in case the engine should be operated by a person without the requisite skill and experience, as this would put him in a position of greatly increased peril. The learned judge then proceeded thus: "In this case it is alleged in the declaration that the conductor was the agent of defendant, and had charge of

the train and command of the other employees of defendant on the train, including the plaintiff. He was put, therefore, by the defendant in his place to discharge the duty which the defendant owed to the plaintiff, to see that the employees of the defendant were discharging the respective duties required of them, and in the discharge of this duty the conductor was not a coservant, but the representative of the defendant, who in that respect is bound by the act or omission of the conductor the same as though such acts had been done or omitted by defendant personally. And the defendant having placed the conductor in a position of authority over the plaintiff and other servants, and made them subject to his direction and control, while the defendant is not chargeable for the consequences of directions given by such superior officer within the scope of the general employment, he is chargeable to plaintiff for an abuse of such authority as much as he would be to a stranger. . . . Suppose the conductor had ordered a day laborer or an entire stranger to take the place of the engineer during his temporary absence, and through his negligence, carelessness, and want of skill plaintiff had received the injury complained of without fault on his part, it would have constituted such an abuse of authority as to render the defendant liable. It was likewise an abuse of his authority in the conductor to order the brakeman to couple the cars in the absence of the engineer, while he himself, being a person unfit, incompetent, and lacking the requisite skill and experience, attempted to manage and operate the locomotive engine in making such coupling. By the exercise of his authority the conductor ordered the plaintiff to perform services of increased peril not contemplated by his contract with defendant. The case is no different from what it would have been had the defendant been a natural person, and, without possessing the requisite skill and experience and being wholly unfit and incompetent, had himself undertaken to run and manage the engine, and had at the same time ordered the plaintiff to couple the cars, and the injury had resulted in consequence of the want of fitness, competency, skill, and experience of defendant. The defendant is equally liable for the acts of his agent, the conductor, as if they were his own, when such acts are an abuse of his authority, or where he stands in place of the defendant." *Cooley, Ch. J.*, referring to the case of *Chicago & N. W. R. Co. v. Bayfield* (1877) 37 Mich. 205, which had been cited as conclusively showing the right of the plaintiff to recover, said: "That case

injuries received while plaintiff was engaged in an enterprise foreign to his employment. If Olson was acting for himself when he got on the way car, or when he got off and encountered the switch, and was not exercising his right as a licensee in a reasonable manner, the defendant did not fail in the performance of its obligation, was not derelict, and is not liable for the unfortunate result: for it was only bound to exercise reasonable care while plaintiff was acting within and under his license, not when he went beyond, and was upon its trains or on its premises without justification. And defendant duly performed its duty when it furnished safe appliances and a safe place for plaintiff while he was engaged in the line of his duty. It was not negligent if at the time and under the circumstances it owed him no duty. We have stated the manner

in which plaintiff's injuries were received, and it is clear that he was licensed, not only to go to Williams's caboose to get his clothing, but also to Campbell's caboose, that he might obtain a few hours' sleep before the train started and his labors began; and while so occupied in a reasonable manner he would be acting within the scope and line of his employment. If, while sleeping in the caboose, a collision had occurred involving defendant's negligence, and plaintiff had been injured, it is quite probable that under the doctrine of *Rosenbaum v. St. Paul & D. R. Co.* 38 Minn. 173, 36 N. W. 447, damages could have been recovered. And probably, had he been run down in a negligent manner while in the yard, without fault of his own, an action could have been maintained. But the present case is altogether different, and to support this verdict we

seems to us altogether different from this. There a common laborer on a railroad was ordered by his superior to perform the duties of a brakeman, and while doing so was injured. He was ordered into a different service to any in which he had ever engaged and the order was plainly wrongful. But in this case the plaintiff was put to no new or different service, and the only complaint is that in the very service he agreed to perform he was exposed to a risk not properly belonging to it, and therefore not contemplated by his contract of service. The risk was certainly unusual, and probably not in the minds of either party when the plaintiff was employed; but that fact would not of itself determine the responsibility.

Accidental injuries are often, perhaps most generally, the results of unexpected causes; but if these causes arise in the course of a servant's employment, he must be deemed to have assumed their risks. And the only question there can be in this case is, whether the plaintiff was ordered to do something which under the circumstances was outside of his employment, so that, had he been inclined to do so, he might rightfully have refused obedience to the order. And this, as it seems to us, must depend upon whether, when the contingency appears to the conductor to render it necessary, that official may for the occasion take charge of the engine, and at the same time require the brakeman to continue to perform his service. That contingencies may and do arise in which the conductor should take charge of the engine for the time, is undoubted. The necessity may sometimes be as urgent as it is plain; and lives may depend upon it. This might happen from injury to the engineer, or sudden illness; and when to leave the train where the disability of the engineer occurs would endanger some other train. But there might be other reasons for the engineer leaving his post, for which the company would not be in fault, and the conductor, with the train in his charge and under obligation to avoid other trains, must act in the emergency as the necessities of the case shall require. His highest and plainest duty in some circumstances will be to take possession of the engine and operate it; and it cannot be possible that, when such is his duty, the brakeman may rightfully prevent its performance by refusing to remain at his post. . . . If under any circumstances the conductor may rightfully take charge of the engine, this suit must fail, as there is no allegation in the declaration to show that in this case he was not justified. And he, being the person responsible for the

safety and management of the train, must be allowed a certain discretion in deciding upon emergencies, and the presumption must favor his action. And when he acts rightfully, it is contemplated in the employment of his subordinates that they, within their several spheres, shall assist him."

Or where the dangerous conditions are known to the master's superintendent and not to the servant. *Rettig v. Fifth Ave. Transp. Co.* (1893) 6 Misc. 328, 26 N. Y. Supp. 896; *Gavigan v. Lake Shore & M. S. R. Co.* (1896) 110 Mich. 71, 67 N. W. 1097 (*arguendo*).

In *Chicago & N. W. R. Co. v. Bayfield* (1877) 37 Mich. 205, one of the grounds upon which it was denied that the risk was not on the servant's shoulders was that, although it was apparent to him that the service was more hazardous than that which he engaged for, this must have been better understood by the master's agent.

The liability in this instance is sometimes placed upon the specific ground that the servant was not cautioned as to the unknown dangers. *Palmer v. Michigan C. R. Co.* (1891) 87 Mich. 281, 49 N. W. 613.

In the following cases the omission to warn the servant was noted as an element of the master's culpability: *Leary v. Boston & A. R. Co.* (1885) 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115; *Union P. R. Co. v. Fort* (1873) 17 Wall. 553, 21 L. ed. 739; *Gavigan v. Lake Shore & M. S. R. Co.* (1896) 110 Mich. 71, 67 N. W. 1097; *Walker v. Lake Shore & M. S. R. Co.* (1895) 104 Mich. 606, 62 N. W. 1032; *Camp v. Hall* (1897) 39 Fla. 535, 22 So. 792; *Mary Lee Coal & R. Co. v. Chambliss* (1892) 97 Ala. 171, 11 So. 897.

In *Mann v. Oriental Print Works* (1875) 11 R. I. 152, the following instruction was affirmed: "If the fireman, although employed only for a fireman, was placed under the orders of the engineer, and was by him suddenly called upon to assist in throwing on a belt, out of his own sphere, but within the sphere of duty of the engineer, and was thus subjected to a risk with which he was not acquainted, or to a peculiar and greater risk at that time and of which he was not informed or cautioned, the defendants would be liable."

Even proof that the servant to whom the order was given was young and inexperienced will not of itself support an averment of negligence. It must also be shown that the circumstances were such as to render the giving of the order negligence in relation to the servant coming under that description. See *Mary Lee Coal & R. Co. v. Chambliss* (1892) 97 Ala. 171,

should be obliged to hold that, having a license to go to one caboose to get his clothes, he had the right in the night-time to go all over the yard, and finally to jump upon another, attached to a moving train, make search for his clothing, and then, with the train still in motion, to jump off in the darkness in a yard filled with side tracks, switches, and other necessary appliances, to say nothing of switching engines and moving freight cars. Some of the reported cases have gone quite far in sustaining verdicts where the question was a close one with respect to the line of duty when the accident occurred, but not one of these approaches

this on the facts. The plaintiff was not acting within the line of his duty, nor within the scope of his employment, when jumping from the caboose, nor was he within his license.

Reference has been made to the *Rosenbaum Case*, and plaintiff's counsel insists that it warrants the verdict here. There is no ground for this view. *Rosenbaum* was rightfully on the train, and it was the duty of the company to provide a safe track. Here plaintiff was wrongfully upon a moving train. Nor was he injured by anything which happened to the train, but by the act of jumping off. Counsel for plaintiff urge

11 So. 897 (railroad company which directs a minor servant to perform some duty outside of his employment does not thereby become an insurer that its "ways, works, and machinery" are absolutely safe—fireman of seventeen years ordered to throw a switch which had a tendency to fly back), disapproving of the rule thus laid down in *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151, 5 N. E. 137: When a servant is put at work outside of his employment, and is injured by reason of defective machinery, railroad tracks, etc., without his fault, the master is liable, regardless of the care he may have exercised to keep the machinery, railroad tracks, etc., in a safe condition. When a servant is thus ordered to work at a particular place, or with particular machinery outside of his employment, the master impliedly assures him, not only that he has exercised reasonable care to have the place, machinery, etc., in a safe condition, but also that they are in a safe condition and fit for the business for which they are used.

The Alabama court said: "We think the rule declared in the case cited . . . imparts into the contract of employment an obligation not within the contemplation of the parties, and one which no prudent employer would assume. . . . A railroad owes no higher duty to a passenger than that here imposed upon the master to his servant. Does not the master fully discharge his obligation in this respect to all his employees when he exercises reasonable care and diligence in seeing that the ways, works, and machinery are such as are in general use by well-regulated railroads, and that they are kept in proper condition? We know of no sound principle of law which exacts a higher degree of care and diligence on the part of the master to his employee than reasonable care and diligence. . . . Where the evidence shows that the employment is more dangerous than that within the scope of his employment, or that the servant is called to use machinery which requires skill not possessed by the servant and not in use in the regular course of his service of employment, the law very properly holds the master liable, under proper circumstances, for such injuries as may result from the increased danger; but the liability here rests upon different principles from those which would make the master an insurer that the ways, works, and machinery were absolutely perfect. It cannot be said that the master has exercised reasonable care and diligence for the safety of his servant, when, by his orders, the servant is exposed to greater peril than that which by his contract of employment he assumed, or when the master exposes his servant of immature years, or one inexperienced and unskilled without proper instruction and warning

as to the peril of machinery or ways and works dangerous in their use."

The passage cited from the *Indiana* case undoubtedly lays down the rule too strongly against the master. That the implied "assurance of safety" deduced from a specific order is merely an assurance of safety so far as reasonable care can attain it has, we think, never been denied as regards risks within the scope of the employment, and there is no apparent reason why such an assurance should bear a different meaning where the risk is one outside the scope of the employment.

In *Anderson v. Morrison* (1875) 22 Minn. 274, the contention was rejected that a cause of action arises in favor of a minor who is injured in consequence of being set at more dangerous work, whether this change in his duties was negligent or prudent. The court said: "The plaintiff claims that upon being injured in consequence of being set at more dangerous work a cause of action arises, whether setting him at the more dangerous work was, under the circumstances, a negligent or a prudent thing to do. This proposition is wrong, and the charge of the court correct. If an employer should set an adult, who had capacity to take care of himself, and who knew the risks, to do a dangerous work, of course the employer would not be liable for an injury occurring to the employee in doing the work. And it would be the same if the employee were a minor, but of sufficient capacity to avoid the danger, and who knew of the danger to be avoided. There could be no greater wrong in putting such a minor to do a work accompanied with risk than in setting an adult to do it; and when it would be proper to put a minor to do such work must necessarily depend upon the particular circumstances of each case, upon the character and degree of the danger, and the capacity of the minor to comprehend and avoid it. Putting the minor to do the work becomes a matter of discretion and care, to be exercised with reference to such circumstances, and the employer can be held liable only where he does not exercise such discretion and care—that is, where he is negligent. The case of *Union P. R. Co. v. Fort* (1873) 17 Wall. 553, 21 L. ed. 739, proceeds upon the proposition that the setting of the minor in that case to do the perilous work for which he had not been employed was an imprudent act, and not on the ground merely that the work was perilous and the employee a minor."

A simple finding of a jury that the plaintiff did not comprehend the dangers incident to the work will not render the master liable. It must also be shown that this lack of comprehension was, or ought to have been, known to the master. *Cole v. Chicago & N. W. R. Co.* (1885) 71 Wis. 128, 37 N. W. 84.

in their brief, that their client was in fact acting under defendant's orders at the time of the injury, and calls attention to the testimony found in folios 91 to 97, Paper Book. An examination of the testimony, which is the conversation between plaintiff, Gilson, and the train master at the latter's office at the time it was agreed that plaintiff should go out on No. 32, pretty conclusively shows that, if he had obeyed the train master's directions or orders, there given, he would have been asleep in Conductor Campbell's caboose when the accident happened, not far from 9 P. M., instead of pursuing a train in

motion, and jumping on and off the platforms of the attached caboose as it moved through the yard. No injuries would have been received if the train master's directions had been promptly followed.

The verdict is set aside, and, as defendant's counsel moved for a verdict before the case was submitted to the jury, which motion should have been granted, and subsequently moved for judgment notwithstanding the verdict, *the court below is ordered to cause judgment to be entered in defendant's favor on the remanding of the case.*

Under the general principle of the law of agency, the master cannot escape responsibility on the plea that the superior servant who gave the negligent order should not have given it. *Union P. R. Co. v. Fort* (1873) 17 Wall. 553, 21 L. ed. 739.

To let in the application of the special principles appropriate to this class of cases, it must, in any event, appear that the order really did take the servant outside the scope of his original employment, and not merely direct the performance of duties somewhat different to those which were required from him in the regular course of his work.

In *Curran v. Merchants' Mfg. Co.* (1881) 130 Mass. 374, 39 Am. Rep. 457, it was contended that the case was taken out of the ordinary line of cases in which the servant is an adult by the fact that the plaintiff, who was fourteen and a half years of age, and had worked in the mill two and a half years, was of tender years, and was set to work in an unusual place, doing what he was not accustomed to do. This argument was rejected on the ground that the evidence was that the work he was doing was precisely what he had been accustomed to do from time to time during the whole term of his employment by the defendant, and that his injury did not proceed from the fact that he was working in dangerous proximity to other machinery over which he had no control.

A father recovered damages for the death of a minor son through the negligence of a fellow servant, while he was engaged in work which, although it was outside the scope of his regular employment, he had sometimes done before with the knowledge of the father. *Ohio & M. R. Co. v. Hammersley* (1867) 28 Ind. 371. A complaint alleging that the injury was received while the servant, a tunnel repainer, was travelling on a train from one tunnel to another under the order of the superintendent, does not show a wrongful transfer from his general line of employment. *Copper v. Louisville, E. & St. L. R. Co.* (1885) 103 Ind. 303, 2 N. E. 749.

IV. *Risks of work outside scope of employment, when deemed to be assumed.*

The mere fact that a servant yielded obedience to an order which required him to undertake duties different from those covered by the agreement under which he entered the employment will not justify the inference that he assumed the risks accompanying the performance of the new duties. *Chicago & N. W. R. Co. v. Bayfield* (1877) 37 Mich. 205; *Union P. R. Co. v. Fort* (1873) 17 Wall. 553, 21 L. ed. 739; *Leary v. Boston & A. R. Co.* (1885) 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115; *Northern P. Coal Co. v. Richmond* (1893) 15 U. S. App. 262, 8 Fed. Rep. 756, 7 C. C. A. 485 (boy employed as "trapper" in mine directed to assist drawers of cars); *Helm v. O'Rourke* 48 L. R. A.

(1894) 46 La. Ann. 178, 15 So. 400 (workman killed by the bursting of a boiler while it was being tested, he having been called away from his regular duties); *Michael v. Roanoke Mach. Works* (1894) 90 Va. 492, 19 S. E. 261 (boiler maker's helper temporarily removed to another department); *Consolidated Coal Co. v. Haenni* (1893) 146 Ill. 614, 33 N. E. 162, Affirming (1892) 48 Ill. App. 115 (blacksmith directed to assist in raising a smoke-stack).

The servant's implied assumption of risks is confined to the particular work and class of work for which he is employed. There is no implied undertaking except as it accompanies and is a part of the contract of hiring between the parties. On the other hand, if the servant, by the orders of the master, is carried beyond the contract of hiring, he is carried away from his implied undertaking as to risks. If the master orders him to work temporarily in another department of the general business, where the work is of such a different nature and character that it cannot be said to be within the scope of the employment, and where he is associated with a different class of employees, he will not, by obeying such orders, necessarily assume the risks incident to the work, and the risks of negligence on the part of such employees. *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151, 164, 5 N. E. 187.

The following from a well-known text book has been judicially approved: "It has been often—and very justly—remarked that a man may decline any exceptionally dangerous employment, but if he voluntarily engages in it he should not complain because it is dangerous. Nevertheless, where one has entered upon the employment and assumed the incidental risks, it is not reasonable to hold that other risks which he is directed by the master to assume are to be left to rest upon his shoulders, merely because he did not take upon himself the responsibility of throwing up the employment instead of obeying the order." *Cooley Torts*, 555, quoted in *Brazil Block Coal Co. v. Hoodlet* (1891) 129 Ind. 327, 336, 27 N. E. 741.

Knowledge of the danger the material point.

Such an assumption must be established by the same evidence as is required in the case of other kinds of extraordinary risks. It is absolutely negated by proof that the servant was excusably ignorant of the risk to which his obedience exposed him. *Palmer v. Michigan C. R. Co.* (1891) 87 Mich. 281, 49 N. W. 613 (section man upon a railroad does not assume the risks incident to loading rails upon a moving train in an unusual manner); *Walker v. Lake Shore & M. S. R. Co.* (1895) 104 Mich. 606, 62 N. W. 1032 (section foreman killed by the recoil of a trolley wire which he was ordered by the roadmaster to cut. Grant, J., dissented

on the ground that this consequence was a patent risk, as well as on the more general ground that no negligence on the part of the company was established in regard to the supply of improper tools for the work).

As where the summons to undertake the unfamiliar duties has to be obeyed promptly, and the servant neither knows the danger nor how to guard against it. *Mann v. Oriental Print Works* (1875) 11 R. I. 152 (one hired as a fireman suddenly called on to assist the engineer in throwing a belt).

Or where the servant, by reason of his youth or inexperience, is incapable of understanding the hazards to be encountered.

On the other hand, the responsibility for such injuries as may result from obedience to the order will be held to have been accepted by the servant under any circumstances which would have justified that inference, where the extraordinary risk was one within the scope of the original contract.

In *Fort Smith Oil Co. v. Slover* (1893) 58 Ark. 168, 24 S. W. 106, the following instruction was disapproved: "The servant's implied assumption of risk is confined to the particular work or class of work for which he is employed. There is no implied undertaking of risks, except such as accompany, and are part of, the contract of hiring between the parties. If the servant, by the express or implied authority of the master, is carried beyond the contract of hiring, he is carried away from his implied undertaking as to risks. If the master orders him to work temporarily in another department of the general business where the work is of such a different nature and character that it cannot be said to be within the scope of the employment, and where he is associated with a different class of employees, he will not, by obeying such orders, assume the risks incident to that service, or assume the risks of the negligence of such class of employees, but would be entitled to recover, if injured by reason of the negligence of such class of employees; provided he himself was not guilty of contributory negligence."

He assumes, therefore, all the ordinary risks of the new duties. *Millar v. Madison Car Co.* (1895) 130 Mo. 517, 31 S. W. 574 (the court remarked that by its ruling it did not mean that the servant assumed the risk of a defective appliance of which he knew nothing, or dangers which were not visible, but the risks that ordinarily attended the working of a reasonably safe appliance of the same character).

So far as he is competent to apprehend them. *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151, 5 N. E. 187.

Whether he be a minor or an adult. See the passage cited in III. *supra*, from the opinion in *Anderson v. Morrison* (1875) 22 Minn. 274.

So far as the language goes. *Foley v. California Horsehoe Co.* (1896) 115 Cal. 184, 47 Pac. 42, seems to be *contra* as regards minors; but the case is one of those in which the phrase "assumption of risks" is improperly used to express a want of care.

The risks thus presumed to be accepted are those susceptible of being described by the same words that are employed to designate extraordinary risks within the scope of the original employment; as "apparent." *Walker v. Lake Shore & M. S. R. Co.* (1895) 104 Mich. 606, 62 N. W. 1032.

Or "obvious." *Feely v. Pearson Cordage Co.* (1894) 161 Mass. 426, 37 N. E. 368; *Leary v. Boston & A. R. Co.* (1885) 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115 (for facts, see VII. b. *infra*; *Wormell v. Maine C. R. Co.* (1887) 79 Me. 397, 10 Atl. 40; *Gavigan v. Lake Shore & M. S. R. Co.* (1896) 110 Mich. 71, 67 N. W. 48 L. R. A.

1097 (experienced section hand engaged with others in relaying a spur track during the progress of which it became necessary to move cars, was climbing at the command of the section boss upon one of the cars to set the brakes thereon and injured by the act of the other hands in violently bumping said car with another).

Or so "open and manifest" that an ordinary man, under the same circumstances, would have ascertained them by the exercise of reasonable diligence. *East St. Louis Ice & Cold Storage Co. v. Sculley* (1896) 63 Ill. App. 147.

So, also, no action is maintainable, where the servant had, as compared with the master, a better opportunity to see and know the extent of the danger. *Houston & T. C. R. Co. v. Fowler* (1882) 56 Tex. 452 (employee killed by derailment due to a wash-out while travelling on a relief train).

Or an equal opportunity. Thus, the fact that an employee in a quarry was called from a safe employment to that upon which he was engaged at the time of the accident will not enable him to recover for injuries from the fall on him of the stone under which he was drilling, such fall being due to seams in the stone, and the hammering by the foreman upon the wedges at the top, where such employee was experienced in quarry work, knew the existence of seams and the danger therefrom, and had an equal opportunity with the master and foreman of ascertaining whether there were seams in the particular stone. *Reed v. Stockmeyer* (1896) 34 U. S. App. 727, 74 Fed. Rep. 186, 20 C. C. A. 381.

This rule, of course, contemplates a comprehension of the danger, and not merely a knowledge of the material conditions. *Northern P. Coal Co. v. Richmond* (1893) 15 U. S. App. 262, 58 Fed. Rep. 756, 7 C. C. A. 485, (boy of fourteen injured through stumbling over a lump of coal near a track in a mine, he being aware that it was there—for jury to say whether he appreciated the risk).

According to several decisions in Indiana, the fact that the risk involved was as open to the observation of the servant as of the master will not warrant the inference that it was assumed, as in cases where the work was within the scope of the employment, the theory being that the master's order operates as an implied assurance of safety which precludes him from raising any defense but that of contributory negligence. The doctrine so formulated, it will be observed, makes the specific order the controlling factor, and brings this class of cases within the range of the same principle as those developed in the note to *McKee v. Tourtelotte* (Mass.) *ante*, 542; *Nall v. Louisville N. A. & C. R. Co.* (1891) 129 Ind. 260, 28 N. E. 183, 611 (employee called out to avert the threatened destruction of a bridge by a freshet); *Louisville, E. & St. L. Consol. R. Co. v. Hanning* (1892) 131 Ind. 528, 31 N. E. 187 (car-repairer directed by his superior to repair a car on a switch track, instead of on the tracks provided for that special purpose and upon which no trains are run or switched).

The position of the court is thus explained in *Brazil Block Coal Co. v. Hoodlet* (1891) 129 Ind. 327, 27 N. E. 741 (servant who usually worked above ground as a blacksmith injured while passing round an unprotected shaft the condition of which was obvious, after he had completed some work in it).

"When a master orders a servant to do something which involves encountering a risk not contemplated in his employment, although the risk is equally open to the observation of both it does not necessarily follow that the servant either assumes the increased risk, or is negli-

gent in obeying the order. If the apparent danger is such that a man of ordinary prudence would not take the risk, the servant acts at his peril. But unless the apparent danger is such as to deter a man of ordinary prudence from encountering it, the servant will not be compelled to abandon the service, or assume all additional risk, but may obey the order, using care in proportion to the risk apparently assumed, and if he is injured the master must respond in damages." See also *Arcade File Works v. Juteau* (1896) 15 Ind. App. 461, 40 N. E. 818, 44 N. E. 326.

The effect of this theory is that the master becomes an insurer of the safety of the servant. *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151, 5 N. E. 187. Yet the case expressly recognizes the doctrine that risks, if comprehended, are assumed.

Even where an assumption of the risk may be inferred, the servant may still recover if it appears that the master, by his failure to discharge his continuing duty to keep the appliances safe, has exposed the servant to additional risks after the new work has been undertaken. *Nall v. Louisville, N. A. & C. R. Co.* (1891) 129 Ind. 260, 28 N. E. 183, 611.

As in all cases of extraordinary risks, the question whether the servant appreciated the risks of new duties is primarily for the jury. *Foley v. California Horseshoe Co.* (1896) 115 Cal. 184, 47 Pac. 42.

V. Doctrine of common employment qualified as regards servants working outside the scope of their employment.

An important exception to the doctrine of common employment is created by the rule that the giving of an order which requires the servant to perform duties not included in the original contract constitutes actionable negligence where such servant is plainly unfitted for the new duties.

The nature and extent of this exception may be stated thus: The principle that the master is not precluded from relying on the defense of common employment by the mere fact that the plaintiff's injury was received in consequence of his complying with an order given by a superior coservant having the right to control him as to the manner of doing his work, is not applicable in cases where that order requires the performance of duties outside the scope of the plaintiff's original contract. Under these circumstances the sole question to be determined, in so far as the master's liability depends upon the representative character of the delinquent coservant, is whether the order which occasioned the injury was one which he had authority to give.

In *Union P. R. Co. v. Fort* (1873) 17 Wall. 553, 21 L. ed. 730, affirming (1871) 2 Dill. 259, Fed. Cas. No. 4,052, the court, after stating the rule as to common employment, said: "This rule proceeds on the theory that the employee, in entering the service of the principal, is presumed to take upon himself the risks incident to the undertaking, among which are to be counted the negligence of fellow servants in the same employment, and that considerations of public policy require the enforcement of the rule. But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise, principals would be released from all obligations to make reparation to an employee in a subordinate position for any injury caused by the wrongful conduct of the person placed over him, whether they were fellow servants in the same common service or not. Such a

doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate employees of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would, so far as this class of persons were concerned, be relieved of all pecuniary responsibility in case they failed to do it. A doctrine that leads to such results is unsupported by reason, and cannot receive our sanction. . . . If the order had been given to a person of mature years, who had not engaged to do such work, although enjoined to obey the directions of his superior, it might with some plausibility be argued that he should have disobeyed it, as he must have known that its execution was attended with danger. Or, at any rate, if he chose to obey, that he took upon himself the risks incident to the service. But this boy occupied a very different position. How could he be expected to know the peril of the undertaking? He was a mere youth, without experience, and not familiar with machinery. Not being able to judge for himself he had a right to rely on the judgment of Collett, and, doubtless, entered upon the execution of the order without apprehension of danger."

One of the grounds on which the decision in *Chicago & N. W. R. Co. v. Bayfield* (1877) 37 Mich. 205, rested, was thus stated by Cooley, Ch. J.: "We also think that where the superior servant, by means of an authority which he exercises by delegation of the master, wrongfully exposes the service, and in consequence he is injured, the master must respond. It is only where the risks properly pertain to the business, and are incident to it, that the master is excused from responsibility; and, a risk of this nature not being one of the kind, the general rule applies, and he must answer for the misconduct of his agent."

The court adopted the broad contention of the plaintiff that, if the master wrongfully sends his servant into a dangerous place, or exposes him to a risk not connected with the service and in consequence he is injured, the rule which exempts the master from responsibility has no application, because the risk is not one which the servant has assumed; and that if, instead of being sent by the master in person, the servant is thus wrongfully exposed to danger by one whom the master has placed over him, and to whose orders he is subjected, the responsibility is the same; the wrongful act of this superior being in law the wrongful act of the master himself.

This case was followed in *Walker v. Lake Shore & M. S. R. Co.* (1895) 104 Mich. 606, 62 N. W. 1032, and by two judges in *Rodman v. Michigan C. R. Co.* (1884) 55 Mich. 57, 54 Am. Rep. 348, 20 N. W. 788.

In *Hayes v. Colchester Mills* (1894) 69 Vt. 1, 37 Atl. 269, the court argued as follows: If this service was beyond the plaintiff's capacity, and so outside the scope of his employment, he did not assume the risks attendant upon it. A person of mature years might have been held to have assumed them by consenting to do the work; but the rights of a child are not permitted to depend upon his ability to discriminate promptly as to the work required of him, or to refuse obedience to the command of his superior. This limitation of the plaintiff's risk renders the doctrine of fellow servant inapplicable. In entering the defendant's service, the plaintiff assumed only such risks arising from the negligence of his coemployees as might be incurred within the scope of his em-

ployment. So it is not necessary to determine whether the nature and extent of Sturgis's authority over the plaintiff were such as to exclude him from the relation of fellow servant. The effect of his authority over the plaintiff is to be considered without reference to that relation. The defendant assigned Sturgis to the care of the machinery, and placed the plaintiff under his orders. If Sturgis, acting within the sphere of his own duty, required of the plaintiff a service which was outside his employment, and which a prudent master would not have imposed upon a person of his years, strength, and judgment, the defendant is liable for the consequences of the improper order.

In *Brazil Block Coal Co. v. Gaffney* (1889) 119 Ind. 455, 4 L. R. A. 850, 21 N. E. 1102, the court, in holding that a mine boss who directed a ten-year-old boy to leave his own work and undertake more dangerous duties, was not a fellow servant of the boy, said: "Nor do we rest our conclusion upon the maxim *Respondet superior*. Mudgett (if not Haines) under the circumstances of this case, was the agent of the appellant, and the superior of the appellee. It was his right to command, and the appellee's duty to obey, and, considering the immature age of the appellee, we must assume that he obeyed the commands of his superiors, supposing that it was his duty so to do, without regard to the dangers or hazards that he would encounter, and without a knowledge thereof."

See also *Jones v. Old Dominion Cotton Mills* (1886) 82 Va. 140 (order given by foreman); *Mann v. Oriental Print Works* (1875) 11 R. I. 152 (order given by engineer to fireman); *Orman v. Mannix* (1892) 17 Colo. 564, 17 L. R. A. 602, 30 Pac. 1037 (order given by gang foreman); and the cases cited, *passim*, in note.

In nearly all the cases in which this aspect of the master's liability has come under consideration the injured servant has been a minor, and language has sometimes been used which indicates that the benefit of this qualification of the doctrine of common employment can only be claimed by minors.

Mann v. Oriental Print Works (1875) 11 R. I. 152, was a case of an adult, so far as appears.

In *Randall v. Baltimore & O. R. Co.* (1883) 109 U. S. 483, 27 L. ed. 1005, 3 Sup. Ct. Rep. 322, Gray, J., said that the principle of *Union P. R. Co. v. Fort* (1873) 17 Wall. 553, 21 L. ed. 739, was that, the servant "being a minor, he was performing, by direction of his superior, work outside of and disconnected with the contract which his father had made for him with the defendant."

In *Leary v. Boston & A. R. Co.* (1885) 139 Mass. 380, 52 Am. Rep. 733, 2 N. E. 115, also, it was remarked that the controlling factor was that plaintiff was a minor.

But with all deference to the eminent judges who have taken this view, the present writer ventures to express an opinion that it is neither consistent with the reason of the qualification nor sustained by the authorities, not excepting even the case commented upon. One of the grounds upon which the Supreme Court of the United States upheld the servant's right of action in *Union P. R. Co. v. Fort* (1873) 17 Wall. 553, 21 L. ed. 739 (as will be seen by reading the extract from the opinion in note), was that he "had no reason to believe he would have to encounter" the risk which caused his injury. Manifestly this element of nonanticipation is of precisely the same evidential import in the case of adults as in the case of servants, in so far as it operates *prima facie* to negative that knowledge which is supposed to exist with regard to the ordinary risks of work 48 L. R. A.

within the scope of the employment. Up to this stage of the inquiry, therefore, adults and minors stand on the same footing.

The second question involved is that which is discussed in the latter part of the opinion in *Union P. R. Co. v. Fort*, *viz.*, whether this presumption of excusable ignorance is overcome by the specific evidence which is relied upon to prove actual or constructive notice of the risk. This question is wholly distinct from the other, and, in considering it, the minority of the servant undoubtedly becomes material, for exactly the same reasons as where the extraordinary risk is one within the scope of the servant's employment. To this extent, therefore, and no further, it is submitted, the tender age of the plaintiff is a controlling factor in the cases which established this limitation of the doctrine of common employment. Minority, in short, makes it more difficult for the master ultimately to prevail on the ground of an assumption of the risks of new duties, but this is only because the general inference of a nonassumption of those risks which is drawn from the servant's nonanticipation is more readily rebutted by specific evidence in the case of adults than in the case of minors.

VI. Contributory negligence as a defense.

In obeying orders generally.

The general rule, as formulated by an eminent judge, is that, where a master commands a servant to go outside of his regular employment to do a work which is attended with special danger, and the servant, in response to the specific commands of his master, goes and does the work in the way and at the time directed, the fact that the servant knew that it was dangerous renders him, as matter of law, guilty of contributory negligence, unless the character of the danger be so patent and so extreme that no one but a foolhardy, reckless man would attempt it. *English v. Chicago, M. & St. P. R. Co.* (1885) 24 Fed. Rep. 908, per Brewer, J. A similar principle holds where the order was given by a superior servant, clothed with authority to direct the servant who brings the action.

In *Chicago & N. W. R. Co. v. Bayfield* (1877) 87 Mich. 205, it was agreed that, even if the superior servant who gave the order represented the company *ad hanc vicem*, the act of the plaintiff in obeying was his own voluntary act, and that the case was the ordinary one of contributory negligence. This contention did not prevail. Cooley, Ch. J., said: "When one person engages in the employment of another, he undertakes to obey all lawful orders, and he subjects himself, for any failure to do so, to the double liability of being expelled from the employment and of being required to pay damages. It is true the master had no right to direct him to do anything not contemplated in the employment; but when one thus contracts to submit himself to the orders of another, there must be some presumption that the orders he receives are lawful, the giving of the orders being of itself an assumption that they are lawful; and the servant who refused to obey would take upon himself the burden of showing a lawful reason for the refusal. This of itself is sufficient reason for excusing the servant who declines the responsibility in any case in which doubts can possibly exist. He should assume that the order is given in good faith, and in the belief that it is rightful; and if, in his own judgment, it is unwarranted, it is not for the master to insist that the servant was in the wrong in not refusing obedience. Respect for the master, as well as a consideration for his own interest, may very properly induce

him to waive his own judgment for that of his superior, and, instead of engaging in disputes, and being, perhaps, ejected from his employment, to leave questions of doubt for future settlement. Now, although we think on the facts, as the jury has found them, there was no authority to send Williams to handle the brakes, yet the point was not so clear but that serious question was made of it on the trial, and it would be grossly unjust to compel the servant at his peril to decide correctly on the validity of an order presumptively lawful when the consequences of even a correct decision might be apparent insubordination, and perhaps difficulty and litigation. It is perfectly just under such circumstances to leave upon the master the responsibility he assumed in giving an unwarranted order, and to hold that the servant is not blamable in yielding obedience to his superior."

See also *Galveston Oil Co. v. Thompson* (1890) 76 Tex. 235, 13 S. W. 60; *Clark County Cement Co. v. Wright* (1897) 18 Ind. App. 630, 45 N. E. 817 (complaint not demurrable because it shows undertaking of new and more dangerous duties); *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151, 5 N. E. 187 (*arguendo*).

In *Frandsen v. Chicago, R. I. & P. R. Co.* (1873) 36 Iowa, 372, it was argued that if it was negligence for a foreman of a repair gang to order his men to enter the railway cutting with a handcar which was run down, it was negligence on the part of plaintiff to go upon it, and that he should have refused. But the court said: "A judicial sanction to such insubordination would breed an infinity of accidents. Although the train was behind time, this would not justify the boss and men, who constitute the repairing force, in setting off their hand car and awaiting the train. It might not arrive for hours, or possibly might itself be awaiting the arrival of the hand car with men, tools, and materials to repair a breach or remove obstructions which stayed its progress. The repairing force, then, should move on, both prudently and obediently, to the discharge of its full duty."

See also *Kehler v. Schwenk* (1892) 151 Pa. 519, 25 Atl. 130; *Orman v. Mannix* (1892) 17 Colo. 564, 17 L. R. A. 602, 30 Pac. 1037; *Camp v. Hall* (1897) 39 Fla. 535, 22 So. 792.

Special reasons for not imputing negligence exist, where the servant's excusable ignorance of the danger to be encountered is a reasonable inference from the fact that he had no time for reflection or choice. *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582; *Dowling v. Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298 (boy of seventeen ordered to stop an engine, such work not being a part of his duty, and to hurry, was caught by an uncovered set-screw); *Hale Elevator Co. v. Trude* (1891) 41 Ill. App. 253 (servant in hasty response abandoned his regular work to add his strength to that of other employees to overcome a present emergency).

A boy of fourteen who suddenly receives an order from his foreman to pick up and throw away a stick of giant powder which has caught fire is not, as matter of law, negligent in obeying, as he has neither time for the close weighing of chances nor the opportunity to comprehend fully the danger of the service to which he is assigned. *Orman v. Mannix* (1892) 17 Colo. 564, 17 L. R. A. 602, 30 Pac. 1037.

Or where, by reason of his youth and inexperience he was incapable of determining whether the work required is within the scope of his employment. *Hayes v. Colchester Mills* (1894) 69 Vt. 1, 37 Atl. 269.
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Or believes himself bound to render obedience to the order. *Mary Lee Coal & R. Co. v. Chambliss* (1892) 97 Ala. 171, 11 So. 897 (minor of seventeen years, employed as a fireman, was ordered to throw a switch).

Or does not comprehend the danger of the new work to which he is assigned.

The fact that a boy of fourteen, injured in a mine by stumbling over a piece of coal lying upon the track while endeavoring, in pursuance of directions of the superintendent directing him to a service outside of the duty of his regular employment and without the knowledge of his parents, to throw off the brake upon a coal car, had seen such piece of coal before he was injured, does not render him, as matter of law, guilty of contributory negligence, since it does not follow, as a conclusion of law, that his judgment had reached such maturity that he was apprised of the danger of running alongside the tracks or setting or removing the brakes under such circumstances. *Northern P. Coal Co. v. Richmond* (1893) 15 U. S. App. 262, 58 Fed. Rep. 756, 7 C. C. A. 485.

Of course, even a minor who fully understands the risks of using an appliance which he is not hired to operate will be held liable for a failure to use the care appropriate to the circumstances for the prevention of injury. *Michael v. Stanley* (1892) 75 Md. 464, 23 Atl. 1094.

A servant is not required to weigh nicely the question whether any particular order is one which his superior has a right to give. *Orman v. Mannix* (1892) 17 Colo. 564, 17 L. R. A. 602, 30 Pac. 1037.

Nor will a servant who is charged with various duties be held, upon uncertain and refined distinctions, to have been negligent when in good faith he performed a service outside of the line of his duty. *Grannis v. Chicago, St. P. & K. C. R. Co.* (1890) 81 Iowa, 444, 46 N. W. 1067 (finding upheld that a wiper in a roundhouse injured while attempting to couple an engine to a car in assisting to take the engine out of the roundhouse, was acting in the line of his duty while making the coupling, the proof being that the plaintiff, although he had never attempted to do such work before, was a man of all work, and required to assist in taking engines into and bringing them out of the roundhouse, and it is shown that other wipers coupled cars).

But clearly he can never be justified in obeying an order which takes him outside his regular duties, where he has been expressly instructed to obey the orders of the superior servant only in so far as they relate to his own department. *Mann v. Oriental Print Works* (1876) 11 R. I. 152, where it was also held that, unless the plaintiff fireman had been instructed not to obey the engineer except in the line of the fireman's employment, the engineer was authorized to call upon him for assistance in any matter within the engineer's department, and the defendant would be liable, even if there was another person who might more properly be called upon.

A servant who is sent to do a piece of work with a machine with which he is not familiar is bound to inquire as to the method of its operation. The failure to seek this information will debar him from recovering for an injury caused by operating it, if it is free from defects. *Millar v. Madison Car Co.* (1895) 130 Mo. 517, 31 S. W. 574.

Where the particular manner in which the new duties are to be performed is left to the discretion of the servant, he cannot recover if he performs them in a way obviously calculated to cause the injury complained of. *Wormell v. Maine C. R. Co.* (1887) 79 Me. 397, 10 Atl.

49 (workman whose ordinary duties were in a car shop injured while coupling cars, under the direction of his foreman. Hand placed where servant could not help seeing it must be caught by the buffer).

Or fails to take the precautions against accident which would have suggested themselves to a prudent man. *English v. Chicago, M. & St. P. R. Co.* (1885) 24 Fed. Rep. 906 (servant was ordered to repair a water tank, and fell from a narrow, ice-covered platform on which he stood).

Or to exercise that measure of skill which he possesses. *Boettger v. Scherpe & K. Architectural Iron Co.* (1894) 124 Mo. 87, 27 S. W. 466 (one hired as a common laborer not required to possess such skill in choosing lumber for a scaffold as will debar him from recovery for injuries received through the breaking of a piece of timber used in erecting the structure).

VII. *Absence of compulsion, an essential element of assumption of risks and contributory negligence.*

a. *Generally.*

As in cases of injuries from other kinds of extraordinary risks, neither an assumption of risks outside the scope of the original employment, nor contributory negligence in encountering those risks, can be predicated, unless it is shown that the work was undertaken voluntarily.

Actual compulsion will readily be inferred where the servant is a minor.

In *Kehler v. Schwenk* (1892) 151 Pa. 505, 25 Atl. 130, one of the elements of liability which was held to warrant a verdict for the plaintiff, a boy of fourteen, was that he was urged into the new service against his will.

An action is maintainable upon a complaint which alleges that a minor was not engaged in the service which he was hired to perform, but that he was "compelled" by the fellow servant to labor at a business much more perilous, and was injured while so engaged. The court said: "There was then no opportunity to adjust the compensation with a view to the risk. There was no consent to perform the service on any terms. It was a compulsory service; and under such circumstances neither justice nor policy requires that the master shall be acquitted of responsibility." *Chicago & G. E. R. Co. v. Harney* (1867) 28 Ind. 30, 92 Am. Dec. 282.

The rights of a child are not permitted to depend upon his ability to discriminate promptly as to the work required of him, or to refuse obedience to the command of his superior. *Hayes v. Colchester Mills* (1894) 69 Vt. 1, 37 Atl. 269.

See also *Patnode v. Warren Cotton Mills* (1892) 157 Mass. 283, 32 N. E. 161 (servant fourteen years of age, and of less than ordinary intelligence, injured while obeying peremptory orders, given with an oath, to assist in operating a machine at which he was not employed to work, the danger attending which was partially concealed from his view, held not negligent, as matter of law).

But, where he is an adult, compulsion is surmised only under exceptional circumstances. See, however, the extracts from the opinion in *Brazil Block Coal Co. v. Hoodlet* (1891) 120 Ind. 327, 27 N. E. 741 (work done under orders *volenti non fit*).

b. *Protest or objection by servant.*

The principle that the failure of the servant to protest against the maintenance of abnormally dangerous conditions due to the mas-

ter's negligence is a circumstance which points strongly, and even conclusively, to the inference that the servant was willing to assume the resulting risks, is equally applicable where the peril is extraordinary in the sense with which we are now concerned.

A brakeman engaged with the distinct agreement that he is not to couple cars except with a stick, and is under no circumstances to go between cars having an engine attached, cannot recover for injuries received in going between the cars by direction of the engineer, on the ground that the duty was outside the scope of his employment, where he makes no objection. *Richmond & D. R. Co. v. Finley* (1894) 25 U. S. App. 18, 12 C. C. A. 595, 63 Fed. Rep. 228. To the same effect, see *Cole v. Chicago & N. W. R. Co.* (1888) 71 Wis. 114, 37 N. W. 84.

The evidential import of a protest actually made depends, both upon the defense which has been raised, and upon the views of the court as to the economic's social principles discussed in note to *O'Maley v. South Boston Gaslight Co.* 47 L. R. A. 165, *Volenti non fit injuria*, as a defense to actions by injured servants. If the defense is an assumption of the risks, the general principle which is almost universally held in the United States, that the servant cannot countervail the effect of his appreciation of the risk by showing that he entered a protest before undertaking his duties, is considered to be equally applicable whether the work to be done is within or outside the scope of the original employment. Accordingly we find it laid down that a servant of full age and adequate experience cannot cast upon the master all the risk of accident in the performance of new duties by simply protesting against being called upon to perform those duties. Under such circumstances he has the choice of either leaving the employment, or to remain and assume all the risks incident to the work he knows that he is expected to do. *Wheeler v. Berry* (1893) 95 Mich. 250, 54 N. W. 876, distinguishing *Chicago & N. W. R. Co. v. Bayfield* (1877) 37 Mich. 205, as being a decision based on the youth, weakness, and inexperience of the servant. To the same effect, is *Leary v. Boston & A. R. Co.* (1885) 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115 (freight truckman, acting temporarily as fireman, was thrown off the foot board of a switching engine by a jolt caused by the passage of the engine over a frog). The court said: "While a person who engages for a particular service agrees to encounter only the dangers of that service, he may, perhaps, in the first instance, assume that the order given him by his superior is warranted by the legitimate scope of his employment. If, so assuming, he is induced to perform duties which, by his contract, he is not bound to perform, and is thus injured, he should be able to maintain an action for the injury against the employer. But, in the case at bar, the plaintiff knew that the duty of aiding as fireman on the engine was not within his original contract as a laborer. He determined to perform it as a part of his engagement with the defendant, rather than lose his position as a laborer. In so doing, he must be held to have assumed its necessary risks. . . . Morally to coerce a servant to an employment, the risks of which he does not wish to encounter, by threatening otherwise to deprive him of an employment he can readily and safely perform, may sometimes be harsh; but when one has assumed an employment, if an additional and more dangerous duty is added to his original labor, he may accept or refuse it. If he has an executory contract for the original service, he may refuse the additional and more dan-

gerous service, and, if for that reason he is discharged, he may avail himself of his remedy on his contract. If he has no such contract, and knowingly, although unwillingly, accepts the additional and more dangerous employment, he accepts its incidental risks; and while he may require of the employer to perform his duty, he cannot recover for an injury which occurs only from his own inexperience."

On the other hand, in *Jones v. Lake Shore & M. S. R. Co.* (1883) 49 Mich. 573, 14 N. W. 551, where a brakeman on a passenger train was ordered to do yard work, and after a protest complied with the order and was injured by a projecting load of lumber, it was held that it was competent to introduce evidence of the protest as indicating a want of consent.

In *Cole v. Chicago & N. W. R. Co.* (1888) 71 Wis. 114, 37 N. W. 84, the court referred to, but declined either to affirm or disaffirm, the rule in this case.

c. Fear of losing position.

In some of the cases just referred to it will be noticed that the effect of the servant's protest is considered with reference to the fact that dismissal must always be taken into account as a possible consequence of disobedience, and that the servant is presumed to be influenced by this consideration.

The fact that there was no threat of dismissal in case of refusal to undertake the new duties was emphasized in *Richmond & D. R. Co. v. Finley* (1894) 25 U. S. App. 16, 63 Fed. Rep. 228, 12 C. C. A. 595, as ground for inferring acceptance of the risks.

Obviously, however, an actual protest is not a necessary or invariable accompaniment of this element, and in some cases its bearing upon the question of the servant's willingness is treated from a more general standpoint, the same disagreement being exhibited by the decisions as in those where objections were made before the servant complied with the master's directions.

In *Gavigan v. Lake Shore & M. S. R. Co.* (1896) 110 Mich. 71, 87 N. W. 1097, the court rejected the contention that, by consenting to perform the service, the plaintiff did not assume the risk, inasmuch as he might be discharged if he refused to perform the service, or, in other words, that the master is to be considered an insurer of the servant performing extraordinary service by direction of a superior, whenever he chooses to obey a direction of one in charge for fear of discharge. See also *Reed v. Stockmeyer* (1896) 34 U. S. App. 727, 74 Fed. Rep. 186, 20 C. C. A. 381, where it was said that the master's having demanded services different from those for which the servant was engaged does not create any liability where the latter consents to do the work rather than be discharged, and *Dougherty v. West Superior Iron & S. Co.* (1894) 88 Wis. 343, 60 N. W. 274, where the same rule was quite broadly laid down.

On the other hand, the supreme court of Indiana has repudiated the theory that the servant is free to quit the service and thus avoid danger, and that, by voluntarily continuing in the service and obeying the command, he consents to take the additional risk. "While in theory the employee, whose master furnishes appliances which both know are defective, is at liberty to quit the service, and refuse to be subjected to the enhanced danger, we cannot close our eyes to the fact that the necessities of the struggle for existence tend strongly to deprive the employee of that theoretical independence and freedom of action. While the service cannot be compulsory in the sense that the employee can be compelled to work against his will, yet the very nature of the relation existing between the parties carries with it the irresistible inference of dependence upon the one side." *Brazil Block Coal Co. v. Hoodlet* (1891) 129 Ind. 327, p. 334, 27 N. W. 741. To the same effect, see *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151, p. 164, 3 N. E. 187. C. B. L.

WISCONSIN SUPREME COURT.

Virginia C. RUGGLES, *Respt.*,

v.

Virginia Cabell TYSON *et al.*, *Apts.*

(104 Wis. 500.)

1. The owners in being of real estate stand, not only for themselves, but for all that may come after them, for all the purposes of litigation affecting the jurisdiction of the court to deal with the whole title.
2. The interposition of a court of equity to preserve a trust estate from destruction by reason of some circumstances not foreseen and provided for by the creator of the trust cannot extend to any change of the trust scheme further than is necessary for the preservation of the property.
3. The best interest of infant owners of an estate in remainder, requiring an allowance to them of an immediate benefit therefrom for their maintenance and education, will not warrant a court of equity in making an allowance to them from the trust estate during the existence of a life tenancy,

NOTE.—For sale of life estate to pay taxes, see also *Defreese v. Lake* (Mich.) 32 L. R. A. 744, and *note*; and *St. Paul Trust Co. v. Mintzer* (Minn.) 32 L. R. A. 756.
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where the trust not only fails to give any interest to the remaindermen until after the life tenant's death, but also makes their interest contingent by providing that the life tenant may, by her will, in her discretion, distribute the estate among her surviving children and grandchildren, and, in default of her appointment, gives the estate to her surviving children and the descendants of deceased children by right of representation.

On rehearing.

4. The entire property of a trust estate may be laid hold of and administered by a court of equity so as to protect the interests in remainder of infants or persons unknown who are likely to be interested in it, against the danger of destruction by tax and other liens, when the matter is brought before the court in a proceeding instituted by the life tenant to obtain authority to sell a part of the property, although the primary object of the proceeding is to get an adjudication as to the power to authorize a sale which shall bar possible remaindermen, and all the counsel representing the different parties attempt to limit the investigation to a part of the property.
5. Judicial inquiry on a general appeal from a judgment in an equitable action to sell part of a trust estate, presenting the

question whether the judgment is proper on the undisputed facts, is not by any means circumscribed by the assignment of errors.

6. **Authority to execute a power by will** is exclusive of its execution in any other manner.
7. **A life tenant of a trust estate to whom is given a power of appointment by will** for the distribution of the remainder, at her discretion, among her surviving descendants, in default of which the remainder shall go to her living children and to the descendants of those who are dead by right of representation, though competent to sell her life interest so as to separate it from the power of appointment, has no authority to separate her estate from the estate in remainder, and should not be given that power by a court of equity without some overpowering necessity existing to demand it, because that course would substitute a mere expectancy for a certainty, contrary to the settlor's scheme.
8. **On the sale of part of a trust estate to discharge liens which exist by fault of the life tenant**, such portion of the proceeds as would go to the life tenant if the value of her life estate were estimated and paid to her may be paid over to her, not as a payment of the value of her interest, but as an investment, if secured by life insurance on her life in reputable level premium companies authorized to do business in the state, and if she adequately secures payment of the premiums, and also secures prompt payment of future taxes on the unsold property by mortgage to the trustee upon her life estate therein, making it a first lien on such estate.

(June 22, 1899.)

A PPEAL by defendants from a judgment of the Circuit Court for Milwaukee County granting authority to sell a portion of a trust estate for the benefit of the life tenant and remainderman. *Reversed.*

Statement by **Marshall, J.:**

Equitable action by the owner of a life estate in certain valuable real property in the city of Milwaukee against her minor children, the owners of the estate in remainder subject to some contingencies, to obtain judicial authority to sell a part of such property, including all estates therein, vested or contingent, upon the ground of a necessity so to do in order to prevent a threatened destruction of such estates by tax and other liens thereon. Proper proceedings were taken to give the court jurisdiction of the infant defendants and have them properly represented by a guardian *ad litem*. The facts set forth in the complaint are covered by the findings of fact, and the prayer for relief by the conclusions of law, filed by the trial court, which are in substance as follows: Plaintiff's father, November 19, 1874, conveyed the property described in the complaint to trustees by deed, upon the following trusts: For the sole use of the grantor during his life; after the death of the grantor, remainder to the sole use of his daughter, the plaintiff, with power to distribute the same by her last will, in her discretion, to her children living at her death and the

children of her deceased children, and remainder to such children in case of her failure to exercise the power, the trustees to convey in fee in accordance with such execution if it shall take place, otherwise to plaintiff's children living at her death and the children of any deceased child, the latter to form a class to take the share of their deceased parent by right of representation; in case of the death of plaintiff without leaving children or grandchildren, remainder to her mother for life, and remainder over, after death of the mother, in fee to the heirs at law of the grantor. The grantor died soon after the making of the trust deed. In 1883 plaintiff was married to Benjamin H. Tyson, with whom she lived till 1895, when she was legally separated from him. There were born to plaintiff, by said marriage, defendants Virginia C. Tyson and Juliet C. Tyson, both under the age of fourteen years at the date of the findings. After the divorce plaintiff was married to George H. Ruggles, with whom she now resides at Pittsburg, Pennsylvania, and by whom she has one child, the infant defendant Anna C. Ruggles. Plaintiff is the sole lineal descendant of her father, and there are no collateral heirs so far as known. Plaintiff's mother has duly quitclaimed her interest in the property to plaintiff. Plaintiff came into possession of the property in 1882, at which time it yielded revenue sufficient to pay the taxes and support her. In 1883, soon after plaintiff's marriage with Tyson, he was permitted to take absolute control of the property and that situation continued down to 1891, during which period, through plaintiff's inexperience, poor health, living so far from the property, and confidence in Tyson, she confided the entire management thereof to him. He was an extravagant, improvident person, and so managed the property as to encumber plaintiff's life estate with leases made in such a way as to secure to himself as much immediate cash as possible, without regard to the interests of the life tenant or the owners of the estate in remainder. Some of the leases were made to run as late as 1916, the entire rental being obtained by Tyson in advance and squandered. Since 1891 plaintiff has managed the property, during which time the taxes have so increased that she has been obliged to, and has, encumbered her life estate to obtain money to pay them and to maintain herself and children, with the result that the income from the property is now only about sufficient to pay the interest on such encumbrances. The proceeds of all such encumbrances have been used to pay taxes on the property and to support herself and her children; and there are yet unpaid taxes of about \$4,000 which plaintiff has no means to pay, she having exhausted her life estate in the manner indicated, and also exhausted every other resource within her reach. The value of the fee of the property is about \$150,000. The owners of the estate in remainder have no property out of which they can be maintained, or out of which the taxes on the property can be paid. There is

no way to save plaintiff's life estate, or the interests of those in remainder, vested and contingent, except by a sale of some part of the property, which cannot be made to advantage unless the entire title can be conveyed to the purchaser. Plaintiff has paid out upwards of \$5,000 in maintaining and caring for her children and she has no resources out of which to continue such care. Lots 4, 6, and 7, in block 127, and lot 15 of block 120, are the most available portions of the property for an immediate cash sale. Such lots have a salable value of about \$40,000; the remaining property is worth about \$110,000. The court has jurisdiction of the entire title to the property, and of all persons interested therein, or that may be interested, whether as owners of precedent or dependent, vested or contingent estates, for the purposes of this action. Plaintiff owns a life estate in the property and the defendants a vested estate in remainder, subject to be opened to admit future children of plaintiff, and subject to be divested by the execution of plaintiff's power to devise the property in fee to her children in her discretion, and subject further to be divested by the death of all plaintiff's children without living issue. It is not known whether there are persons to take the estate in case the contingency shall arise upon which it will go to the heirs at law of plaintiff's father, nor is it necessary that the facts in that regard should be known in order that the court may control the entire title. The court has power to direct a sale and conveyance of any part of the property that may be necessary for the benefit and protection of the estate, in such manner as may be deemed best, conveying to the purchaser the entire title. Plaintiff should have judgment for the sale of lots 4, 6, and 7 in block 127, in the second ward of the city of Milwaukee, and lot 15 in block 120 of such ward, for the purposes of this action. A person should be appointed trustee to make the sale under the direction of the court, and convey the property to the purchaser. The expenses, costs, charges, and disbursements, past and future, in any way connected with the action, should be paid out of the general fund. The value of the plaintiff's life estate should be computed according to standard annuity tables, out of which the trustee should see that all tax claims of every nature are paid. The value of plaintiff's life estate, less the disbursements for tax liens and \$5,000 for past care and maintenance of the two oldest minor children, should be paid to the plaintiff. The balance of the fund should be invested for the defendants according to their interests therein, Virginia C. and Juliet C. Tyson being each charged with \$2,500 paid to plaintiff. The sums so invested for the benefit of the defendants should be disbursed, principal and interest, as the court may from time to time direct. Judgment was entered accordingly with appropriate details for carrying out its provisions.

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Mr. Edward S. Bragg, with Mr. Rollin B. Mallory, for appellants:

The presence of the present estate in remainder, as party defendant in an action in equity, is a sufficient representation of the possible future estate which may vest upon the happening of the expiration of the present life estate in possession, leaving no heirs, or issue of heirs, surviving the plaintiff.

Calvert, Parties, 48 *et seq.*; Mitford, Ch. Pl. 200, *173; Cooper, Ch. Pl. *26; 1 Dan. Ch. Pr. *490, 265; *Giffard v. Hort*, 1 Sch. & Lef. 407; *Lloyd v. Johns*, 9 Ves. Jr. 63; *Cockburn v. Thompson*, 16 Ves. Jr. 325; *Reynoldson v. Perkins*, Amb. 564; *McArthur v. Scott*, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652; *Eagle F. Ins. Co. v. Cammet*, 2 Edw. Ch. 127; *Williamson v. Field*, 2 Sandf. Ch. 563; *Nordine v. Greenfield*, 7 Paige, 548, 34 Am. Dec. 363; *Mead v. Mitchell*, 17 N. Y. 213, 72 Am. Dec. 455; *Ulcems v. Clemens*, 37 N. Y. 70; *Brevooort v. Brevoort*, 70 N. Y. 140.

Messrs. Quarles, Spence, & Quarles, for respondent:

The question involved is governed by—

Bofil v. Fisher, 3 Rich. Eq. 2, 55 Am. Dec. 627; *Gavin v. Curtin*, 171 Ill. 640, 40 L. R. A. 776, 49 N. E. 523; *Hale v. Hale*, 146 Ill. 260, 20 L. R. A. 247, 33 N. E. 858; *Loring v. Hildreth*, 170 Mass. 328, 40 L. R. A. 127, 49 N. E. 652; *Kent v. Church of St. Michael*, 136 N. Y. 18, 18 L. R. A. 331, 32 N. E. 704; 2 Spence, Eq. Jur. 707; *Wills v. Slade*, 6 Ves. Jr. 498; *Gaskell v. Gaskell*, 6 Sim. 643; *Harrison v. Wallton*, 95 Va. 721, *sub nom. Harrison v. Turnbull*, 41 L. R. A. 703, 30 S. E. 372; *Giffard v. Hort*, 1 Sch. & Lef. 386; *Faulkner v. Davis*, 18 Gratt. 651, 98 Am. Dec. 698.

Marshall, J., delivered the opinion of the court:

There does not appear to be any serious, if any, controversy between the parties to this cause. While the attitude of counsel for appellants and respondent is in form adversary, all appear in fact to contend for a declaration by this court that the judgment appealed from is right and binding upon all persons interested in the property and that a sale of it made pursuant to such judgment will entitle the purchaser to an absolute title in fee simple thereto. No question seems to be raised by the learned counsel who appears as guardian *ad litem* for the infant defendants, but that the judgment rendered was proper, but he deems it important that a final adjudication by this court should be had as regards the binding force of the decree upon persons not before the court otherwise than as represented by those in whom the immediate estate in remainder is vested, in order that the property may be sold under such circumstances that the price obtained will not be affected by any suspicion as to whether the purchaser will take a full title thereto. In that counsel for respondent agree. Notwithstanding the harmony indicated, in view of the fact that the defendants are infants and the title vested in them, in whole or in part, may go over to persons not

now in being, the examination of the result in the court below must include the subject of whether the proper judgment was rendered on the facts found, both as to its binding force on all persons having vested or contingent interests in the property, and as to the disposition of the proceeds of the proposed sale.

As to whether the judgment acts on the whole title, it is considered that the owners in being of real estate, for all the purposes of litigation affecting the jurisdiction of the court to deal with the whole title, stand, not only for themselves, but for all that may come after them. The rule is universal, and, generally speaking, persons in being having only contingent interests are deemed to be represented by the owners of the precedent estate of inheritance, for the purposes of litigation. To that general rule there are some exceptions not necessary to be noted in this opinion, as they do not apply to this case. The owner of the life estate here, and the owners of the estate in remainder, all being parties, the judgment of the court and its execution will act upon the whole title to the property, binding all persons having vested or contingent interests therein, present or future. It is often said that such is the rule as a matter of convenience or necessity, but suffice it to say that it is a rule of law as inflexibly binding upon property in lands as any principle that has received judicial sanction so long as not to be open to question. *Calvert, Parties to Suits in Equity*, 48; *Mitford, Ch. Pl.* 173; 2 *Spencer, Eq. Jur.* 707; 1 *Smith, Ch. Pr.* 92; *Story, Eq. Pl. Redf. ed.* 144; *Barbour, Parties to Actions*, 488; *Nodine v. Greenfield*, 7 Paige, 544, 34 Am. Dec. 363; *Mead v. Mitchell*, 17 N. Y. 210, 72 Am. Dec. 455; *McArthur v. Scott*, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652; 11 Am. & Eng. Enc. Law, p. 728; *Hale v. Hale*, 146 Ill. 227, 20 L. R. A. 247, 33 N. E. 858; *Gavin v. Curtin*, 171 Ill. 640, 40 L. R. A. 776, 49 N. E. 523; *Kent v. Church of St. Michael*, 136 N. Y. 10, 18 L. R. A. 331, 32 N. E. 704; *Kirk v. Kirk*, 137 N. Y. 510, 33 N. E. 552.

As to whether the judgment improperly disturbs the suspension of the power of alienation as to the property in question, the creator of the life estate for plaintiff, and the estate in remainder for her children, had an undoubted right to place the title to his property beyond the power of any person acting for the owners of the estate in remainder, to prevent its going to them *in specie*, and his wishes in that regard must be carried out so far as possible. It is not doubted but that the powers of a court of equity are ample to prevent the destruction of the estate in remainder under the circumstances of this case. Rather than that the scheme of the creator of such estate shall entirely fail by reason of some circumstance not foreseen by him and provided for, the court may intervene, but only for the purpose of, and so far as necessary to, preserve the property. If it cannot be preserved in the form intended, it may be preserved in its equivalent. It is not 48 L. R. A.

the interests of those in remainder, as such interests may appear to the court, that are to be considered and conserved, but their interests as the creator of the estate in remainder provided for them. So the fact, if it be a fact, that it would be for the best interests of the infant owners of the estate in remainder to allow them an immediate benefit therefrom to maintain and educate them, does not warrant a disturbance of the scheme intended to postpone such benefit to a later time. It is the necessity that something shall be done to guard against the danger that the title in remainder may be prevented from reaching defendants in possession at all, which calls into activity the equity power of the court.

In *Bofill v. Fisher*, 3 Rich. Eq. 1. 55 Am. Dec. 827, upon which much reliance is placed by respondent's counsel, whether the court possessed equity powers to act under such circumstances as we have in this case, was considered and decided in the affirmative. True, it appears by the statement of the case and some things said in the opinion, that in adjudging the sale in the court below and affirming the judgment on appeal the interests of the life tenant and of the owners of the estate in remainder, as regards immediate enjoyment of the subject of the suit, was considered; but the sole question presented and decided on appeal was whether the court possessed power to bar, by its decree, the unborn and absent contingent remaindermen. No question as to the proper distribution of the fund arising from the sale was considered or decided.

In *Hale v. Hale*, 146 Ill. 227, 20 L. R. A. 247, 33 N. E. 858, the court decided, in effect, that for the purpose of preserving the estate for those ultimately entitled thereto, the court could authorize the conversion of property of one kind into that of another, and the holding of the latter as the equivalent of the former. In *Gavin v. Curtin*, 171 Ill. 640, 40 L. R. A. 776, 49 N. E. 523, also cited by respondent, a case quite similar to the one before us, the court directed a sale of the property for the purpose of preserving the estate of the life tenant and that of the remaindermen as well, from being divested by tax liens and a mortgage to which both estates were subject, it appearing that the income from the property was not sufficient to keep down the interest and taxes, and that the improvements were likely to go to waste for want of necessary repairs. The power of equity to furnish an adequate remedy to meet the necessities of the situation was held to be beyond reasonable controversy, but that the remedy in such case should be adapted to the preservation of the property and be limited to that. In such an emergency the court is required to stand in the place of the creator of the estates, and do what he would have authorized had he anticipated the exigencies rendering some change in his scheme necessary in order to prevent the loss of the subject of it.

Probably no case can be found that goes farther than those referred to. The rule

they recognize, being one of necessity, its scope is obviously limited by the purpose which calls for its application, that of preserving the subject and title of the estate. For that purpose the scheme of the creator of the estates may be invaded and varied by changing property which in one form is liable to be lost, into another form not subject to that danger, the property in its new form to be devoted to the same use and to go in the same line, upon the same contingencies, as that for which it was taken in exchange,—not to be distributed and consumed. No necessity of preservation calls for such a remedy as consumption of the property and entire annihilation of the grantor's scheme.

It follows that the judgment appealed from, so far as it goes beyond providing for the sale of a part of the property to create a fund out of which to guard against those dangers that now menace the title in remainder, and to make such investments of the residue of the fund and such disposition of the property unsold, as will prevent a recurrence of such dangers, and as far as practicable remedy the impairment of the estate caused by the improvident management by the life tenant, it must be modified. There is no justification for distributing the proceeds of a sale as was attempted by the judgment appealed from. By such judgment the interest of the life tenant is to be computed and paid to her, whereas the scheme of her father entitles her to the income of the whole property for life, subject to those duties in respect to keeping up repairs and keeping down taxes as devolve upon a life tenant by law. The judgment authorizes the division of the remainder of the fund, after deducting the expenses of the litigation, and the value of plaintiff's life estate into three parts, and the immediate payment of \$5,000 out of two of the shares to discharge a supposed equitable claim of the plaintiff for the past support of the oldest children. It was not intended that either of the defendants should have any part of the *corpus* of the property till it should reach them under the will of their mother or by reason of her death without devising the property. What part of the property either of the defendants will finally have is uncertain. Each has a vested interest, but it is subject to be devested by the will of the mother or be diminished by the future birth of children. To compute the value of the estate in remainder, as represented by the proceeds of the sale of the property, and make a present division of it, would be erroneous in the extreme.

Just what, from an equitable and business standpoint, looking only to the purpose to be conserved, should be done under the circumstances of this case, is by no means clear; but it is plain that nothing should be done for the purpose of a present distribution and enjoyment of the property, since it was designed to be kept in *solido* till the time for distribution fixed by plaintiff's father. The fact that she has imprudently so handled the property as to prejudice her interests and those of the defendants as well cannot

change her father's scheme in law or in equity so as to give anything more to her than he designed she should have, or give her that in a different way than he designed she should receive it, to the prejudice of the estate in remainder. She was entitled to the income of the property during her life, and was bound, out of such income, to preserve the property from loss by taxes or want of repairs. Having put it out of her power to perform such duty, and demonstrated most clearly that the interests of those to come after her should be guarded by a stronger hand, the necessity of fortifying against the recurrence of the present difficulty is quite as important as overcoming such difficulty. Before the commencement of this action plaintiff encumbered her life estate to such an extent that the interest on the mortgage indebtedness absorbed the entire income from the property, leaving nothing with which to pay the taxes. If she used the income to keep down taxes she was liable to lose her life estate by the enforcement of the mortgages; if she used the income to keep down interest on the mortgages, and let the taxes go, she was liable to sacrifice the whole estate. In meeting that situation it is deemed best that the mortgages on the life estate should be controlled by investing so much of the fund as may arise from any sale that may be made as shall be necessary to buy them in for the benefit of all persons interested in the estate, the amount so used to be returned to the fund as fast as can be from future income from the property, the end to be attained being to preserve the property in *solido* till the termination of the life estate. The entire fund created by the sale of any part of the property, so far as practicable, should be preserved in lieu of such part. The necessary use of some of the fund to pay such expenses of the litigation as plaintiff ought to pay, or to pay the taxes, should be returned to the fund as fast as practicable out of the income, keeping in view that such fund should be held to the same use and subject to the same final distribution as the benefactor intended. It is considered that the end which the decree should aim to secure can be most certainly accomplished by vesting the title in fee, and the control of all the property, that to be sold and that not to be sold as well, in a suitable trustee, to be hereafter administered under the direction of the court; that the trustee should be required to give a suitable bond to secure the faithful performance of his duties, as indicated in the judgment appealed from; that the property directed to be sold by such judgment, should be sold as therein indicated; that out of the proceeds of the sale there should be paid appellants' costs, disbursements, and expenses in this litigation, such part as are taxable costs against respondent to be charged to her by the trustee to be subsequently repaid as hereafter indicated; that there should also be paid and charged to plaintiff, to be returned as hereafter indicated, all outstanding tax claims against the property; that

any lien or lienable claim on the estate in remainder should be paid from the fund, permanently reducing it to that amount; that the balance of the fund should be invested, first, by buying in for the benefit of the fund the mortgage encumbrances placed on respondent's life estate before this action was commenced, with the indebtedness secured thereby; and that the residue of the fund should be invested in good interest-bearing securities subject to the approval of the court. The trustee should disburse the income from the invested fund, and the rents from the remaining realty, first, by paying current expenses of administering the trust, and taxes and insurance; second, by adding to the invested fund the amount of the charges against plaintiff for taxes and other matters paid for her account; third, by freeing the invested fund of the indebtedness of plaintiff, secured by the mortgages on her life estate; fourth, by paying the balance to respondent. The result will be that after the invested fund shall have been increased to the amount paid for plaintiff's account, and be freed from her indebtedness secured on her life estate, the entire income from the invested fund, and the remaining real estate as well, less sufficient to keep up repairs and taxes and pay for administering the trust, will go to the respondent. She will have the benefit of the entire income from all the property, as was originally designed, but such income will be devoted to the discharge of her obligations to the property till they shall be extinguished.

The judgment of the Circuit Court is reversed, and the cause remanded with directions to render judgment in accordance with this opinion.

A rehearing having been granted, **Marshall, J.**, on November 7, 1899, delivered the following additional opinion:

A rehearing was granted in this case on one question, namely, What is the most practicable and just method, from a business standpoint, conformable to the law as settled in the decision rendered, of saving the estate from loss without unnecessarily varying the plan of the grantor under which all parties claim? It needs but little attention to the language of the question to discern that the result of the motions for a rehearing was to leave the legal principles, upon which the decision of the court was grounded, irrevocably closed. Nevertheless counsel for appellants assumed the privilege of going into the whole case in the reargument, and were permitted to do so; and while what we may say now outside of the question for consideration cannot affect the result, because of the importance of the subject, reference will be made to some of the learned counsel's contentions.

It is said that the only property involved in the action was four lots, not the whole property constituting the estate; that the primary object of the action was to obtain an adjudication respecting the power of the

court to authorize a sale of real estate circumstanced like that in question, so as to bar possible remaindermen; that the remainder, after the expiration of the life estate, is vested in the appellants; that if they were of age they could sell such remainder without the aid of the court, and that the life tenant can do the same; hence the court went beyond the scope of the action in laying hold of the entire property and administering it.

In the first place the court is by no means bound by the object or objects in view in instituting an action, except so far as such objects are legitimate from a legal standpoint. If there be one object which is legitimate, and it be sought for the purpose of carrying out others not legitimate, however praiseworthy be the motives from a philanthropic or moral standpoint, especially if such other objects affect the interests of infants or persons unknown who are liable, on the happening of a possible contingency, to be interested, it is not only proper, but it is the duty of the court, to so guard its decree upon the primary question, that the effect of it will be in all respects legitimate. It is not within the power of counsel for one party, or both acting together, to tie the hands of the court in the exercise of its equity powers to effect justice as to any question coming within the scope of any subject presented for consideration and decision.

In the second place, the subject of the action, not any particular object counsel may have had in view, fixed the limits of the field which the court had to investigate. What was that subject? The sale of any particular lots or lots? Certainly not. Obtaining money to satisfy the personal necessities of the respondent and her children? Certainly not. The power of the court to sell real estate of minors and use the proceeds for their maintenance? Not that. Yet the several questions mentioned have been repeatedly pressed upon our attention, both to support the judgment appealed from and obtain a change of the directions of the court as to the proper decree. The subject of the action was the necessity of a change in the form of property the title and use of which was vested for life in one person who appeared as plaintiff, and the residue of the title was vested in other persons, made defendants as representing such residue for all parties who might on any contingency be entitled thereto upon the termination of the particular estate. Concurrent action of the parties in whom the title was vested, without the aid of the court, could not pass a full marketable title to the property; and that seemed to be necessary in order that a part of it at least might be sold for a full value and sufficient of the proceeds used to pay off liens which jeopardized the interests of all parties. The complaint spread before the court the condition of the estate, confessing, but excusing, so far as intentional wrongdoing was concerned, guilt of waste by the life tenant, setting forth the dangers which her management had created and which threatened to take the estate away from all interested un-

der the common benefactor, and her inability, unaided by the court to successfully cope with the situation. The court was asked to exercise its extraordinary powers by taking hold of the entire property and applying an effective remedy. Specific methods of relief were suggested and prayed for, going more to the use of the property so as to remedy the necessities of the unfortunate plaintiff and her children than that of saving the estate from destruction. The court was by no means bound to grant relief by adopting such methods, or dismiss the action, even in the absence of a general prayer for relief. The preservation of the entire property was the subject to be dealt with, so the life tenant, in her bill, prayed, among other things, that the court might do what in its judgment might seem meet and agreeable to equity. That expressly placed the entire title to the property under the control of the court, as it was anyway, from the very nature of the action and of the facts. While the principle, that the court has power, by an action *in rem*, to preserve property under such circumstances, disregarding the mere form of it when that appears to be necessary, was invoked, that special jurisdiction seems to have been entirely lost sight of in the effort to convert the property into money and use the proceeds to alleviate, in part, the pressing necessities of the parties to the action.

In the third place, it is not true that if the appellants were of age they could sell the estate without the aid of the court. They could sell their interests in the estate, that is all. Such interests may never ripen into an absolute title or property the appellants will be entitled to enjoy. That does not seem to have been appreciated, hence the pressing necessities of the respondent, in fact of all the parties to the action, have been urged as a justification for disturbing the scheme of the settlor of the estates by taking property for the benefit of the appellants, and of the respondent as well, which does not now, and may never, belong to either of them. Who can now point to the person who will ultimately be entitled to the estate in remainder? What can justify such judicial proceedings as that of taking and using part of it for the benefit of a mere trustee of the title, who, by the happening of any one of several possible contingencies, may be divested of such title and it be vested in another with absolute power of enjoyment and disposal? This court has no such power. It may bar remaindermen as to the particular thing, but cannot extinguish their rights in the equivalent of the property. This is not an action for the adjudication of the rights of either party, represented before the court, in the title to the property, but an action to authorize the preservation of it in the form of an equivalent of property of some other form.

If it were true that if the plaintiffs were of age they, joining with the life tenant, could dispose of the entire property absolutely, the simple question before the court

would be whether it is for the best interests of the appellants that their property should be sold and a part of it used for their benefit during their minority. To support the power of a court of equity to do that, no reference to judicial authorities reaching back a century would be necessary, inasmuch as it is amply provided for by statute.

It is said the only relief prayed for not covered by statute is the right to apply the proceeds of the estate in remainder to relieve the necessities of the minors, and to reimburse the respondent for money paid out for their use over and above her income from the life estate; that in the action she tendered a surrender of her power of appointment under the settlor's deed, and that by such means the several estates can be united and sold and the proceeds appropriated, as held by authorities, ancient and modern. On the first part of the proposition, as we have seen, the scope of the prayer for specific relief in the complaint by no means limits the jurisdiction of the court. On the facts found and the pleadings, the trial court pronounced judgment. A general appeal from that judgment presented to this court the question of whether it was proper on the undisputed facts. Judicial inquiry was not, by any means, circumscribed by the assignment of errors. It was and is limited only by duty to examine and correct the judgment in every respect where legal principles were violated to the prejudice of the appellants or those whom they represent, so far as such violations clearly appear from the record. Appellants are minors standing as the mere representatives of a title liable to pass out of them to others in spite of anything they or the life tenant or the court can possibly do. On the second part of the proposition under discussion, it must be said that we are not acquainted with any authority, ancient or modern, to support it. Those cited to our attention do not apply, and it is firmly established, both at common law and by statute, that a special power, to be executed by will, cannot be executed in any other way, or be released or extinguished so as to cut off a taker not participating in the extinguishment and who is entitled to take in case the power be not executed in the manner provided by the donor of the power. The power may be extinguished by a conveyance by the donee and life tenant to the holders of the estate in remainder in respect to whom such donee has the power of appointment so as to give a preference of one over another; or it may be extinguished by the holder of the life estate, joining with the holders of the estate in remainder in a conveyance to a third person; but the effect of such a circumstance is by no means so far-reaching as to give the vendee under the joint deed a greater title than that possessed by the vendors. If such title be defeasible, the title of the vendee will be subject to the same infirmity. If the title be liable, upon the happening of a contingency, to go over to other persons, their interests will not be affected by the convey-

ance. The latter circumstance, which controls the situation dealt with in this case, is what makes the proposition urged upon us unsound and the authorities cited to support it not applicable. We may conclusively point what is here said by a brief reference to such authorities.

In *Re Bostwick*, 4 Johns. Ch. 100, the proposition decided was that when the income of a sum of money is devised to a mother, and the principal sum after her death to her children, the property may, by permission of the court, be broken in upon and used in part for the present education and maintenance of the children, and to pay debts previously contracted by the mother for their past maintenance, where there is an actual necessity therefor that cannot otherwise be satisfied. It will be noted that the title to the principal sum in remainder, in that case, was in the children absolutely. To support the decision, *Harvey v. Harvey*, 2 P. Wms. 21, was cited, where it was said the master of the rolls declared that where a legacy was given to an infant payable at twenty-one, without any devise over, the doctrine indicated was proper.

In *Re Burke*, 4 Sandf. Ch. 618, the facts were that two infant children, living with their father, had an annual income consisting of the use of \$60,000, the principal being vested in them contingent upon their reaching the age of twenty-one, otherwise in the survivor of them, and if neither reached such age, then over to the brothers of the mother and their issue. The question was how much the father, who possessed but a moderate income, ought to have out of the income belonging to the children towards their support and education. No suggestion is found in the opinion of the court of a right to break in upon the principal sum, which was conditionally vested in the daughters. In *Wooten v. House* (Tenn. Ch. App.) 36 S. W. 932; *McKnight v. Walsh*, 23 N. J. Eq. 136; *Wilkes v. Rogers*, 6 Johns. 566; and *Billingsly v. Critchet*, 1 Bro. Ch. 268, the infant child or children had a fortune absolute. There was no devise over, or right of survivorship. It was held that the necessities of the children might be supplied out of the property.

It will readily be seen from the foregoing brief analysis of authorities that they do not touch the question under discussion here. The distinction between such question and the one we have decided here is clearly pointed out in numerous English cases, holding that if there is an estate with a devise over which may take effect on a contingency, such estate cannot be used for the benefit of the precedent holder without the consent of the contingent devisee or vendee. *Greenwell v. Greenwell*, 5 Ves. Jr. 194; *Fairman v. Green*, 10 Ves. Jr. 44; *Lomax v. Lomax*, 11 Ves. Jr. 48; *Errington v. Chapman*, 12 Ves. Jr. 20; *Errat v. Barlow*, 14 Ves. Jr. 202. In *Greenwell v. Greenwell*, the object was the same as that sought here. The title was in a grandchild to be preserved and, with the accumulations, paid to him on his arriv-

ing at the age of twenty-one, and with like limitations over to his sisters in case of his death under that age. The father was dead and the children sorely in need of assistance because of the character and circumstances of the mother. The lord chancellor remarked; "I fear if I should make a decree it would be my will, and not that of the testator's." In view of the pressing necessities of the case it was decided to make the order prayed for conditional, upon consent being given by all persons who would be contingently entitled to the property.

In *Fairman v. Green*, the master of the rolls said on the same subject: "The court has not done this except where all the parties who were to have maintenance were equally interested, . . . but if there is a legatee over the court has always taken the consent of such legatee."

Again, in *Lomax v. Lomax*, the lord chancellor said: "If all die under twenty-one and a child not yet in existence should come into existence and attain that age, that child clearly would take the whole, . . . therefore I may give it to those children [if I grant the prayer] who may never become entitled to it." And in the same line, in *Errat v. Barlow*, the conclusion was stated, in effect, thus: "If the chance of surviving is equal among all the members of the class, and there is no other interested that upon any contingency can take that will be prejudiced, maintenance, when necessary, may be allowed, but it is impossible to give it where, in any event, the property may belong, ultimately, to other persons."

The foregoing is the settled law as far back as we find adjudicated cases on the subject. They are in accordance with reason and common sense. Any other doctrine would sanction confiscation and render it impossible to settle an estate upon any plan that would, in any reasonable probability, be carried out according to the scheme of the settlor. A failure to keep in mind the distinction between taking the property of an infant and expending it for his benefit, and taking property to which such infant has a mere naked legal title, which may go over in possession and enjoyment to some other person, is what has led to most of the difficulties in this case. It must not be forgotten, at any step in this litigation, or in administering the final decree that shall be rendered, that plaintiff has but a life estate, coupled with a power of appointment by will to say how the estate in remainder shall be divided between her surviving children in whom the immediate estate in remainder is vested, in case she leaves surviving children, such children to take equally if the donee of the power fails to execute it, and the estate to go over to others specified by the settlor in case of there being none of the immediate remaindermen to take. While that is a special discretionary power which, by the rules of the common law may be separated from the life estate, the settlor having failed to provide clearly to the contrary, or extinguished as to any person interested by a conveyance by such person or

by a joint conveyance by such person and the life tenant to another (2 Lewin, Trusts, p. 725; Ping. Real Prop. § 1124; 2 Washb. Real Prop. pp. 388, 389), it cannot be extinguished so as to cut off persons not participating, or executed at any other time or in any other manner than that indicated by the settlor. When authority to execute a power by will is given, it is exclusive, by the rules of the common law, as well as by statute. Ping. Real Prop. § 1164; 2 Lewin, Trusts, 1888, p. 616; 2 Perry, Trusts, 317; Rev. Stat. § 2146.

Finally, we are referred to *Ex parte Yaney*, 124 N. C. 151, 32 S. E. 491, as conclusive—so far as the decision of the highest court of one state can be considered conclusive on a question in the courts of another state—on the point that the life tenant and the holders of the title in remainder may, joining, convey the title, notwithstanding the future birth of a child may add to the class entitled to take under the deed or will after the expiration of the life estate. A moment's examination of the case shows that the court only held that where all the remaindermen in being are before the court, a sale of a full title may be authorized though there may be possibilities as to others being ultimately entitled to participate in the avails of the property as members of the class, the property, however, to be preserved in its new form for the benefit of those ultimately entitled thereto. That is what was decided in this case. The North Carolina court, however, held that where there is a right of survivorship, as here, between members of a class, the court cannot authorize a sale at all, because the ultimate takers in that event cannot be known. That doctrine, applied here, would defeat the whole object of this litigation; but that it is wrong in part seems clear, and is demonstrated by several well-considered cases cited in our former opinion. There is no good reason for saying that the court may authorize the sale of lands where the title in remainder is vested in a class which is subject to open and let in new members, but cannot if the scheme laid in the will or deed be such that members of the class may drop out and their interests go to the surviving members thereof. The theory, as before indicated, upon which the court takes jurisdiction, is that the proceeding is *in rem*, and that those having the vested interests stand for those having contingent interests. In that view, whether there be a contingency which will increase the class or one which will decrease it, or extinguish it altogether, should make no difference, since it is the *res* that is being dealt with and is to be preserved unimpaired in value for the ultimate taker or takers. However, it is the settled doctrine in North Carolina that a court of equity has no power to authorize a sale of property held by a title which may be divested by the happening of some contingency, and the title thereby be vested in another not in being or that cannot be known. *Justice v. Guion*, 76 N. C. 442; *Watson v. Watson*, 56 N. C. (3 Jones, Eq.)

400; *Williams v. Hassell*, 74 N. C. 434. It will be noticed, in examining these cases, that the only power of the court suggested was to convert property from one form into another for the purpose of preserving it or to increase its value, not distributing it so as to prejudice the possible remaindermen; and even that was denied where the property was held by members of a class with the right of survivorship in case of a member dropping out by death.

The foregoing review of authorities cited by counsel to support the contention for a decree allowing a partial distribution and consumption of the property in question, and citation of authorities to the contrary, with what was said in the former opinion, we apprehend, show clearly the soundness of the conclusion which was reached.

When the danger of loss to the estate shall have been securely fortified against, there is no reason why the equivalent of any of the property that shall have been sold, and the unsold lands, should not be used so as to provide for the respondent and her children so far as such provision may be consistent with a certain preservation of the property for the ultimate takers upon the expiration of the particular estate. Whatever the necessities of the parties may be, the court cannot break in upon the estate in remainder to relieve them, and cannot sever the life estate from the residue of the title unless it appears that there is no other practical way to administer the property under the circumstances. The fact that where by a deed or will the life tenant and the remaindermen are left free to convey the entire title, in case of a sale made by order of the court the value of the life interest may be computed upon the basis of the expectancy of life of the life tenant and paid over to such tenant, is not very persuasive in a case like this where the interests of the parties are not separable without a clear violation of the expressed will of the common benefactor. While the life tenant, in the instant case, is competent to sell her interest so as to separate it from the power of appointment, she has no authority to separate her estate from the estate in remainder, and she should not be given that power by the court without some overpowering necessity existing to demand it, because that course would substitute a mere expectancy for a certainty, contrary to one of the most important features of the settlor's scheme. The firm adherence of the court to the legal principles indicated is by no means inconsistent with anxious solicitude to relieve the misfortunes of the parties to this action so far as power exists in the court to do so, and that solicitude has been entertained here from the first. The situation mentioned, however, cannot obscure the fact that the respondent is responsible, before the law, for the dangers which necessitate the change in the property in question which has been directed by the court. The decision of the cause, with directions made to remedy the dangers which exist and guard against a recurrence of similar dangers in the future,

was intended to be for the best interests of all concerned so far as such interests could be legally conserved.

The directions made as to the decree to be rendered in the court below were not intended to, and did not, differ from the judgment appealed from so far as relates to the mere machinery of selling and conveying the property. That whole subject, as well as the handling of the proceeds of the sale, within the limits of the plan outlined by the decision, was left expressly and plainly to be administered by the trial court. There is nothing in such decision preventing a new loan upon the life estate by permission of the trial court under the directions of the trustee for the purpose of taking up encumbrances bearing a high rate of interest, bought in for the benefit of the estate, or preventing a reduction in the rate of interest on such encumbrances if found to be too high, or changing any mere matter of administration so far as the same relates to the making of a proper deed to carry out the sale, if one shall be made. So, in respect to the matters referred to, no modification in the decision heretofore made by this court is needed to meet the objections raised on the reargument.

On the subject of what change can properly and safely be made in the manner of handling that portion of the estate which will be represented by the proceeds of the four lots, in case of their sale, and the care of the residue of the estate, from the directions contained in the former decision, has received the most careful consideration, resulting in a conclusion that the life estate ought not to be separated from the estate in remainder, but that, if respondent desires to substitute insurance upon her life in reputable level premium insurance companies, payable to the trustee for the remaindermen at her death, in place of her liabilities to the estate, that will accumulate in the hands of the trustee by a carrying out of the directions in such decision, she may properly be allowed to do so to an amount equal to that which would go to her upon a separation of her life interest in the proceeds of the sale of the four lots, if she adequately secures the payment of the premiums upon the policies of insurance, as such premiums fall due, and also secures the remaindermen by a mortgage on her life estate in the unsold property to their trustee, the prompt payment of future taxes on the property, and that, in the event of her taking advantage of this privilege, the unsold property should be released from the trust created by the decree. It has been concluded to make an addition to the directions contained in the decision heretofore made, in accordance with these views, thereby practically adopting a suggestion made by appellant's counsel on the argument. That

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will result, if respondent so elects, in giving the trustee for the remaindermen, insurance for such money as may be paid out of the proceeds of the property sold, for her account, a return of the unsold property to the control of the respondent, as life tenant, and in securing to her a net income of about \$1,500 per year as the property is now circumstanced, which will doubtless be largely increased as improvident leases shall expire. No other modification of the decision of record seems advisable.

The directions for the entry of a decree in the trial court are changed, by adding thereto that such decree shall further provide, in substance, as follows: The respondent may, at her election, reimburse the estate for the money paid out for her account by life insurance on her life placed in reputable level premium insurance companies authorized to do business in this state, to the extent of such portion of the proceeds of the property sold as would go to her if the value of her life estate were estimated and paid to her; the sum so used, however, to be considered an investment of property of the estate in which respondent has a life estate, secured by the life insurance, and not a payment to the life tenant out of it, of the value of such interest. The policies of insurance shall not be accepted, however, by the trustee, unless approved by the court upon the recommendation of the trustee, and the punctual payment by the plaintiff of the premiums that shall fall due upon the policies, and the future taxes upon the unsold and all the property of the estate be secured by the life tenant by a mortgage to the trustee upon her life estate in such property, so laid that it will be a first lien on such estate. Upon the insurance being given and accepted, under the conditions named, the unsold real estate shall be released from the trust created by the decree and the life tenant restored to the control thereof as such tenant, subject to the obligations incident to that relation to the property. Upon the insurance premiums and the taxes on all the property of the estate for any year, being paid by the life tenant, the trustee shall pay to her the income of the trust fund for such year, less the expenses of administering the trust, but if she shall fail to make any of such payments, the trustee shall discharge the unpaid obligations out of any portion of the trust fund that would otherwise go to the life tenant, paying the residue, if any there be, to her; and if there be a deficiency, he shall enforce the mortgage security upon the life estate in accordance with the terms thereof, to recover the amount of such deficiency. No costs shall be allowed, on the rehearing, to either party, except clerk's fees, which shall be paid by the respondent.

STATE of Wisconsin *ex rel.* David S. ROSE
et al.
v.
 SUPERIOR COURT OF MILWAUKEE
 COUNTY *et al.*

(.....Wis.....)

1. An injunction against the passage of an ordinance within the general power of the municipality, creating a contract between a city and a street-railway company, is void for want of jurisdiction, whether the ordinance is authorized by law or not, since the passage of such an ordinance is a legislative act which the court has no power to supervise.
2. Failure to submit to a committee an amendment to an ordinance as originally proposed does not constitute any ground on which a court of equity can grant an injunction against passing the ordinance.

(February 27, 1900.)

APPPLICATION for a writ of prohibition to prevent the Superior Court of Milwaukee County from proceeding with a contempt proceeding to punish defendants for passing and enforcing an ordinance granting a street-railway franchise. *Granted.*

Statement by Cassoday, Ch. J.:

It appears from the record: That January 18, 1900, there were filed in this court three verified petitions,—one by David S. Rose, mayor of the city of Milwaukee; another by Edward M. Schuengel, clerk of the city of Milwaukee; and another by Cornelius Corcoran and twenty-two others, therein named, being twenty-three in number, and a majority of the forty-two aldermen of that city. That each of such petitions prayed that a writ of prohibition issue from this court to the superior court of Milwaukee county, and to the Honorable John C. Ludwig, judge thereof, restraining him and it from proceeding in such contempt proceedings therein mentioned, and from passing any sentence therein against the petitioners, respectively, and from imposing any fine upon them, and from restraining them, respectively, of their liberty, and from in any way punishing any of them for the cause therein stated. That on the same day such writ was issued from this court, as so prayed, until February 2, 1900, and until the further order of this court, and that on the day last named that court and the judge thereof show cause before this court why they should not be absolutely restrained and prohibited from any further proceedings in such contempt proceeding and matter. That January 27, 1900, Hon. John C. Ludwig, as such judge of the superior court of Milwaukee county, made and filed in this court due re-

turn under the seal of that court to such writ to the effect that such writ had been and was being obeyed. That December 21, 1899, one H. A. Schwartzburg began an action in that court against the mayor, clerk, and the forty-two members of the common council of the city of Milwaukee, and of other persons and corporations named in the summons and complaint therein mentioned, and a true copy of which is therewith returned, and procured therein an injuncti-
 onal order, a true copy of which is thereunto annexed and therewith returned, upon the verified complaint and the undertaking, a true copy of which is annexed and therewith returned, and which summons, complaint, undertaking, and injuncti-
 onal order were duly served on all of such defendants therein. That after such service certain of such defendants violated and set at naught such injuncti-
 onal order, as shown by their admissions and answer. That thereafter, upon motion by such defendants to vacate such injuncti-
 onal order before that court, and upon the hearing of that motion, the disregard and violation of such injuncti-
 onal order was brought to the notice of that court, whereupon that court made and caused to be served the order to show cause, a true copy of which is thereunto annexed and therewith returned. That the same was duly served on all of such defendants accused of viola-
 tion of such injuncti-
 onal order, except Caufy; and that such accused persons appeared in answer to the order to show cause, whereupon specific charges were filed against each, true copies of which charges are thereunto annexed and therewith returned. That thereupon such defendants, being personally present and by their counsel, offered, in answer to the charges, their return to the order to show cause, and asked to have the same stand as an answer or demurrer to such charges; and the court, having heard arguments thereon at great length, and at the conclusion of such arguments, made and filed the decision in writing, a true copy of which is thereunto annexed and therewith returned; and that such proceedings in that court went no further than the decision and determination as set forth in such written opinion up to the time the writ herein was served upon him, and he thereby certified to this court, in obedience to such writ, and with such writ, the annexed, which are true, correct, and complete copies of all the proceedings aforesaid, and all the papers in such contempt proceedings, and that copies are returned instead of the original for the reason that the defendants so charged, by their attorneys, insisted on proceeding with the motion to vacate such injunction while the matters relating to such contempt were in progress in this court under the writ afore-

NOTE.—For injunction against passage of municipal ordinance, see *Montgomery Gaslight Co. v. Montgomery* (Ala.) 4 L. R. A. 816; and *Roberts v. Louisville* (Ky.) 13 L. R. A. 844, and note.

For injunction to prevent enforcement of ordinance or statute, see *South Covington & C. Street R. Co. v. Berry* (Ky.) 15 L. R. A. 604; 48 L. R. A.

Rushville v. Rushville Natural Gas Co. (Ind.) 15 L. R. A. 321; *Georgia Pkg. Co. v. Macon* (C. C. S. D. Ga.) 22 L. R. A. 775; *Augusta v. Burum* (Ga.) 26 L. R. A. 840; *Deems v. Baltimore* (Md.) 26 L. R. A. 541; *Farmer v. St. Paul* (Minn.) 33 L. R. A. 199; *Plumb v. Christie* (Ga.) 42 L. R. A. 181; and *Cicero Lumber Co. v. Cicero* (Ill.) 42 L. R. A. 696.

said. That upon the hearing in this court, February 2, 1900, such relators severally demurred to such return. That in the complaint of H. A. Schwartzburg, so mentioned in such return, it is alleged, in effect, that he is and was at all times therein mentioned a resident, citizen, elector, and taxpayer in the city of Milwaukee, and as such brought that suit in his own behalf and in behalf of all other taxpayers of the city similarly situated. That the defendant David S. Rose is the duly elected, qualified, and acting mayor of that city; that the defendant E. M. Schuengel is city clerk of that city; and that the defendants therein named, being forty-two in number, are the duly elected, acting, and qualified aldermen constituting the common council of that city. That the defendant the Milwaukee Electric Railway & Light Company, is a stock corporation organized and incorporated under the laws of Wisconsin, and engaged in the business of running and operating the city railway by electric power in the streets of Milwaukee, and also making and disposing of for money to the city and to other persons electric light and power. That the defendant Henry C. Payne is a resident in Milwaukee, and the vice president of such railway and light company, and the defendant Charles F. Pfister is one of the directors thereof. That all of the other officers and directors of the railway and light company reside outside of this state, except one Bigelow. That the city of Milwaukee is now, and has been for many years last past, the owner of and entitled by law to grant, sell, or dispose of for money, the right to use its streets for street-railway purposes and the transportation of passengers under and pursuant to the charter of the city and the laws of the state. That the city, in its corporate capacity, and as trustee for the public, owns and has the right to grant to any person or corporation the use of its streets, or any part thereof, for the carriage and transportation of passengers for hire or compensation, and to fix the rate of such compensation to be charged by such grantee, and that such right is of great value, to wit, for all streets available for such purposes, \$3,000,000. That there are 16 miles in length of streets therein referred to upon which no right has been heretofore granted to the railway and light company. That that company has, or claims to have, certain licenses or rights under ordinances of the city to use most of the streets of the city available for street-railway purposes for a limited period, which, by the terms of such ordinances, has not yet expired. That the railway and light company and the mayor of the city and certain other defendants who are members of the common council, unknown to the plaintiff, soon after their election, colluded and conspired together for the purpose of obtaining for the railway and light company, as a gratuity from the city, valuable rights, licenses, and franchises to use its streets for street-railway purposes on all principal streets of the city not theretofore held by the railway and light company for such purposes, and an extension of its

existing licenses or franchises for the purpose of preventing the common council, in the exercise of its just powers in the future, from regulating the rate of fare to be charged by the railway and light company, and for the purpose of extending existing licenses or franchises to use such streets, and so heading off any future common council or mayor from acting thereon; and, for the purpose of carrying out such conspiracy, the mayor opened up and carried on correspondence with the officers of the railway and light company, and held interviews and had meetings with such officers at various times between April 10, 1898, and November 20, 1898. That in pursuance of such conspiracy and combination the railway and light company, November 4, 1898, offered to the mayor, and through him to the city, that, in case the city would grant the railway and light company the right to charge 5 cents for each single fare for each passenger, with one transfer for each fare paid, and the right to lay tracks and operate its street railways over certain streets in the city not then covered by such street railway or any of its franchises, the railway and light company would pay to the city, in lieu of a reduction of fares, January 1, 1899, \$50,000, January 1, 1900, \$60,000, January 1, 1901, \$70,000, January 1, 1902, \$80,000, January 1, 1903, \$90,000, January 1, 1904, \$100,000, and \$100,000 annually thereafter, and, in addition, whenever the profits earned by the railway and light company should pay a dividend of 6 per cent per annum on its stock to its stockholders, that then and from thenceforth there should be paid to the city one third of all annual profits above 6 per cent in addition to the \$100,000 per annum, and that such payments were to be independent of and in addition to all taxes, assessments, license fees, or charges exacted from the railway and light company under any law of this state. That such communication, with other correspondence between the mayor and the officers of the railway and light company, was made public November 20, 1898. That thereupon the electors and taxpayers of the city assembled in several mass meetings, and protested against the sale of such licenses or franchises, or the extension thereof, or the sale of the right of the city to regulate the fare charged by the railway and light company. That such offer was not accepted, but the proceedings thereon were allowed to lapse and be abandoned. That thereafter the mayor and certain of the members of the common council and the railway and light company and its officers renewed and continued their efforts in pursuance of the unlawful combination and conspiracy aforesaid, to procure for the railway and light company, without any compensation to the city, the valuable rights, privileges, licenses, and franchises aforesaid, and held various conferences and meetings at divers places and on different dates for the purpose of obtaining from the city, through the collusion and connivance of the mayor, the valuable rights, licenses, and franchises aforesaid, and thereafter, and in pursuance of such

combination and conspiracy, the railway and light company caused to be prepared and submitted to the common council an ordinance thereunto annexed, to which the amendment thereunto annexed and made part thereof was, December 18, 1899, made and passed to a third reading by the common council. That the only compensation or payment to the city for such grant in such ordinance contained was that the railway and light company would sell, to be used during certain hours in each day, 25 tickets for \$1, or 6 tickets for 25 cents, each of which tickets should entitle the holder thereof to use the same upon the cars of the railway and light company only between the hours of 5:30 o'clock and 7:30 o'clock in the morning, and between the hours of 5 o'clock and 6:30 o'clock, central standard time, in the afternoon of each day, until January 1, 1905, and thereafter to continue the sale of tickets in packages at the prices aforesaid until December 31, 1934, each to be good at all hours of the day, with the same privileges as are or may be accorded to the passengers paying a single cash fare of five cents. That the mayor, Henry C. Payne, Charles F. Pfister, and certain of such aldermen and various agents of theirs throughout the city, at their instigation and direction, falsely gave out, held forth, and pretended that under the existing ordinance possessed by the railway and light company that company had an absolute right to charge five cents for each fare, and that such right was beyond the power of the common council to regulate. That in return for the concession on the part of the railway and light company to the city of a power which the city amply possessed at all times therein mentioned, the city should and ought to grant the railway and light company, not only an extension for all its existing licenses or franchises for a period of ten years after 1924, but also the right to charge an absolute fare of five cents for each passenger, except as modified through purchases of tickets in quantities aforesaid, and to the extent aforesaid. That additional licenses or franchises to use about 16 miles of the streets of the city described, shutting out all possible competition, should be given gratuitously to the railway and light company. That the railway and light company and its officers and the mayor and certain of such aldermen colluded and conspired together in pursuance of the plan, scheme, or conspiracy aforesaid to procure the grant and licenses to use such streets, fixing the rates aforesaid, and extending the period of existing licenses as aforesaid in the form of a contract, instead of in the form of legislation, so that such ordinance should be first apparently proposed by the city subject to the acceptance of the railway and light company, and that thereafter the railway and light company should accept the same in writing, and make the pretended concessions aforesaid, and extend its lines upon the 16 miles of new streets, and so obtain in the form of an ordinance a contract, which could not be thereafter impaired, either by the state legisla-

ture or by the common council; and that such was the purpose of the railway and light company and its officers, aided by the mayor and certain members of the common council, and for such purposes the ordinance in question was passed. That under the existing ordinances the railway and light company has no absolute right to charge a fare of five cents, but only a fare not to exceed five cents, for each passenger, subject to the regulations by the common council, and has no right to use any of the streets longer than 1924, except at the will or pleasure of the common council, and has no authority or right whatever on the new streets mentioned, nor to withhold transfer tickets, but are in all such matters subject to the reasonable regulations of the common council. That the railway and light company and its officers and the mayor and certain of the aldermen, in pursuance of such fraudulent and collusive scheme to give away the valuable property or rights aforesaid of the city to the railway and light company, are negotiating and dealing together, and pretending to represent the city for the purpose of making proposed ordinances, not an ordinary legislative measure or quasi contract, like a charter, but an absolute contract based upon a compromise as a valuable consideration. That the vice president of the railway and light company, acting for and on behalf of that company, for the express purpose of obtaining such ordinance, and of silencing opposition to the same, and obtaining support of the alderman who represented the ward, entered into an agreement with such citizens therein whereby he and that company assumed and agreed to pay such citizens \$8,500 in case of the passage of such ordinance, and thereby induced many of such aldermen to vote for such ordinance. That the mayor and common council have no legal right, power, or authority to make any such contract with the railway and light company, nor to give away or donate any of the property or rights, licenses, or franchises which the common council might, by law, have authority to grant or confer without a valuable consideration when it is possible to obtain a valuable consideration therefor. That the pretended consideration or compromise is wholly inadequate and insufficient to pay for the rights granted by such ordinance and the amendment thereto over and above what the railway and light company already enjoys. That the rights granted by such ordinance and the amendment thereto, over and above and beyond those owned or enjoyed by the company under existing ordinances, are worth more than \$1,000,000. That December 18, 1899, one Cassius M. Payne offered, in writing, to the city, \$100,000 in cash for all the additional rights, licenses, and franchises over and above what it now possesses, proposed to be granted to the railway and light company by such ordinance, and accompanied such offer with a tender of a certified check to the city for \$25,000 as earnest of good faith and part payment. That Cassius M. Payne was able, ready, and willing to pay

\$100,000 to the city for such rights, privileges, and franchises last mentioned, and is still able, ready, and willing to pay such sum of \$100,000 for the purpose aforesaid, which offer the city and its officers refused, and still refuse, to accept, or any other sum for such rights, privileges, and franchises, but intend by means of the collusion and conspiracy aforesaid to give the same as a gratuity to the railway and light company. That the proposed ordinance was reported to the common council for passage as a new or substitute ordinance by the majority of a special committee to which the same was referred December 4, 1899, accompanied by the minority report calling attention to its evils and injustice, and the inadequacy of consideration therefor. That December 18, 1899, such ordinance came before the common council for passage upon the majority and minority report of the special committee. That, notwithstanding the several facts mentioned, the common council, December 18, 1899, after passing the amendment thereunto annexed, by a vote of twenty-five in favor of such amendment to seventeen against it, in the manner therein set forth, and in pursuance of the agreement, combination, and conspiracy therein mentioned, passed such ordinance as amended, and ordered it engrossed, and that such ordinance is now in the hands of the city clerk and of the engrossing committee of the common council, and the same will be engrossed, ordered to a third reading, and passed at the next meeting of the common council, to be held within a few days, and will then be accepted by the railway and light company, and thereafter enforced by the city, to the great loss and damage of the plaintiff and all those similarly situated. That the twenty-five members of the common council so voting for such ordinance, being defendants named therein, colluded and conspired together with the mayor and Payne and Pfister to obtain such valuable rights and franchises for the railway and light company gratuitously or for the alleged consideration mentioned, and held various conferences prior to December 18, 1899, in secret, and rehearsed the proceedings which they would take at such meeting, and agreed together as to the mode of proceeding. That the minority of the common council called the attention of that body to the fact that they could not understand the legal effect of the amendment, and moved that the amendment be referred to the judiciary committee, but the same was voted down by the twenty-five members of the common council last named, and the amendment has never been referred to or considered by any committee of the common council. That at the meeting of December 18, 1899, the chairman of the common council instructed the twenty-five members how to vote, and the effect of their voting on certain motions. That the twenty-five aldermen so named prevented all efforts at adjournment, refused to go into committee of the whole, and rushed the measure through the common council without deliberation, and with indecent haste, and without consideration. That, in pursuance of

such colluding and conspiracy, the twenty-five members of the council last named, prior to the meeting of December 18, 1899, agreed together that no amendment to such ordinance proposed by anyone except one of their number named should be considered or permitted to pass, and that no amendment thereto should be referred to the judiciary committee. That such report of the minority should not be adopted or approved. That at the meeting of December 18, 1899, the twenty-five aldermen therein named carried out in voting and passing upon such ordinance their agreements in aid of and pursuant to such conspiracy. That under the proposed ordinance as originally written, and also under the same as amended, the city acquires no rights that it did not theretofore possess under existing franchises, charter, and ordinances, and receives no consideration whatever. That no consideration accrued to the city or the taxpayers thereof. That, in furtherance of such conspiracy, Pfister, for the purpose of buying off opposition to the proposed ordinance and obtaining support of certain aldermen, entered into an agreement in writing December 18, 1899, prior to the vote on such ordinance, with a certain person therein named, and others unknown to the plaintiff, to the effect that he would be personally liable to pay about \$9,000, or not to exceed \$9,000, in case the proposed ordinance passed the common council, and was accepted by the railway and light company, which offer was accepted, and their opposition to such ordinance by reason thereof withdrawn. That by reason of the facts alleged the money, rights, privileges, and franchises mentioned were lost to the city, and squandered, and the plaintiff's burdens of taxation correspondingly increased, the burdens of taxation of all other taxpayers in the city in similar condition to the plaintiff are correspondingly increased by such unlawful waste and squandering of the salable, valuable rights and property of the city. That the railway and light company has issued \$7,000,000 in negotiable, corporate bonds, secured by a mortgage on its right of way, cars, apparatus, and property, including such rights and franchises, and all other rights and franchises which it may acquire from the common council, and may issue still other bonds, all of which may go into the hands of bona fide holders for value, and hence become enforceable. That the common council and city clerk threatens and intends to engross and pass such ordinance or contract by a majority vote of all its members, and give out that they are about to do so, and the mayor of the city threatens and intends to approve the same, and gives out that he will do so, and the railway and light company threatens and intends to immediately accept the same, and file or tender a relinquishment of such pretended rights as they claim to be the consideration of such contract. That a full discovery be had, and that each and every of the defendants be required to make answers in that behalf, and, when such facts are discovered, the same be added by amendment to such complaint.

That the plaintiff has no adequate remedy at law, and, unless that court grant to him its injunctive order or writ of injunction, he and his fellow taxpayers will be without remedy; wherefore the plaintiff asked that the defendants therein be each and all enjoined and restrained from passing such ordinance.

Upon such verified complaint and the undertaking thereunto annexed, the court commissioner, on December 21, 1899, ordered that the city, the mayor, the city clerk, and each and every of the defendants named therein as aldermen of the city, be, and they were thereby, enjoined and restrained until the further order of that court from signing, and engrossing, passing, amending, voting on, publishing, approving, or enforcing such proposed ordinance, as amended, or any similar ordinance, and from contracting away any rights of the city, by ordinance or otherwise, to the railway and light company, under such proceedings, and that the railway and light company, Pfister, and Payne, each and all of them, were thereby enjoined and restrained from accepting the ordinance as amended, or any similar ordinance, and from attempting to purchase from the city, except by open competition, and upon due notice and upon adequate consideration, any rights, privileges, or franchises to use the streets of the city. Upon the hearing in the trial court of the several orders to show cause why the injunction so issued by such court commissioner December 21, 1899, should not be vacated and set aside, it having appeared to the judge of such court in open court by affidavits filed and read in opposition to such motions, and by statements of one of the attorneys and counsel for some of the aldermen defendants and by one of the attorneys and counsel for the mayor, that, notwithstanding the injunctive order therein named and served upon the defendants, the mayor signed and approved the ordinance January 2, 1900, and the city clerk signed such ordinance, and the president of the common council signed and approved such ordinance, and the twenty-four aldermen therein named as defendants voted on, passed, and approved such proposed ordinance, and that all and singular the acts aforesaid of the defendants in violation of such injunction were done at the city of Milwaukee January 2, 1900; that, therefore, the trial court, of its own motion, suspended the hearing upon such several orders to show cause why the injunction should not be vacated and set aside, and on January 5, 1900, ordered that each and every one of the aforesaid defendants, who, as it is claimed, violated such injunctive order, show cause before that court why he should not purge himself of his alleged contempt, or why, in default of his being able to do so, he should not be punished as for a contempt of that court, in the manner and to the extent allowed by law; that a copy of that order to show cause should be served on each of the defendants named in the body of the order on or before 9 o'clock A. M. of January 5, 1900; and it was therein further ordered 48 L. R. A.

that each and every one of the defendants named in the body of that order as having violated such injunction show cause, as aforesaid, before that court on January 5, 1900, at 10 o'clock A. M. of that day, or as soon thereafter as counsel could be heard, and that specific charges be then and there filed under oath against and served upon each of such defendants named in the body of that order. Such order to show cause having been duly served, the trial court, upon the hearing thereof, adjudged that it had jurisdiction, and hence granted the order to show cause, and adjudged that the mayor, clerk, and the majority of the common council named were guilty of the contempt of that court in violating such injunctive order.

Mr. Charles Quarles, for relator Rose: The act in question was legislative in its nature.

The common council could have granted the franchise in question by resolution, by vote properly recorded on its minutes, or by ordinance.

Green Bay v. Brauns, 50 Wis. 204, 6 N. W. 503.

Independently of its form, the act in question is legislative in its nature, since the grant to a street-railroad company to use the streets is a franchise "granted by the state, acting through the common council of the city, to the railroad company."

Wright v. Milwaukee Electric R. & Light Co. 95 Wis. 29, 36 L. R. A. 47, 69 N. W. 791; *State ex rel. Atty. Gen. v. Madison Street R. Co.* 72 Wis. 612, 1 L. R. A. 771, 40 N. W. 487; *Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818; *State ex rel. Cream City R. Co. v. Hilbert*, 72 Wis. 184, 39 N. W. 326; *Stedman v. Berlin*, 97 Wis. 505, 73 N. W. 57.

The exceptional power of delegation of legislative authority to the common council of a city, while not given by the Constitution, exists by force of the immemorial exercise of this power by municipalities, long antedating the Constitution, and assumed to be recognized by that instrument as though written therein.

Tilley v. Savannah, F. & W. R. Co. 5 Fed. Rep. 657.

Real contractual relations can arise only by way of estoppel, arising, not from the acceptance merely, but from action in reliance upon the ordinance, and expenditure of money in construction, on the faith thereof.

St. Louis v. Western U. Teleg. Co. 148 U. S. 103, 37 L. ed. 385, 13 Sup. Ct. Rep. 485; *New Orleans v. Great Southern Telegraph & Teleg. Co.* 40 La. Ann. 41, 3 So. 533; *Belle-ville v. Citizens' Horse R. Co.* 152 Ill. 180, 26 L. R. A. 681, 38 N. E. 584; *Chicago Municipal Gaslight & Fuel Co. v. Lake*, 130 Ill. 42, 22 N. E. 616; *Baltimore Trust & Guarantee Co. v. Baltimore*, 64 Fed. Rep. 160; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 566, 41 L. ed. 1117, 17 Sup. Ct. Rep. 653.

The act is legislative, notwithstanding contract arises therefrom.

Des Moines Gas Co. v. Des Moines, 44 Iowa, 505, 24 Am. Rep. 756; *New Orleans*

Waterworks Co. v. New Orleans, 164 U. S. 481, 41 L. ed. 523, 17 Sup. Ct. Rep. 161; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Montgomery Gaslight Co. v. Montgomery*, 87 Ala. 245, 4 L. R. A. 616, 6 So. 113; *Kittinger v. Buffalo Traction Co.* 160 N. Y. 377, 54 N. E. 1081; *Hayes v. Michigan C. R. Co.* 111 U. S. 237, 28 L. ed. 414, 4 Sup. Ct. Rep. 369; *Wabash R. Co. v. Defiance*, 167 U. S. 97, 42 L. ed. 91, 17 Sup. Ct. Rep. 748.

The act being legislative, it was beyond the power of a court of equity to interfere.

Atty. Gen. ex rel. Taylor v. Brown, 1 Wis. 513; *Mississippi v. Johnson*, 4 Wall. 500, 18 L. ed. 441; *Green v. Mills*, 25 U. S. App. 383, 69 Fed. Rep. 852, 16 C. C. A. 516, 30 L. R. A. 90; *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; *Cincinnati Street R. Co. v. Smith*, 29 Ohio St. 306; *Montgomery Gaslight Co. v. Montgomery*, 87 Ala. 245, 4 L. R. A. 616, 6 So. 113; *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 481, 41 L. ed. 523, 17 Sup. Ct. Rep. 161; *Cape May & S. L. R. Co. v. Cape May*, 35 N. J. Eq. 419; *Alpers v. San Francisco*, 32 Fed. Rep. 503.

If the court below was without jurisdiction, then the disregard of the injunctive order constituted no contempt.

Dickey v. Reed, 78 Ill. 261; *Weber v. Weber*, 90 Wis. 467, 63 N. W. 757; *State ex rel. Fowler v. Green Lake County Circuit Ct.* 98 Wis. 143, 73 N. W. 788; *Re Sawyer*, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164.

Public policy requires that municipal legislatures shall be free from interference by the courts.

Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204.

Messrs. Ryan, Ogden, & Bottum, for relators Corcoran *et al.*:

Jurisdiction is the power to hear and determine the subject-matter in controversy between the parties to a suit, to adjudicate or exercise any judicial power over them; the question is whether, on a case before a court, their action is judicial or extrajudicial, with or without the authority of law to render a judgment or decree upon the rights of the litigant parties.

Rhode Island v. Massachusetts, 12 Pet. 718, 9 L. ed. 1233.

Jurisdiction as thus defined was wholly wanting in the court below to adjudicate between the parties upon the subject-matter of the complaint.

Des Moines Gas Co. v. Des Moines, 44 Iowa, 505, 24 Am. Rep. 756; *Kittinger v. Buffalo Traction Co.* 160 N. Y. 377, 54 N. E. 1081; *Talcott v. Buffalo*, 125 N. Y. 280, 26 N. E. 263.

The consideration and passage of the ordinance in question was a legislative act.

New Orleans Waterworks Co. v. New Orleans, 164 U. S. 471, 41 L. ed. 518, 17 Sup. Ct. Rep. 161; *State ex rel. Atty. Gen. v. Madison Street R. Co.* 72 Wis. 612, 1 L. R. A. 771, 40 N. W. 487; *Wright v. Milwaukee Elec.* 48 L. R. A.

trio R. & Light Co. 95 Wis. 29, 36 L. R. A. 47, 69 N. W. 791.

A court of equity has no jurisdiction to sit in review of the discretion of the legislature, or to enjoin legislative action.

People ex rel. Bolton v. Albertson, 55 N. Y. 50; *People ex rel. McLean v. Flagg*, 46 N. Y. 401; *Baird v. New York*, 96 N. Y. 567; *Waterloo Woolen Mfg. Co. v. Shanahan*, 123 N. Y. 345, 14 L. R. A. 481, 28 N. E. 338; *Pedrick v. Ripon*, 73 Wis. 622, 3 L. R. A. 269, 41 N. W. 705.

This doctrine is equally applicable to common councils of cities as to legislatures of states.

Taylor v. Carondelet, 22 Mo. 105; *Heland v. Lowell*, 3 Allen, 407, 31 Am. Dec. 670; *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 41 L. ed. 518, 17 Sup. Ct. Rep. 161; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505, 24 Am. Rep. 756; *Montgomery Gaslight Co. v. Montgomery*, 87 Ala. 245, 4 L. R. A. 616, 6 So. 113; *State ex rel. Atty. Gen. v. Cunningham*, 81 Wis. 440, 15 L. R. A. 561, 51 N. W. 724; *Crescent City L. S. L. & S. H. Co. v. Police Jury*, 32 La. Ann. 1192; *Harrison v. New Orleans*, 33 La. Ann. 222, 39 Am. Rep. 272; *Alpers v. San Francisco*, 32 Fed. Rep. 503; *People ex rel. Negus v. Dwyer*, 90 N. Y. 402.

The disregard of an alleged injunctive order issued by a court in excess of its jurisdiction and power constitutes no contempt, and warrants no penalty.

Dickey v. Reed, 78 Ill. 261; *State ex rel. Fowler v. Green Lake County Circuit Ct.* 98 Wis. 143, 73 N. W. 788; *Weber v. Weber*. 90 Wis. 467, 63 N. W. 757.

Messrs. Timlin, Glicksman, & Conway and Toohy & Gilmore, for respondents:

When a municipal council acts, or is about to act, illegally,—that is, beyond the powers conferred on it by law,—it is amenable to the power of the courts, and the courts have jurisdiction to annul, direct, or restrain the unlawful acts of such body.

The term "jurisdiction," when applied to a court, is the power residing in such court to determine judicially a given action, controversy, or question presented to it for decision.

1 Pom. Eq. Jur. § 1; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Re Rosenberg*, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299.

Whether or not the complaint stated a good cause of action, or whether or not the plaintiff was the proper person to bring a suit, were questions, not of the jurisdiction of the court, but relating to the merits of the action, and the court had jurisdiction notwithstanding the complaint might be insufficient or the plaintiff not the proper person to sue.

People ex rel. Davis v. Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536.

When we find it stated that a court of equity has no power or no jurisdiction of suits for injunction against cities or their common councils to prevent the passage of an ordinance, except in cases where the ordinance is invalid or *ultra vires* or fraudulent, and property rights are invaded or

threatened by its passage, all such cases, notwithstanding they deny in words the jurisdiction of the court, by such decisions concede or establish jurisdiction over the subject-matter.

State ex rel. Gill v. Watertown, 9 Wis. 254; *State ex rel. Anderton v. Kempf*, 69 Wis. 470, 34 N. W. 226; *Earles v. Wells*, 94 Wis. 285, 68 N. W. 964; *Land, Log & Lumber Co. v. McIntyre*, 100 Wis. 258, 75 N. W. 964; *Webster v. Douglas County*, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451; *State ex rel. Marinette, T. & W. R. Co. v. Tomahawk*, 96 Wis. 73, 71 N. W. 86; *Port of Mobile v. Louisville & N. R. Co.* 84 Ala. 115, 4 So. 626; *Roberts v. Louisville*, 92 Ky. 95, 13 L. R. A. 844, 17 S. W. 216; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505, 24 Am. Rep. 756; *Stevens v. St. Mary's Training School*, 144 Ill. 336, 18 L. R. A. 832, 32 N. E. 962; *Patterson & P. Horse R. Co. v. Paterson*, 24 N. J. Eq. 169; *Meredith v. Sayre*, 32 N. J. Eq. 557; *Cape May & S. L. R. Co. v. Cape May*, 35 N. J. Eq. 419; *People ex rel. Negus v. Dwyer*, 90 N. Y. 402; *People ex rel. Davis v. Sturtevant*, 9 N. Y. 283, 59 Am. Dec. 536; *Davis v. New York*, 1 Duer, 451; *Milkau v. Sharp*, 15 Barb. 193, 27 N. Y. 611, 84 Am. Dec. 314; *Blaschko v. Wurster*, 156 N. Y. 437, 51 N. E. 303; *Adamson v. Union R. Co.* 74 Hun, 3, 26 N. Y. Supp. 136; *Norris v. Wurster*, 23 App. Div. 124, 48 N. Y. Supp. 656; *Gusthal v. New York*, 48 N. Y. Supp. 652; *Gerlach v. Brandreth*, 54 N. Y. Supp. 479; *Cincinnati Street R. Co. v. Smith*, 29 Ohio St. 291; *Page v. Allen*, 58 Pa. 338, 92 Am. Dec. 272; *Trading Stamp Co. v. Memphis*, 101 Tenn. 181, 47 S. W. 136; *Spring Valley Waterworks v. Bartlett*, 8 Sawy. 555, 16 Fed. Rep. 615; *Alpers v. San Francisco*, 32 Fed. Rep. 503; *Murphy v. East Portland*, 42 Fed. Rep. 308; *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. ed. 1070; *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 481, 41 L. ed. 523, 17 Sup. Ct. Rep. 161.

A city in Wisconsin, whose charter provided that deeds and grants should be made by the mayor and city clerk, could grant the use of its streets by action of the mayor and city clerk, but it could only regulate by ordinance. In cities where the common council exercises the granting power of the corporation, it might act, under § 1862, Rev. Stat., by resolution, by ordinance, or by mere vote.

Merchants' Union Barb Wire Co. v. Chicago, B. & Q. R. Co. 70 Iowa, 105, 28 N. W. 494.

The grant of the right to use streets is a grant of a property right.

People v. O'Brien, 111 N. Y. 1, 2 L. R. A. 255, 18 N. E. 692; *State ex rel. Milwaukee Street R. Co. v. Anderson*, 90 Wis. 550, 63 N. W. 746.

The making of a grant by a person exercising delegated power is not a legislative act.

State ex rel. Atty. Gen. v. O'Neill, 24 Wis. 149; *State ex rel. Adams v. Burdge*, 37 L. R. A. 157, 70 N. W. 347, 95 Wis. 390; *Polk v. Wendell*, 5 Wheat. 293, 5 L. ed. 92; *United* 48 L. R. A.

States v. Arredondo, 6 Pet. 728, 8 L. ed. 547; *Rice v. Minnesota & N. W. R. Co.* 1 Black, 358, 17 L. ed. 147.

Legislative grants direct from the legislature, and not through one exercising a delegated power, have been held void in Wisconsin for uncertainty.

Sellers v. Union Lumbering Co. 39 Wis. 528.

For lack of acceptance by all.

Ferrel v. Woodward, 20 Wis. 462.

The act of making a grant of property is contractual, and not a legislative act in its nature.

United States v. Hatch, 1 Pinney, 182; *Gough v. Dorsey*, 27 Wis. 119; *State ex rel. Orton v. School & University Land Comrs.* 17 Wis. 248.

Under § 1862, if valid, the city authorities had the right to make, as one of the terms upon which they exercised the power to make the grant, a stipulation that the grantee should pay into the corporate treasury any sum of money they saw fit to exact.

Booth, Street Railways, § 284; *Chicago General R. Co. v. Chicago*, 176 Ill. 253, 52 N. E. 881; *Allegheny v. Millville E. & S. Street R. Co.* 159 Pa. 411, 28 Atl. 202.

The taxpayer was consequently interested in the exercise of this power, that the advantage thereof be not lost to the city by any unlawful and improvident exercise of the power.

Adamson v. Union R. Co. 74 Hun, 3, 26 N. Y. Supp. 136; *Cole's Estate*, 102 Wis. 1, 78 N. W. 402; *Land, Log & Lumber Co. v. McIntyre*, 100 Wis. 258, 75 N. W. 969.

Taxpayers have been allowed again and again to challenge grants of this kind by injunction against the ordinances in New York.

Blaschko v. Wurster, 156 N. Y. 437, 51 N. E. 303; *Norris v. Wurster*, 23 App. Div. 124, 48 N. Y. Supp. 656; *Gusthal v. New York*, 48 N. Y. Supp. 652; *Gerlach v. Brandreth*, 54 N. Y. Supp. 479.

The complaint shows that the grantee was attempting to procure the grant, and was about to procure it by unlawful means, and that it was to be given out upon an unlawful consideration equivalent to bribery, and as destructive of the action of the agent intrusted with the power to make the grant.

New Haven v. New Haven & D. R. Co. 62 Conn. 252, 18 L. R. A. 256, 25 Atl. 316; *Doane v. Chicago City R. Co.* 160 Ill. 22, 35 L. R. A. 588, 45 N. E. 507; *State ex rel. Wildman v. Kidd*, 63 Wis. 337, 23 N. W. 703; *State ex rel. Newell v. Purdy*, 36 Wis. 213, 17 Am. Rep. 485; *Greenhood*, Pub. Pol. 306-308.

A writ of prohibition is never to be issued unless it clearly appears that the inferior court is about to exceed its jurisdiction.

Smith v. Whitney, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570; *Ex parte Gordon*, 104 U. S. 515, 26 L. ed. 814; *Ex parte Pennsylvania*, 109 U. S. 174, 27 L. ed. 894, 3 Sup. Ct. Rep. 84; *Ex parte Hagar*, 104 U. S. 520, 26 L. ed. 816.

Cassoday, Ch. J., delivered the opinion of the court:

The mayor, city clerk, and the twenty-three aldermen who are petitioners herein, and constituting a majority of the common council of the city of Milwaukee, frankly admitted to the trial court that they had severally violated the injunctive order in question. The only excuse given for such violation is that the court was without jurisdiction to make such order. The learned trial judge, in his concise opinion in the case, concedes that, if the court had no jurisdiction in the action commenced by Schwartzburg, then such order was a nullity, and there was no contempt in disobeying it. But he contends that the court did have jurisdiction, and that, however erroneous the making of it may have been, yet that it was binding upon the defendants therein until set aside or reversed. If the court had such jurisdiction, then the conclusion reached by the trial judge was undoubtedly correct. Thus, in a recent case, our late Brother Pinney, speaking for the court, said: "With whatever irregularities the proceeding may be affected, or however erroneously the court may have acted in granting an injunction in the first instance, it must be implicitly obeyed, as long as it remains in existence; and the fact that it has been erroneously granted affords no justification or excuse for its violation. The party against whom it issues, or who is affected by notice of its existence, will not be allowed to violate it on the ground of a want of equity in the bill, since he is not at liberty to speculate upon the intention or decision of the court, or upon the equity of the bill, or to question the authority of the court to grant relief upon the facts stated, except upon application to dissolve or vacate the injunction. Upon proceedings for contempt for violation of an injunction, the only legitimate inquiry is whether the court granting the injunction had jurisdiction of the parties and of the subject-matter, and the court will not, in such proceedings, consider whether the order was erroneous. If the court had jurisdiction of the subject-matter, the fact that its power was erroneously exercised does not render the injunction void, but only voidable upon proper application; and, until set aside or revoked, it is entitled to implicit obedience." *State ex rel. Fowler v. Green Lake County Circuit Ct.* 98 Wis. 149, 150, 73 N. W. 790. The "wilful disobedience of any process or order lawfully issued or made" by a court having jurisdiction of the parties and subject-matter is made by statute a criminal contempt. Rev. Stat. § 2565. The trial judge, being convinced, as he manifestly was, that the court had such jurisdiction, could not, without stultifying his conscience, do otherwise than he did, regardless of the personality or the official positions of the defendants therein. The important question, therefore, is whether the court did have such jurisdiction to issue that order; and that question, as indicated by the trial judge, depends upon the question whether the common council, in passing the ordinance, acted with-

in its prescribed limits as a legislative body. In determining that question the trial judge properly held that he was confined to the facts alleged in Schwartzburg's complaint, which, upon such hearing on the question of contempt, were taken as true. For that reason we have given the substance of that complaint in the foregoing statement. It is quite lengthy, and is largely argumentative. It alleges, in effect, that the corporate rights and franchises to operate such street railways in all the streets of the city are owned by the city; that, as such owner, the city was entitled to grant, sell, or dispose of the same for money; that such rights and franchises are of the value of \$3,000,000; that one responsible man had offered in writing \$100,000 in cash for the additional rights, licenses, and franchises proposed to be granted to the railway and light company, and that the same are worth \$1,000,000; that the mayor and the twenty-three aldermen who are petitioners herein, against the protests of the electors and taxpayers of the city, as expressed in "several mass meetings," colluded and conspired and unlawfully combined with the officers and agents of that company to grant to the railway and light company such additional corporate rights and franchises without any consideration, and as a mere gratuity, and that the company and the vice president thereof has assumed and agreed to pay certain citizens of a certain ward \$8,500 in case the ordinance passed, to silence opposition thereto, and secure the support of the alderman of such ward; that a director of the company, named, had, prior to the passage of the ordinance, agreed that, in case the ordinance passed, he would be personally liable to pay to such person and others (to the plaintiff unknown) "about \$9,000, or not to exceed \$9,000," for the purpose of buying off opposition and obtaining the support of certain aldermen. Such charges were well calculated to arouse indignation on the part of the people, and may have been more or less persuasive with the representatives of the people in the common council, but we fail to perceive their bearing upon or relevancy to the questions of jurisdiction here presented. When more than half a century ago, the majority of the people of Rhode Island, under the leadership of Mr. Dorr, attempted, without the consent of the existing state government, to set up a new state government, and the question of rightful authority came before the Supreme Court of the United States, Mr. Webster, in his great argument, aptly declared that "men cannot get together, and count themselves, and say they are so many hundreds and so many thousands, and judge of their own qualifications, and call themselves the people, and set up a government. The power is with the people, but they cannot exercise it in masses or *per capita*. . . . The exercise of legislative power and the other powers of government immediately by the people themselves is impracticable. They must be exercised by representatives of the people. . . . The basis of this representation is suffrage. . . . Suffrage is the delegation of the power of

an individual to some agent. . . . In the exercise of political power through representatives we know nothing—we never have known anything—but such an exercise as should take place through the prescribed forms of law.” 6 Webster’s Works, 223–226. Similar views were manifestly entertained by Chief Justice Taney and the court in deciding the case. *Luther v. Borden*, 7 How. 1, 12 L. ed. 581. The power and authority of the common council to enact the ordinance in question is not to be determined by mass meetings and popular assemblies, but only by the prescribed law applicable to the case. If a director of the railway and light company, or the vice president of that company, has committed any crime or any unlawful act, the courts are open, and they are liable, like other citizens, to prosecution. But such facts, if true, are wholly immaterial on such questions of jurisdiction, and much more so if they are untrue. The members of the common council appear to have been divided as to the wisdom of passing the proposed ordinance, and the same seems to have been true of the citizens. As frequently occurs, in respect to important matters of legislation, the friends and opponents of the measure appear to have had frequent conferences and meetings, but it does not follow that such meetings, even if in secret, constituted a conspiracy. Secret caucuses are quite common in political action. They are an incident of popular government. It is not alleged that such combination was to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means, unless the passage of any such ordinance was unlawful, which will be considered later. It is only necessary here to say that no alderman nor officer of the city is charged with anything unlawful, unless the support and attempt to pass such ordinance was unlawful. The theory of Schwartzburg’s complaint is that the corporate rights and franchises in question were owned by the city, and were held in trust for its citizens and taxpayers and the public, and that the same were the subject of barter and sale to the highest bidder. Such corporate rights and franchises in this country are special privileges conferred by the sovereign power of the state or nation, and do not belong to the citizens of the state or county by common right. At common law, such corporate rights and franchises were incapable of being seized and sold on execution. *Gue v. Tide Water Canal Co.* 24 How. 263, 16 L. ed. 635; 1 Freeman Executions, § 179, and cases there cited; *Yellow River Improv. Co. v. Wood County*, 81 Wis. 560, 17 L. R. A. 92, 51 N. W. 1004, and other cases there cited. They are granted to a corporation or individuals for some specific purpose. They are, consequently, essential to the purpose, and hence cannot be separated from it without destroying the grant. Of course, such grant can be made upon condition, or with any other restriction or limitation. Such corporate rights and franchises can only be sold, assigned, or trans-

ferred when and as authorized by statute. *Ibid.* See also *Combes v. Keyes*, 89 Wis. 311, 27 L. R. A. 369, 62 N. W. 59; Rev. Stat. § 1788, as amended by chapter 198, Laws 1899.

This brings us to the question whether the common council had the power to pass the ordinance. No one doubts the power of the legislature to create cities, and give them the general powers possessed by municipal corporations at common law; and, in addition thereto, such powers pertaining to municipalities as may be specifically granted, as in the case of the city of Milwaukee. The statute expressly authorizes the formation of “corporations for constructing, maintaining, and operating street railways” under Rev. Stat. chap. 86, and provides that they “shall have powers and be governed accordingly.” *Id.*, § 1862. That section also expressly provides that “any municipal corporation or county may grant to any such corporation, under whatever law formed, or to any person who has the right to construct, maintain, and operate street railways the use, upon such terms as the proper authorities shall determine, of any streets or bridges within its limits for the purpose of laying single or double tracks and running cars thereon for the carriage of freight and passengers, to be propelled by animals or such other power as shall be agreed on, with all the necessary curves, turnouts, switches, and other conveniences. Every such road shall be constructed upon the most approved plan and be subject to such reasonable rules and regulations and the payment of such license fees as the proper municipal authorities may by ordinance, from time to time, prescribe. Any such grants heretofore made shall not be invalid by reason of any want of power in such municipal corporation to grant, or any such railway corporation or person to take the same; but in such respects are hereby confirmed.” The authority of the legislature to delegate to municipal corporations the power to so grant such corporate rights and franchises cannot be seriously doubted. In fact, this court, construing that section, has expressly held that a municipal ordinance granting such corporate rights and franchises, “has the force and effect of a statute of the state.” *State ex rel. Atty. Gen. v. Madison Street R. Co.* 72 Wis. 612, 1 L. R. A. 771, 40 N. W. 487; *State ex rel. Cream City R. Co. v. Hilbert*, 72 Wis. 184, 39 N. W. 326; *State ex rel. Wisconsin Teleph. Co. v. Janesville Street R. Co.* 87 Wis. 78, 22 L. R. A. 759, 57 N. W. 970; *Ashland v. Wheeler* 88 Wis. 616, 60 N. W. 818; *Wright v. Milwaukee Electric R. & Light Co.* 95 Wis. 36, 36 L. R. A. 47, 69 N. W. 791. So it has been held by the Supreme Court of the United States that “the legislature may delegate to municipal assemblies the power of enacting ordinances relating to local matters, and such ordinances, when legally enacted, have the force of legislative acts.” *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 41 L. ed. 518, 17 Sup. Ct. Rep. 161. To the same effect is *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505, 24 Am. Rep. 756.

This is in accordance with the general rule. Thus it is stated that, "although the proposition that the legislature of a state is alone competent to make laws is true, yet it is also settled that it is competent for the legislature to delegate to municipal corporations the power to make by-laws and ordinances with appropriate sanctions, which, when authorized, have the force in favor of the municipality, and against persons bound thereby, of laws passed by the legislature of the state." 1 Dill. Mun. Corp. 4th ed. § 308, and cases there cited. Of course, no such ordinance can enlarge or diminish the terms of the statute by which the power is so delegated. Id. § 317. It is contended that the proposed ordinance would be void because it would impose an additional burden upon abutting lotowners without providing for compensation. It is enough to say that the proposed grant only covers, and could only cover, such rights as the common council has power to grant. It in no way purports to affect, nor could it affect, the rights of abutting lotowners. *Paterson & P. Horse R. Co. v. Paterson*, 24 N. J. Eq. 158; *Krueger v. Wisconsin Teleph. Co.* (decided herewith) 81 N. W. 1041. The grant being made by the legislature, representing the sovereign power of the state, through the agency of the common council, it is certainly legislative in its character. Thus, it has been held that "a grant of a right of way over a tract of land to a railroad company by a municipal corporation by an ordinance which provides that the company shall erect suitable fences on the line of the road, and maintain gates at street crossings, is not a mere contract, but is an exercise of the right of municipal legislation, and has the force of law within the corporate limits." *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369. The fact that the passage and acceptance of the ordinance may result in a contract does not destroy its legislative character. *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505, 24 Am. Rep. 756. Thus, in a recent case, it is held in New York that "the action of the common council of Buffalo in granting consent to construct a street railroad under the revised charter of Buffalo . . . is a legislative, and not an administrative, act." *Kittinger v. Buffalo Traction Co.* 54 N. E. 1081, 160 N. Y. 377. The passage of the ordinance in question being legislative in its character, the question recurs whether the trial court, as a court of equity, had jurisdiction to restrain the common council from passing the same. The question is very important, and has received careful consideration. Our dual system of state and national governments is unique and intricate. We not only have numerous states embraced within the nation, but numerous municipalities in each state. The governmental power of each state, as well as the nation, is divided into three separate departments,—legislative, executive, and judicial,—which are in their action almost wholly independent of each other. The same three departments, in an inferior and subordinate way, exist in

each municipality. In the exercise of such powers, the natural, if not the essential, order is for the legislative department, engaged in the enactment of laws, by-laws, and ordinances, to act first; the executive department, engaged in executing and enforcing the laws, to act next; and for the judicial department, engaged in construing and declaring the laws, to act last; and hence the conservative agency of the government, whether national, state, or municipal. From the very nature of things, the judicial power cannot legislate, nor supervise the making of laws. It is equally true that the legislative power cannot act judicially. Thus it has been held in Pennsylvania that the legislature has no power to order a new trial, or to direct the court to order it, either before or after judgment, since such power was judicial. *De Chastellux v. Fairchild*, 15 Pa. 18, 53 Am. Dec. 570, per Gibson, Ch. J. One of the most eminent jurists, in such matters, which this country has produced, speaking for the Supreme Court of the United States, has left on record this statement: "That department [judicial] has no will in any case. . . . Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge: always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law." Chief Justice Marshall in *Osborn v. Bank of United States*, 9 Wheat. 866, 6 L. ed. 234. The same chief justice wrote the opinion of the court refusing to restrain the state of Georgia and its several officials from enforcing an act of the legislature of that state in conflict with a treaty between the United States and the Cherokee Nation of Indians in that state, and which act of the legislature was subsequently held to be void, on the ground that such restraint was an exercise of political power. *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. ed. 25; *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483. See also *Louisiana v. Texas*, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251. For the same reason that court refused to restrain President Andrew Johnson from enforcing an act of Congress alleged to be unconstitutional and void, and in fact refused to allow the bill to be filed. *Mississippi v. Johnson*, 4 Wall. 475, 18 L. ed. 437. Numerous cases might be cited where courts have refused to take jurisdiction to control the discretion of administrative officers. A failure to observe the dividing line between legislative and judicial power, as indicated, may account for some want of harmony in judicial utterances. One of the cases most relied upon by counsel for the defendant is *People ex rel. Davis v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536, punishing Sturtevant, one of the aldermen of the city.

for contempt in violating an injunction in the case of Davis & Palmer against the mayor and aldermen, restraining the latter from authorizing the building of a railway in Broadway, on the ground that the same was a public nuisance. 9 N. Y. 269, 59 Am. Dec. 540. But it appears in the injunction suit that the mayor and common council had no power whatever to authorize the building of such railway, and hence were acting without any authority. *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186. Of course, a common council cannot act legislatively where it has no power to act at all. In *People ex rel. Negus v. Dwyer*, 90 N. Y. 402, relied upon by counsel, the elevated railway had been incorporated by the legislature, to run on certain streets, or others that might be named by the mayor and common council. The common council passed a resolution naming certain streets. The mayor vetoed the same. Thereupon the common council were restrained from passing the resolution over the veto. Notwithstanding, they passed it over the veto, and were punished for contempt. The only ground upon which that case can be justified, if at all, in our judgment, is that the mere naming of such streets was not a legislative act, but a mere ministerial act. Later cases in that state seem to condemn the restraining of the common council when clearly acting within its power and discretion. *Talcott v. Buffalo*, 125 N. Y. 280, 26 N. E. 263; *Kittinger v. Buffalo Traction Co.* 160 N. Y. 377, 54 N. E. 1081. In this last case it was held that the action of the common council in granting consent to construct a street railway was a legislative act, and that the rule that courts cannot inquire into the motives inducing legislation extends to legislative acts by a common council of a city as well as to those by a state legislature. To the same effect, *Waterloo Woolen Mfg. Co. v. Shanahan*, 128 N. Y. 346, 14 L. R. A. 481, 28 N. E. 358; *People ex rel. Bolton v. Albertson*, 55 N. Y. 54; *United States v. Des Moines Nav. & R. Co.* 142 U. S. 510, 35 L. ed. 1099, 12 Sup. Ct. Rep. 308; *Angle v. Chicago*, St. P. M. & O. R. Co. 151 U. S. 3, 38 L. ed. 55, 14 Sup. Ct. Rep. 240. As indicated in this last case, the court is limited to the question of power, and its inquiry does not extend to matters of expediency, the motives of the legislators, nor the reasons given for their action. It has been held in New York that "the writ [of certiorari] will not issue to review a mere legislative . . . action, although it may involve the exercise of discretion." *People ex rel. O'Connor v. Queens County Supers.* 153 N. Y. 370, 47 N. E. 790. The general rule, undoubtedly, is, as recently held by the Supreme Court of the United States, that "a court of equity cannot properly interfere with, or, in advance, restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character." *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 481, 41 L. ed. 518, 523, 17 Sup. Ct. Rep. 161. To the same effect, *Chicago v. Evans*, 24 Ill. 52; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505, 48 L. R. A.

24 Am. Rep. 756; *Mason v. Shawneetown*, 77 Ill. 533; *Stevens v. St. Mary's Training School*, 144 Ill. 336, 18 L. R. A. 832, 32 N. E. 962; *Muhler v. Hedekin*, 119 Ind. 482, 20 N. E. 700; *Cape May & S. L. R. Co. v. Cape May*, 35 N. J. Eq. 419; *Alpers v. San Francisco*, 32 Fed. Rep. 503; *Detroit v. Hosmer*, 79 Mich. 384, 44 N. W. 622. The exceptions to the rule would seem to be limited to cases where the governing body of the municipality has no power to act, on the particular subject, legislatively, at all, or where the threatened act is not legislative, but purely ministerial, or where such body is clothed with certain powers, but threatens to go beyond or outside of such powers, and thereby invade the property or property rights of the complainant, or where such body threatens to squander or divert some fund or property held by it or some of its officials in trust for its taxpayers and citizens. *Stevens v. St. Mary's Training School*, 144 Ill. 336, 18 L. R. A. 832, 32 N. E. 962; *Spring Valley Waterworks v. Bartlett*, 8 Sawyer, 555, 16 Fed. Rep. 615; *Roberts v. Louisville*, 92 Ky. 95, 13 L. R. A. 844, 17 S. W. 216; *Murphy v. East Portland*, 42 Fed. Rep. 308; *State ex rel. Atty. Gen. v. Eau Claire County Circuit Ct.* 97 Wis. 1, 38 L. R. A. 554, 72 N. W. 139. But it is well settled that courts of equity will not attempt to control the discretionary or legislative powers vested by law in municipal corporations. *Stevens v. St. Mary's Training School*, 144 Ill. 336, 18 L. R. A. 832, 32 N. E. 962. So, in Indiana, it has been held not to be within the jurisdiction of a court of equity to enjoin the common council of a city from investigating charges against waterworks trustees or other municipal officers, and from removing them from office. *Muhler v. Hedekin*, 119 Ind. 482, 20 N. E. 700. So, in New Jersey, it has been held that "there can ordinarily be no judicial restraint or interference with municipal corporations in the bona fide exercise of powers legislative or discretionary in their nature, provided private rights are not violated." *Cape May & S. L. R. Co. v. Cape May*, 35 N. J. Eq. 419. So it has been held in the Federal court in Oregon that "a court of equity will not enjoin a municipal corporation in the exercise of its legislative function, unless the proposed act is beyond the scope of its power, and its passage would work irreparable injury." *Murphy v. East Portland*, 42 Fed. Rep. 308. Of course, the courts may interfere, and prevent the enforcement of an illegal ordinance after its passage. This is held in several of the cases cited.

Counsel also contend that the proposed ordinance not only grants corporate rights and franchises, but will make, when accepted, an irrevocable contract. We do not feel called upon in this case to determine whether that is so or not. If the ordinance goes beyond, and is outside of, the authority given by the statute quoted, then to that extent it would be invalid, and would hurt no one. If, on the contrary, it is within the authority so given by the legislature, and the legislation is valid, then it is not perceived upon what

ground a court of equity can interfere at the suit of a private party. As already indicated, such corporate rights and franchises are not like a fund or property held in trust for the citizens and taxpayers of the city. The statute expressly authorizes the making of the grant "upon such terms as the proper authorities shall determine," and this, in the instant case, manifestly means the common council. The statute also provides that such road shall "be subject to such reasonable rules and regulations and the payment of such license fees as the proper municipal authorities may by ordinance, from time to time, prescribe." Construing that statute, this court has held that the common council may, from time to time, change the license fee to be paid by the company, notwithstanding the amount of the fee was originally fixed by the ordinance granting the franchises. *State ex rel. Cream City R. Co. v. Hilbert*, 72 Wis. 184, 39 N. W. 326. Of course, whatever contract is so made is subject to the conditions imposed by the statute giving the authority to make the contract. The power so vested in the common council is, within the limits prescribed, a discretionary power; and we must hold that a court of equity has no jurisdiction to restrain the common council from exercising such discretion, especially at the suit of a private party. It is said that the amendment to the ordinance, as originally proposed, was not submitted to a committee as required. It is enough to say that a court of equity has no place in the chamber of the common council to supervise or superintend the proceedings of that body, while engaged in the exercise of legislative or discretionary functions. The common council of Milwaukee, like other legislative bodies and courts, is liable to commit errors which may be fatal to its action; but that does not take away its power to act. Counsel for the defendant admitted upon the argument that the common council had power to pass the ordinance, if it had proceeded regularly. But a court of equity has no power to prevent such action merely because the mode or manner of its procedure is irregular. To do so would be to stop the machinery of the city government. It is not a question of the propriety, or expediency, or wisdom of the proposed action, but a question of the power of the common council and the jurisdiction of the court.

The peremptory writ of prohibition is awarded.

ILLINOIS STEEL COMPANY, Appt.,

v.

Joseph BUDZISZ et al., Rspts.

(.....Wis.....)

1. An amendment to an answer by setting up the statute of limitations is

permissible under Rev. Stat. § 2830, authorizing amendments in furtherance of justice to correct a mistake in any respect, where the defendants are poor people, unacquainted with legal matters, and the failure to plead the statute was due to a mistake of their attorney.

2. The imposition of terms as a condition of granting leave to amend a pleading is not absolutely required by Rev. Stat. § 2830, authorizing amendments, in the discretion of the court, "upon such terms as may be just."

3. A parol transfer by the first to the second occupant, of property held adversely, and the latter's succession in possession under it, may be sufficient to unite the two possessions into one continuous, uninterrupted possession referable to the first entry, for the purpose of acquiring title by adverse possession.

On rehearing.

4. Actual hostile exclusive occupancy of land without any presumption or claim of right is sufficient to ripen into title under the statute of limitations.

(February 27, 1900.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Milwaukee County in favor of defendants in an action brought to recover possession of certain real estate. *Affirmed.*

Statement by Marshall, J.:

Action of ejectment. The subject of the controversy was an irregular piece of land about 40 feet wide by 170 feet long, defined, as to boundaries, by actual possession by the defendant. The complaint was in the usual form. The only material issues presented by the answer, originally, were raised by a general denial. The case was brought to trial on the part of defendants by attorneys substituted for the one who interposed the answer, some twenty-one months having elapsed since the action was commenced. On the day of the trial, before the jury was impaneled, an amendment to the answer was permitted, setting up the ten and twenty years' statutes of limitations. Exception was taken by appellant's counsel to the allowance of such amendment. The evidence conclusively or strongly tended to prove, and plaintiff's counsel, in substance, admitted, that more than twenty years prior to the commencement of the action one John Skoczek inclosed the premises with a fence, built a house thereon and thereafter occupied the same continuously till about 1886, when he sold out and transferred the property and possession thereof to defendant Joseph Budzisz for a valuable consideration, who occupied the same continuously thereafter down to the time of the trial. The court decided that adverse possession of the property commenced when Skoczek inclosed and commenced to occupy the same; that he and his successor in possession oc-

NOTE.—On the question of tacking of possessions of property held adversely, see also *Erck v. Church* (Tenn.) 4 L. R. A. 641, and note; as well as *Pittsburgh, Ft. W. & C. R. Co. v. Peet* (Pa.) 19 L. R. A. 467; and *Gindrat v. 48 L. R. A.*

Western Railway of Alabama (Ala.) 19 L. R. A. 839.

For parol gift as basis of adverse possession, see *Schafer v. Hauser* (Mich.) 35 L. R. A. 833, and note.

cupied the property continuously for more than twenty years before the action was commenced; that the parol transfer of the property from Skoczek to Budzisz, and the entry by the latter under the former pursuant thereto, made the adverse possession thereof exclusive and uninterrupted from the time possession was taken by Skoczek. In accordance therewith a verdict was directed in favor of defendants, upon which the judgment appealed from was rendered.

Messrs. Van Dyke & Van Dyke, & Carter, for appellant:

Discretion to permit amendment must be the exercise of a sound legal discretion under all the circumstances of the case, and not a mere whim or caprice. And it should only be granted when, under all the circumstances, it is reasonable that such discretion should be exercised, and then only upon such terms as, under all the circumstances, shall be just.

Smith v. Dragert, 61 Wis. 222, 21 N. W. 46; *Eldred v. Oconto Co.* 30 Wis. 206; *Fogarty v. Horrigan*, 28 Wis. 142; *Meade v. Lawe*, 32 Wis. 261; *Dehnel v. Komro*, 37 Wis. 336; *Plumer v. Clarke*, 59 Wis. 646, 18 N. W. 467.

The original owner, not the disseisor, is favored.

No presumptions will be indulged in for his benefit, but all presumptions are in favor of the true owner.

Sydnor v. Palmer, 29 Wis. 226; *Ryan v. Schuartz*, 94 Wis. 403, 69 N. W. 178.

Possession is an "interest" in lands, and a sufficient "interest" therein to entitle the possessor to maintain ejectment against an intruder into his possession.

Bates v. Campbell, 25 Wis. 613; *Howard v. Easton*, 7 Johns. 205; *Moore v. Moore*, 21 Me. 350.

A judgment against a person in possession becomes a lien, and his possession may be sold on execution.

Jackson ex dem. Cary v. Parker, 9 Cow. 80.

A sale and transfer of such possession is most certainly, therefore, a sale and transfer of an "interest" in lands, and is included within the statutory prohibition.

Graeven v. Dieves, 68 Wis. 317, 31 N. W. 914; *Elofrson v. Lindsay*, 90 Wis. 203, 63 N. W. 89; *Ablard v. Fitzgerald*, 87 Wis. 516, 68 N. W. 745; *Dhein v. Beuscher*, 83 Wis. 316, 53 N. W. 551; *Sheppard v. Wilmott*, 79 Wis. 15, 47 N. W. 1054; *Sydnor v. Palmer*, 29 Wis. 252; *Pepper v. O'Dowd*, 39 Wis. 548; *Stevens v. Brooks*, 24 Wis. 326; *McEvoy v. Loyd*, 31 Wis. 142; *Furlong v. Garrett*, 44 Wis. 111; *Fuller v. Worth*, 91 Wis. 406, 64 N. W. 995; *Bailey v. Wells*, 8 Wis. 141, 76 Am. Dec. 233.

On motion for rehearing.

If Skoczek had, at the time he sold and transferred his possession to Budzisz, any estate of any kind, or any interest of any extent, great or little, in the land, which he says he sold to Budzisz, a parol transfer or surrender or assignment of such estate or interest is within the very letter of the prohibition of the statute.

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Bare possession is an estate or an interest in lands.

Bates v. Campbell, 25 Wis. 613.

Bare possession constitutes the first degree of title.

3 Greenleaf's *Cruse*, Real Prop. p. 312; *Swift v. Agnes*, 33 Wis. 239; *Link v. Doerfer*, 42 Wis. 394, 24 Am. Rep. 417; *Hammer v. Hammer*, 39 Wis. 187; *Hacker v. Horlemus*, 74 Wis. 23, 41 N. W. 965; *Elofrson v. Lindsay*, 90 Wis. 206, 63 N. W. 89; *Jones v. Bland*, 112 Pa. 176, 2 Atl. 541; *Hutchinson v. Perley*, 4 Cal. 33, 60 Am. Dec. 578; *Winans v. Christy*, 4 Cal. 70, 60 Am. Dec. 597; *Adams, Ejectment*, p. 249; *Bequette v. Caulfield*, 4 Cal. 278, 60 Am. Dec. 615; *Richardson v. McNulty*, 24 Cal. 348; *Hubbard v. Barry*, 21 Cal. 325; *Bird v. Lisbros*, 9 Cal. 1, 70 Am. Dec. 617; *Plume v. Seward*, 4 Cal. 94, 60 Am. Dec. 599; *Jones v. Nunn*, 12 Ga. 472; *Tyler, Ejectment*, 70.

Possession of land is prima facie evidence of title, and is sufficient evidence of title as against all persons, but one who can show either a prior possession or a better title.

Newell, Ejectment, p. 433; *New York v. Carleton*, 22 Jones & S. 555, 113 N. Y. 284, 21 N. E. 55; *Allen v. Rivington*, 2 Wms. Saund. 111a; *Doe ex dem. Smith v. Webber*, 1 Ad. & El. 119; *Asher v. Whitlock*, L. R. 1 Q. B. 1; *Smith ex dem. Teller v. Lorillard*, 10 Johns. 338; *Novion v. Hallett*, 16 Johns. 327; *Jackson ex dem. Murray v. Denn*, 5 Cow. 200; *Whitney v. Wright*, 15 Wend. 171; *Carleton v. Darcy*, 90 N. Y. 566.

In an action of ejectment, proof or prior possession by the plaintiff, claiming to be the owner in fee, is prima facie evidence of ownership and seisin, and, although the lowest kind of evidence, it is sufficient to authorize a recovery, unless the defendant shows a better title.

Anderson v. McCormick, 129 Ill. 311, 21 N. E. 803; *Jackson ex dem. Murray v. Hazen*, 2 Johns. 22; *Jackson ex dem. Duncan v. Harder*, 4 Johns. 202, 4 Am. Dec. 262; *Robinoe v. Doe ex dem. Colwell*, 6 Blackf. 86; *Day v. Alverson*, 9 Wend. 223; *Doe ex dem. Herbert v. Herbert*, 1 Ill. 278, 12 Am. Dec. 192; *Mason v. Park*, 4 Ill. 533; *Davis v. Easley*, 13 Ill. 198; *Brooks v. Bruyn*, 18 Ill. 539; *Keith v. Keith*, 104 Ill. 402; *Hardisty v. Glenn*, 32 Ill. 62; *Bowman v. Wettig*, 39 Ill. 417; *Keane v. Cannone*, 21 Cal. 291, 82 Am. Dec. 738; *Bird v. Lisbros*, 9 Cal. 1, 70 Am. Dec. 617; *Winans v. Christy*, 4 Cal. 70, 60 Am. Dec. 597; *Pratt v. Phillips*, 1 Sneed, 543, 60 Am. Dec. 162; *Jackson ex dem. Stewart v. Town*, 4 Cow. 599, 15 Am. Dec. 405; *Jackson ex dem. Cary v. Parker*, 9 Cow. 84.

One in possession may maintain an action of ejectment on his own demise against such of the defendants as afterward entered upon his possession, without title or authority, but as mere intruders.

McLaurin v. Salmon, 11 B. Mon. 96, 52 Am. Dec. 563; *Den ex dem. Cain v. McCan*, 3 N. J. L. 438, 4 Am. Dec. 384; *Den ex dem. Johnson v. Morris*, 7 N. J. L. 6, 11 Am. Dec. 508; *Jackson ex dem. Duncan v. Harder*, 4 Johns. 202, 4 Am. Dec. 262; *Thompson v.*

Burhans, 61 N. Y. 68; *Miller v. Long Island R. Co.* 71 N. Y. 383; *New York v. Carleton*, 113 N. Y. 284, 21 N. E. 55; *Risch v. Wiseman* (Or.) 59 Pac. 1111; *Carleton v. Darcy*, 90 N. Y. 573; *Jackson ex dem. Murray v. Hazen*, 2 Johns. 22; *Whitney v. Wright*, 15 Wend. 171; *Hammond v. Doty*, 184 Ill. 246, 56 N. E. 371; *Griffin v. Spencer*, 6 Hill, 525; *Smith ex dem. Teller v. Lorillard*, 10 Johns. 356; *Day v. Alverson*, 9 Wend. 223; *Riverside Co. v. Townshend*, 120 Ill. 9, 9 N. E. 65; *Ricard v. Williams*, 7 Wheat. 59, 5 L. ed. 398; *Goodwin v. Scheerer*, 106 Cal. 690, 40 Pac. 18; *Leonard v. Flynn*, 89 Cal. 543, 26 Pac. 1099; *Hill v. Draper*, 10 Barb. 458; *Christy v. Scott*, 14 How. 292, 14 L. ed. 426; *Turner v. Aldridge*, McAll, 229, Fed. Cas. No. 14,249; *Green v. Jordan*, 83 Ala. 220, 3 So. 513; *Louisville & N. R. Co. v. Philyaw*, 88 Ala. 264, 6 So. 837; *Benefeld v. Albert*, 132 Ill. 665, 24 N. E. 634; *Hollenback v. Ess*, 31 Kan. 88, 1 Pac. 275; *Douglass v. Ruffin*, 38 Kan. 530, 16 Pac. 783; *Redden v. Tefft*, 48 Kan. 302, 29 Pac. 157; *Jackson v. Boston & W. R. Corp.* 1 Cush. 575; *McRoberts v. Bergman*, 132 N. Y. 73, 30 N. E. 281; *Moore v. Moore*, 21 Me. 350; *Rader v. Allen*, 27 Or. 344, 41 Pac. 154; *Tapscott v. Cobbs*, 11 Gratt. 172; *Wilson v. Palmer*, 18 Tex. 592; *Pratt v. Phillips*, 1 Sneed, 543, 60 Am. Dec. 162; *Adams v. Guice*, 30 Miss. 397.

A parol contract to buy or sell such possession is within the statute of frauds, and void.

Howard v. Easton, 7 Johns. 205.

Messrs. Fiebing & Killilea and M. C. Krause, for respondents:

Although the adverse possession must be continuous and uninterrupted, it is immaterial whether it be held for the entire period by one person or by several persons in succession, provided there is a "unity of possessions," or, in other words, a privity of estate or title.

1 Elliott, Gen. Pr. § 297, p. 371; *Woolman v. Ruehle*, 100 Wis. 31, 75 N. W. 425.

Any amendment of the answer was permissible, provided the facts introduced constitute a defense.

Brayton v. Jones, 5 Wis. 117; *Brown v. Bosworth*, 62 Wis. 542, 22 N. W. 521; 4 Wait, Pr. p. 652.

The weight of authority is against any discrimination against defenses denominated unconscionable; and where a party asks leave to amend his answer by setting up the statute of limitations the amendment will generally be allowed.

Gilchrist v. Gilchrist, 44 How. Pr. 317; *Bowman v. DePeyster*, 2 Daly, 203; *Sheldon v. Adams*, 41 Barb. 54, 18 Abb. Pr. 406, 27 How. Pr. 179; *Bank of Kinderhook v. Gifford*, 40 Barb. 659; *Union Nat. Bank v. Bassett*, 3 Abb. Pr. N. S. 359; *McQueen v. Babcock*, 3 Keyes, 428, 3 Abb. App. Dec. 129; *Catlin v. Gunter*, 11 N. Y. 368; *Smith v. Dragert*, 61 Wis. 222, 21 N. W. 46; *Orton v. Noonan*, 25 Wis. 672; 13 Enc. Pl. & Pr. pp. 186, 189, 190, 209; *Spring v. Gray*, 5 Mason, 505, Fed. Cas. No. 13,259; *Knox v. Cleveland*, 13 Wis. 254; *Sprecker v. Wakeley*, 11 Wis. 432; *Hill v. Kricke*, 11 Wis. 48 L. R. A.

442; 7 Wait, Act. & Def. 308; *De Beauvoir v. Owen*, 5 Exch. 166; 5 Field, Lawyers' Briefs, p. 347; *Way v. Hooton*, 156 Pa. 8, 26 Atl. 784; *Bird v. Sellers*, 113 Mo. 590, 21 S. W. 91; *Nelson v. Brodhack*, 44 Mo. 596, 100 Am. Dec. 328.

The several possessions of successive disseisors may be "tacked" together so as to make a continuous possession, where there is privity of estate or title; the privity required to constitute continuous adverse possession may be effected by any conveyance, agreement, or understanding which has for its object a transfer of the rights of the original entry, and "no paper evidence of a transfer of possession is necessary when the property is held under the claim of the first entryman, but the continuity may be shown by parol."

Allis v. Field, 89 Wis. 334, 62 N. W. 85; *Ryan v. Schwartz*, 94 Wis. 411, 69 N. W. 178; 2 Ballard, Real Prop. § 25; Sedgw. & W. Trial of Title to Land, p. 593; 6 Wait, Act. & Def. p. 455; 1 Wood, Limitations of Actions, § 271; 2 Wood, Limitations of Actions, § 431; Newell, Ejectment, § 53, p. 740; *Ramsay v. Glenny*, 45 Minn. 401, 48 N. W. 324; *Vandall v. St. Martin*, 42 Minn. 166, 44 N. W. 625; *McNeely v. Langan*, 22 Ohio St. 32; *Fanning v. Willcox*, 3 Day, 258; *Smith v. Chapin*, 31 Conn. 531; *Shannon v. Kinny*, 1 A. K. Marsh. 3, 10 Am. Dec. 705; *Chilton v. Wilson*, 9 Humph. 399; *Cunningham v. Patton*, 6 Pa. 355; *Scheetz v. Fitzwater*, 5 Pa. 126; *Overfield v. Christie*, 7 Serg. & R. 173; *Johnson v. Nash*, 15 Tex. 419; *Alexander v. Pendleton*, 8 Cranch, 462, 3 L. ed. 624.

It is not necessary to the running of the statute that possession be held under color of title. Where there is possession of the requisite character, the question whether there is color of title or not is wholly immaterial.

Paine v. Skinner, 8 Ohio, 167; *Yetzer v. Thoman*, 17 Ohio St. 130, 91 Am. Dec. 122.

As to third persons against whom the possession is held adversely, if such transfers of possession were in fact made, it is immaterial whether they were effected by deed or devise, or by an agreement either written or verbal.

Davock v. Nealson, 58 N. J. L. 21, 32 Atl. 675; *McNeely v. Langan*, 22 Ohio St. 33; *Weber v. Anderson*, 73 Ill. 439; *Menkens v. Blumenthal*, 27 Mo. 198; *Cunningham v. Patton*, 6 Pa. 357; *Scheetz v. Fitzwater*, 5 Pa. 120; *Smith v. Chapin*, 31 Conn. 530; *Crispen v. Hamman*, 50 Mo. 544; *Shuffleton v. Nelson*, 2 Sawy. 545, Fed. Cas. No. 12,822; *Alexander v. Pendleton*, 8 Cranch, 462, 3 L. ed. 624; *Vandall v. St. Martin*, 42 Minn. 163, 44 N. W. 625.

Marshall, J., delivered the opinion of the court:

Two questions are presented for consideration: (1) Did the trial court err in allowing the amendment, pleading title by adverse possession? (2) Did the possession of the second occupant, under the circumstances, continue the possession of his predecessor so

as to satisfy the statutory call for an uninterrupted twenty years' continuous adverse possession?

1. Section 2830, Rev. Stat., says: "The court may, upon the trial . . . in furtherance of justice and upon such terms as may be just, amend any process pleading . . . by correcting . . . a mistake in any other respect, or by inserting other allegations material to the case." The power to grant amendments under the statute is very broad, and its exercise rests solely in the sound discretion of the trial court, whose decision cannot be disturbed except for a clear abuse of judicial power. *Phanis Mut. L. Ins. Co. v. Walrath*, 53 Wis. 669, 10 N. W. 151; *Smith v. Dragert*, 61 Wis. 222, 21 N. W. 46; *Morgan v. Bishop*, 61 Wis. 407, 21 N. W. 263. The only limitation upon the power of the court, in cases where it may be exercised under any circumstances, and it is conceded this case is within the statute, is that it must be in furtherance of justice. *Smith v. Smith*, 19 Wis. 522; *Morgan v. Bishop*, 61 Wis. 407, 21 N. W. 263. That is, the power must be exercised to that end, and there must be some reasonable ground for saying that such was the motive. The only condition of the exercise of the power is that it must be on such terms as may be just in the judgment of the trial court. Necessarily, there is no rule by which the presence of the statutory motive for the exercise of the power, or the sufficiency of the condition attached to it, can be tested, except that the act and the condition must be within the bounds of reason as applied to the particular case; and there is no rule on appeal by which to test the judgment of the trial court, except that it must have some reasonable ground to support it in view of the facts, and the rule that the legal presumption is that it has such ground till the contrary is made to affirmatively appear.

What has been said, with the brief reference to the facts upon which the amendment was allowed, will furnish a basis for a right conclusion regarding the question presented.

The defendants were evidently poor people, unacquainted with legal matters. The failure to plead the defense of the statute of limitations was the mistake of their attorney. After the case had been pending for considerably more than a year, defendants concluded that their interests required the employment of other attorneys, and they acted accordingly, resulting in the substitution, for the attorney who interposed the answer, of those who now represent them. The substitution took place April 15, 1899. Three days thereafter the amended answer was drawn. The motion for leave to file it was heard without objection for want of notice, and was granted without objection, except that "the defense of the statute of limitations cannot be set up by amendment," and that the amendment, "under the circumstances, is not permissible." We take it that the language of the objection, "the amendment, under the circumstances, is not permissible," was merely explanatory of the

language, "the statute of limitations cannot be set up by amendment." So it will be seen that the only objection raised to the amendment was want of power in the court to permit it. All other objections were in effect waived. Counsel for appellant now concedes that the court had ample power in the premises. They could not seriously contend otherwise, since it has been so held even in tax-title cases, where a much more stringent rule prevails than in cases like this, even after a reversal on appeal. *Morgan v. Bishop*, 61 Wis. 407, 21 N. W. 263; *Smith v. Dragert*, 65 Wis. 507, 27 N. W. 317.

But it is said the court exceeded its discretionary power by granting the amendment without terms, attention being called to *Morgan v. Bishop*, where there was a reversal on that ground, and *Smith v. Dragert*, 65 Wis. 507, 27 N. W. 317, where affirmance was grounded on the fact that terms of the amendment were imposed. Both cases differ materially from this, in that, after a failure on one trial by a reversal in this court, a new defense was interposed by amendment. It was in regard to that situation that Mr. Justice Lyon in the *Dragert Case* said, the general rule, in ordinary cases, is considered to be that the party amending his pleading will be required to pay all taxable costs up to the time of granting leave to amend, and motion costs, and that such is the rule where a new defense is set up for the purposes of a new trial, as in this case.

The statute does not, under all circumstances, require the imposition of terms as a condition of granting leave to amend a pleading. The whole subject, as to the justice of the amendment, and whether it shall be granted upon condition and if so what condition, is left to the sound discretion of the trial judge. The imposition of terms has a twofold object: The infliction of a penalty for the negligence requiring a remedy by the amendment; and to give to the adverse party an equivalent for the injury to him by delay or increased expense because of the amendment. Where there is neither a reason for the infliction of a penalty, nor prejudice to the adverse party of any kind to be compensated for,—even the calling of adverse counsel into court for the purposes of the amendment, as was the situation in this case,—it cannot be said on appeal that the failure of the trial court to impose terms was either an abuse of discretion or a violation of any rule of law. *Schaller v. Chicago & N. W. R. Co.* 97 Wis. 31, 71 N. W. 1042; *Carroll v. Fethers*, 102 Wis. 436, 78 N. W. 604.

2. The main contention made by appellant's counsel is that the parol transfer by the first to the second occupant of the property, and his succession in possession under it, was not effectual to unite the two possessions into one continuous uninterrupted possession referable to the first entry, and existing thereafter for twenty years. We are referred to § 2302, Rev. Stat., which provides that "no estate or interest in lands, other than leases for a term not exceeding one

year . . . shall be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing." It is said by way of emphasizing or in support of such contention, that the learned circuit judge expressed a personal opinion that, under such section, lands acquired by adverse possession cannot be transferred by parol; but a judicial opinion to the contrary, in harmony, as he supposed, with the decisions of this court. If that be so, we are compelled to say the learned judge was wrong as to the holdings of this court, and counsel in error in supposing there is any such difficulty as the trial court supposed in the way of his recovering in this case. Such errors spring, not only from a misapprehension of the decisions of this court, but the effect of an act creating privity between successive adverse possessors of property as regards the statute of limitations.

The transfer of property acquired by adverse possession is one thing, and the preservation of a condition of property as to adverse occupancy, which if permitted to continue long enough will divest the actual owner thereof of title and vest it in the adverse occupant, is quite another thing. The two things should not be confused, otherwise the statute referred to will be erroneously applied.

Title to property, acquired by adverse possession, is of the same nature as any other, and either is plainly governed by the statute as regards the manner of its transfer; but the mere fact that a person is so circumstanced as regards realty, as to dispossess the owner thereof adversely, does not, till the expiration of the statutory limitation upon the right of such owner to reclaim that possession, vest any estate in lands, within the meaning of § 2302, in such possessor, or the substitution of another in his place, to continue the dispossession of the true owner, the transfer of any such estate. Section 2302, and § 4207, Rev. Stat., the limitation statute, are entirely independent of each other; so the essential premise upon which the argument of the learned counsel for appellant is based does not exist.

We come down to the question of whether privity can be created between successive possessors of realty, so that if two possessions blended into one, continued for a sufficient length of time, will satisfy § 4207, Rev. Stat., which provides that "no action for the recovery of real property or the possession thereof, shall be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor was seised or possessed of the premises in question within twenty years before the commencement of such action." It will be noted that the plain reading of the statute, as this court has heretofore decided, is that actual occupancy of the land to the exclusion of the true owner for the statutory period is all that is necessary to preclude such owner from thereafter re-

claiming the property. *Lampman v. Van Alstyne*, 94 Wis. 417, 69 N. W. 171; *Wilkins v. Nicolai*, 99 Wis. 178, 74 N. W. 103; *Wollman v. Ruchle*, 100 Wis. 31, 75 N. W. 425; *Meyer v. Hope*, 100 Wis. 123, 77 N. W. 720. There are many other decisions, in this state and elsewhere, to the same effect, but they need not be cited here inasmuch as this court has so recently, several times, on full consideration of the subject, construed the statute.

Is a paper transfer, evidencing a change of possession by succession, necessary to blend the first possession into the second,—tack them to each other, as it is called? In that, we adhere to what was said by the court, speaking by Mr. Justice Pinney, in *Allis v. Field*, 89 Wis. 327, 62 N. W. 85, and *Ryan v. Schwartz*, 94 Wis. 403, 69 N. W. 178, to the effect that, though the possession of several distinct occupants of land, lasting for a continuous period of twenty years, cannot be united to satisfy the limitation statute, successive possessions, each reaching to and uniting with the one that follows it, by privity between the occupants, so as to render the possession of the property continuous from the first entry to the end of the period of twenty years, satisfies the statute, and a parol transfer of possession by one to another, as the former goes out of and the latter goes into possession, satisfies the essential of privity to tack the possessions together.

The authorities all agree that privity between successive possessors is all that is necessary to render them continuous, if the possession be in fact actual and adverse. That privity may be created in any way that will prevent a break in the adverse possession and refer the several possessions to the original entry. It may be created by lease, as between landlord and tenant, or by descent by operation of law from ancestor to heir, or by conveyance, either by parol or otherwise, from vendor to vendee. 1 Am. & Eng. Enc. Law, 2d ed. p. 842, and cases cited in the notes; *McNeely v. Langan*, 22 Ohio St. 32; *Haynes v. Boardman*, 119 Mass. 414; *Witt v. St. Paul & N. P. R. Co.*, 38 Minn. 122, 35 N. W. 862; *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678; *Vance v. Wood*, 22 Or. 77, 29 Pac. 73; *Crispen v. Hannagan*, 50 Mo. 536; *Weber v. Anderson*, 73 Ill. 439; *Faloon v. Simshauser*, 130 Ill. 649, 22 N. E. 835; *Menkens v. Blumenthal*, 27 Mo. 198. The above cases, many of which are referred to in the briefs of counsel, are but a few of the authorities that might be cited to support the doctrine stated. It seems to be conceded by appellant's counsel that many of such authorities are directly contrary to their position, but claim is made that they do not apply by reason of the statute (§ 2302), which, as we have indicated, does not apply to the facts of this case.

Only a few authorities that can be found are out of line with those cited. They are in harmony with elementary principles as laid down in the text-books. The doctrine is found as clearly stated perhaps, as anywhere, in 2 Ballard, Real Prop. § 25.

cited by respondents' counsel, the following language being used: "Successive possessions may be tacked together so as to form a continuous and uninterrupted possession for the essential period of time. There must be a privity existing between the parties transferring the possession. Such possession may begin in parol without deed or writing and may be transferred from one occupant to another by parol bargain and sale accompanied by delivery. All that the law requires is continuity of possession where it is actual; and this continuity and connection may be effected by any conveyance or understanding which has for its object a transfer of the rights of the possessor or of his possession, when accompanied by an actual delivery of the possession." The doctrine is stated in 2 Pingrey, Real Prop. § 1193, thus: "Continuity is an indispensable element of adverse possession; but several possessions may be tacked together where they can be referred to the original entry. No paper evidence of a transfer of possession is necessary when the holding is under claim of the first entryman."

The discussion of this subject and citation of authorities might be continued to great length. It will be noted that in every treatment of the matter, whether by text writers or in judicial opinions, it is said that all that is necessary, where there is continuity of possession in fact, to connect the several parts of it; where there are such parts, so as to blend them into one term, continuous from first to last, is that there be privity between the persons as one succeeds to the other. Privity in such a case is the same as in any other, and it may be created in the same way. It is merely a succession of relationship in the same right to the same thing. 1 Greenl. Ev. §§ 189, 523; *Hart v. Moulton*, 104 Wis. 349, 80 N. W. 599. All that is necessary to privity between successive occupants of property, and in regard thereto, is that one receive his possession from the other by act of such other or by operation of law.

If a person, not the true owner, but hostile to him, be in actual possession of a part of a larger tract of land, under a deed describing the whole, in law he is in actual possession of the whole for the purposes of the statute of limitations, though as to a part the possession be in fact only constructive. In that situation it is said, and it is the law, that the adverse possession cannot extend beyond the calls of the deed, meaning thereby that actual possession by construction cannot be extended beyond the calls of the written instrument by virtue thereof; but if land be actually occupied beyond the calls of the deed, hostile to the true owner, the written instrument does not preclude such occupancy from being adverse. The occupancy does not refer to the deed, but to the fact itself and its hostile character. There was such an occupancy in *Wollman v. Ruckle*, 104 Wis. 603, 80 N. W. 919, and the point was directly decided in *Bishop v. Bleyer* (Wis.) 81 N. W. 413. The full legitimate effect was given in those cases to 48 J. R. A.

the rule that the possession under a deed cannot be extended beyond its calls. Full effect was also given to the presumption that a person so circumstanced only intends to claim what his deed calls for, and the further presumption that the land, as to which the occupant has no title, he holds consistent with the title of the true owner. The first presumption, however, was rebutted by clear proof that the occupant claimed that the disputed tract was in fact within the calls of his deed. The second was rebutted by clear proof that the possession was actual and hostile to the true owner. Such presumptions yield to proof, like any other presumptions of fact, or facts otherwise established. It is the facts, when established, that govern.

Circumstances similar to those last above described were presented in *Graeven v. Dieves*, 68 Wis. 317, 31 N. W. 914; *Dhein v. Beuscher*, 83 Wis. 316, 53 N. W. 551; *Ab-lord v. Fitzgerald*, 87 Wis. 516, 58 N. W. 745; *Sheppard v. Wilmott*, 79 Wis. 15, 47 N. W. 1054; *Elofrson v. Lindsay*, 90 Wis. 203, 63 N. W. 89; *Fuller v. Worth*, 91 Wis. 406, 64 N. W. 995; and *Ryan v. Schwartz*, 94 Wis. 403, 69 N. W. 178. The first of such cases ruled the others. It was there held that adverse possession of the property by a person, beyond the calls of his deed, did not unite with a similar possession held by his vendee. But it will be noted that there is nothing in the opinion indicating that a written transfer of the outside property was a statutory requisite to privity between two successive possessions. The case turned on rules of evidence, applied with a severity, it must be admitted, almost precluding, in such cases, proof of the fact of privity other than by a written transfer. The *Graeven Case*, as will be seen, was misapprehended and extended by the other cases cited. However, the idea now suggested, that a written transfer is a statutory requisite to privity under § 2302, was not thought of.

Such stress was laid, in the *Graeven Case*, on the presumption that occupation by one of premises not his own is in subordination to the title of the true owner, and the rule that adverse possession must be strictly construed and that every reasonable presumption (it will be noted that in some of the cases the word "reasonable" was left out in stating the rule) is to be made in favor of the true owner,—that such presumptions resisted the logic of facts that would seem to leave no room for a conflicting reasonable inference. Yet it is plain that the court did not there, or in the more recent cases which followed, deem the fact of privity entirely closed to proof except by a written transfer. The case did not go upon the theory that paper evidence to create privity between adverse possessions is necessary, but upon the theory that adverse possession and all facts tending to establish it must be construed so strictly in favor of the true owner that succession to actual possession of lands, a part of which was transferred by deed, though the part within and that without the calls of the instrument constitute one entire prop-

erty, will not, for the purposes of adverse possession, overcome the presumption, arising from the limitations of the deed, that the vendor only transferred to his vendee possession of the land within its calls. That is out of harmony with *Wollman v. Ruehle*, 104 Wis. 603, 80 N. W. 919, and many other cases in other courts that might be cited. It is out of harmony with the statute that continuous disseisin for twenty years turns the presumptions against the true owner, and repeated decisions in recent years in harmony with the statute. *Wilkins v. Nicolai*, 99 Wis. 178, 74 N. W. 103; *Meyer v. Hope*, 101 Wis. 123, 77 N. W. 720; *Wollman v. Ruehle*, 104 Wis. 603, 80 N. W. 919. That this court did not intend to hold that a paper transfer is essential to privity between possessions for the purposes of the statute of limitations is clear. It has not been so understood, as indicated in *Ryan v. Schwartz*, 94 Wis. 403, 69 N. W. 178, and *Allis v. Field*, 89 Wis. 327, 62 N. W. 85, where *Graeven v. Dieves* and the cases ruled by it were referred to as authority, and it was distinctly said that a paper transfer is not essential to the tacking of adverse possessions together.

In *Dhein v. Beuscher*, 83 Wis. 316, 53 N. W. 551, speaking of a chain of title by successive possessions, the land being beyond the calls of the paper transfer, it was said, "The deeds fail to show privity." That was obviously correct. The deeds of themselves did not show privity to any land except that within the calls of the deed, but that did not prevent the fact, if it were a fact, that the property was bought as a whole, and there being no actual succession of possession pursuant to the purchase and hostile to any other right, being of sufficient probative power to establish privity. The case most clearly out of harmony with the idea that *Graeven v. Dieves* only laid down a rule of evidence not intended to preclude a parol creation of privity between possessions, and clearly inconsistent with the idea that the essential of privity can be created by parol, accompanied by actual succession in possession, is *Ablad v. Fitzgerald*, 87 Wis. 516, 58 N. W. 745. There Mr. Justice Newman said, speaking for the court, and to the vital point in the case: "The defendant, too, is without a chain of paper title. It does not appear that he has a deed conveying the disputed strip to him. The disputed strip is outside the 40 acres. Without such a conveyance it is difficult to see how he can connect his own possession to the possession of his predecessor so as to make the adverse possession continuous. . . . Without a deed of the strip it seems that the defendant can claim no right to the land founded upon the adverse possession of his grantor. This seems to be the effect of *Graeven v. Dieves*, 68 Wis. 317, 31 N. W. 914." Language to the same effect was used in *Elofrson v. Lindsay*, 90 Wis. 203, 63 N. W. 89, and *Fuller v. Worth*, 91 Wis. 406, 64 N. W. 995, but the error in those cases, without directly overruling them, was largely corrected in *Ryan v. Schwartz*, 94 Wis. 403, 69 N. W. 178, and 48 L. R. A.

such error expressly discarded in *Wollman v. Ruehle*, 104 Wis. 603, 80 N. W. 919, and *Bishop v. Bleyer* (Wis.) 81 N. W. 413, thereby bringing the law into harmony with what was really intended in the *Graeven Case*, and softening the rule of evidence so as to harmonize with the generally accepted doctrine on the question and the statute, both of which had been departed from.

Further discussion of the subject is unnecessary. Sufficient has been said to bring out clearly the true doctrine as understood by the court, that a paper transfer is not necessary to connect adverse possessions together; that privity, successive relationships to the same thing, is the connecting link: that a paper transfer is but a means of establishing the fact of privity, but not the only evidence; that the presumption, that a person in possession of land who conveys part of it and transfers possession of the whole intended to transfer only that within the calls of his conveyance, and the presumption that a person in possession, not as owner, holds subject to the true owner, are mere rebuttable presumptions of fact that yield to any clear relevant evidence to the contrary, whether it be written, or inferential from facts established by positive evidence. *Meyer v. Hope*, 101 Wis. 123, 77 N. W. 720.

We might almost call the roll of the courts on that doctrine. The Missouri court said. We know of no rule that requires written evidence to establish the fact of privity. *Menkens v. Blumenthal*, 27 Mo. 198. The Illinois court said that where the owner, in possession of a strip of land, together with adjoining land, conveys the latter and transfers possession of the whole, and the grantee takes possession of the property as an entirety, the possession of that outside the calls of the deed being actual in both possessors, the presumptions in favor of the true owner and as to the limitations of the deed give way to the facts, and privity in adverse possession is established. *Faloon v. Simshauser*, 130 Ill. 649, 22 N. E. 835. The Alabama court said that, where a person holds land adversely, outside the calls of his deed, claiming a continuity of such possession from his grantor, the presumption that the latter only intended to create privity to the extent of the calls of the deed may be overcome by proof that the former obtained possession of the property from the latter as a part of the land purchase, because a paper transfer to continue adverse possession in privity is not necessary. *Dothard v. Densen*, 72 Ala. 541. To the same effect, are *Erck v. Church*, 87 Tenn. 575, 4 L. R. A. 641, 11 S. W. 794, and *Kendrick v. Latham*, 25 Fla. 819, 6 So. 871. A few cases, it is conceded, are out of line with the doctrine stated.

Much difficulty experienced in regard to the law of title by adverse possession will be avoided by referring and adhering to the statutes where they cover the subject, and not treating rules of evidence as rules of law. The following recapitulation of principles necessarily or incidentally referred to in this opinion may be an aid to that end.

(1) Adverse possession should be strictly construed, all reasonable presumptions being made in favor of the true owner, including the presumption that actual possession is subordinate to the right of such owner; but such strict construction and such presumptions are subject to the following limitations.

(2) Good faith by the adverse claimant as to his right at the instant of entry, or during the limitation period, is not necessary, because the statute, by its terms, only requires actual, continuous, exclusive possession under such circumstances as to wholly dispossess the true owner both actually and constructively.

(3) Actual, continuous, exclusive possession for the statutory period, unexplained, displaces the presumptions in favor of the true owner, and creates a presumption of fact that such possession, and the commencement of it, were characterized by all the requisites to title by adverse possession, and that the title of the adverse claimant is perfect. The statute so provides.

(4) The letter of the statute requires only such adverse possession as will continuously exclude the true owner from possession, whether actually or constructively, during the entire limitation period; that is, so far as the letter of the statute goes, a person in possession can successfully defend such possession against the true owner when he has been entirely excluded from possession for twenty years.

(5) By judicial construction, now a rule of property, the statute does not apply unless the exclusion of the owner from possession has been during the whole period by a single hostile possession, exercised either by one or more persons acting together, or by possessions in succession connected by privity between the actors.

(6) A transfer to connect successive possessions, in conformity to § 2302, Rev. Stat., is not essential to the privity necessary to continue the mere dispossessed condition of the true owner.

(7) Privity denotes merely a succession of relationship to the same thing, whether created by deed or by other act, or by operation of law. If one, by agreement, surrender his possession to another, and the acts of the parties are such that the two possessions actually connect, the latter commencing at or before the time the former ends, leaving no interval for the constructive possession of the true owner to intervene, such two possessions are blended into one, and the limitation period upon the right of such owner to reclaim the land is thereby continued, because, by the statute, as construed, the only essential to such continuity is that the dispossession of the true owner be actually continued.

(8) The calls of a deed, when title by adverse possession is claimed, limit the right as a matter of law:

(a) Where the ten-year statute relating exclusively to claims of title founded on written instruments is relied on;

(b) As to the extent which actual possession

of a part will draw to it constructive possession of the whole;

(c) The extent to which title can be claimed by adverse possession under the instrument itself.

(9) The calls of the deed limit the right as a presumption of fact, where a person is in possession of lands outside of but adjacent to and together with lands within the calls of his deed; also where a person, being so circumstanced, by written instrument conveys the lands within such calls to another, and surrenders to such other possession of the whole.

(10) The first presumption last above mentioned yields to clear, relevant evidence showing that the possession outside the calls of the deed was not characterized by any recognition of the true ownership, whether that occur by mistake of boundaries or distinct hostile intention. The second of such presumptions yields to clear evidence that the premises were taken from a predecessor in possession as part of the property purchased, and that the two possessions, so intentionally united, were physically united by the successor going into possession at or before the time his predecessor went out of possession.

The judgment of the Circuit Court is affirmed.

A petition for rehearing having been filed, **Marshall, J.**, on April 27, 1900, handed down the following response:

It is profitable to have a case of this importance, as regards the principles involved, brought to the attention of the court a second time by a motion for rehearing based on a careful study, by eminent counsel for the losing party, of the reasons given for the judgment rendered. That course, if it does not result in any relief for the moving party, will generally bring sharply to notice any error, either of law or fact, or unsoundness of reasoning, in the opinion filed that may otherwise remain uncorrected for a sufficient length of time to cause prejudice to the rights of parties in other litigation. If the reasons for the result first reached stand the close scrutiny of counsel, ever ready to seize upon the slightest weakness in an adverse decision as ground for further proceedings, confidence in the soundness of such decision must be materially strengthened thereby. Such has been the result in this instance.

Counsel for appellant suggest a single point, only, in the opinion of the court, wherein they confidently claim error was committed, and that such error is the very foundation stone of the decision adverse to their client. We said: "The mere fact that a person is so circumstanced, as regards realty, as to dispossess the owner thereof adversely, does not, till the expiration of the statutory limitation upon the right of such owner to reclaim that possession, vest any estate in lands, within the meaning of § 2302, Rev. Stat., in such possessor, or the substitution of another in his place, to continue the dispossession of the true owner, the transfer of any such estate. Sections

Messrs. J. H. Sturdevant & Son and Charles F. Grow, for plaintiff in error:

Standing timber is a part of the real estate, and an oral contract for the sale thereof is void under the statute of frauds.

Lillie v. Dunbar, 62 Wis. 198, 22 N. W. 467.

Plaintiff in error received a bond for a deed, with right to take possession and commence logging said land at once, and went into possession thereunder cutting and skidding logs without knowledge of any claim of defendant in error at least eleven days before the trees in said right of way were cut down, which facts revoked the license of the defendant in error, if any he ever had.

Gamble v. Cook, 106 Mich. 561, 64 N. W. 482; *Ward v. Rapp*, 79 Mich. 469, 44 N. W. 934.

The Lowes, by their contract of sale and giving possession, put it out of their power to further control or dispose of the lands or the timber growing thereon.

Winne v. Ulster County Sav. Inst. 37 Hun. 349; *Cook v. Starns*, 11 Mass. 533; *Wescott v. Delano*, 20 Wis. 514; *Coleman v. Foster*, 1 Hurlst. & N. 37.

A parol license may be revoked by the licensor's appropriation of the land to any use inconsistent with the enjoyment of the licensee, or by other acts which indicate an intention to revoke the license.

13 Am. & Eng. Enc. Law, p. 556; *Bran-deis v. Neustadt*, 13 Wis. 142.

When the defendant in error cut the timber, he was not relying upon any license from the Lowes, but was acting under his contract with the town of Fremont to clear the right of way, and such cutting of timber at any time will not take plaintiff's claimed parol agreement out of the statute of frauds if such cutting is not referable exclusively to such parol contract.

Knoll v. Harvey, 19 Wis. 99.

In order to give the disclosure of a party the character of a privileged communication, it must be made to the attorney acting for the time being in the character of a legal adviser.

Brayton v. Chase, 3 Wis. 456; *Tucker v. Finch*, 66 Wis. 17, 27 N. W. 817; *Cady v. Walker*, 62 Mich. 157, 28 N. W. 805; *Romberg v. Hughes*, 18 Neb. 579, 26 N. W. 351; 1 Greenl. Ev. § 244; 19 Am. & Eng. Enc. Law, p. 143.

Messrs. L. M. Sturdevant and R. F. Kountz, for defendant in error:

A court of equity will enforce specific performance of the contract in question.

Picrepoint v. Barnard, 6 N. Y. 279; *Pratt v. Ogden*, 34 N. Y. 20.

The Lowes might have maintained a replevin for the logs at any time.

Bent v. Hozie, 90 Wis. 625, 64 N. W. 426.

It cannot be contended that this contract of purchase made with Jesse Lowe gave Bruley any title to the land, as upon its face it is only a contract to give a title at a future time upon the payment of a sum of money.

Huddleston v. Johnson, 71 Wis. 339, 37 N. W. 407; *Heath v. Van Cott*, 9 Wis. 522; *Hoile v. Bailey*, 58 Wis. 455, 17 N. W. 322. 48 L. R. A.

His only right to the timber, if any, was a mere license to sever it.

2 Bingham, Real Prop. p. 76; *Dodge v. McClintock*, 47 N. H. 383; *Acystone Lumber Co. v. Kolman*, 94 Wis. 465, 34 L. R. A. 821, 60 N. W. 165.

If the contract was executed by the severing of the timber before it was revoked, the title to the timber cut under the license would vest in the licensee.

Marsh v. Bellew, 45 Wis. 36; *Lillie v. Dunbar*, 62 Wis. 198, 22 N. W. 467.

Garvin was in possession before Bruley had any rights under his contract. Neither Bruley nor the owners of the land could prevent his cutting the timber.

White v. King, 87 Mich. 111, 49 N. W. 518; *Rice v. Roberts*, 24 Wis. 461, 1 Am. Rep. 195.

This court has gone further than most courts in guarding the communications between attorney and client.

Getclaff v. Seliger, 43 Wis. 297; *Foster v. Hall*, 12 Pick. 89, 22 Am. Dec. 400; *Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627; *Moore v. Bray*, 10 Pa. 519; 3 Jones, Ev. § 767.

A written agreement to sell land does not imply a license to cut down trees.

Moores v. Wait, 3 Wend. 104; *Huddleston v. Johnson*, 71 Wis. 339, 37 N. W. 407.

Winalow, J., delivered the opinion of the court:

Examination of the evidence convinces us that the findings of the jury are sufficiently supported by the evidence, and the main question to be decided is whether these findings, in connection with the undisputed facts, justify the judgment rendered. Garvin attempted to purchase the timber by parol, and paid part of the purchase money, and agreed to pay the balance at a future time. While this contract was void under the statute of frauds because it was a contract for the sale of an interest in real estate, it was still effective as a parol license to cut timber, which was good until revoked; and the title to timber cut in reliance upon such license, prior to revocation thereof, would rest in Garvin. *Marsh v. Bellew*, 45 Wis. 36; *Lillie v. Dunbar*, 62 Wis. 198, 22 N. W. 467. So the question simply is whether the license was revoked before Garvin cut the timber and converted it into personal property. There was no revocation by notice. The license had been executed by cutting the timber before any notice of revocation was given. But it is claimed that the written contract of sale of an undivided half of the land made by Bruley with Jesse Lowe December 8, and prior to the cutting of the timber, operated as a revocation of the license *pro tanto*. It is difficult to see how this conclusion can be escaped. A parol license to cut timber on the licensor's land is simply authority to do certain acts upon another's lands. Being founded in personal confidence, it is not assignable, and it is gone if the licensor deed the land to another, or if either party die. *Thomck v. Fiedler*, 91 Wis. 386, 64 N. W. 1030; *Northern P. R.*

Co. v. Paine, 119 U. S. 561, 30 L. ed. 513, 7 Sup. Ct. Rep. 323. The authority is ended by the transfer of the title or by the fact of death, and no notice thereof is necessary. The estate of the licensor is gone, and the licensee's authority to go upon the land necessarily expires with the expiration of the licensor's estate. 1 Sugden, Vendors, 8th Am. ed. p. 177, note 1; 2 Am. Lead. Cas., note to *Prince v. Case*, p. 550. So, had Jesse Lowe deeded one half of the land to Bruley prior to the cutting, instead of making a contract to convey the same, there is no doubt that the license would have been thereby revoked as to an undivided half of the timber. But the contract to convey vested in Bruley the beneficial title to the land and timber, as between him and his grantor, and divested the grantor of all right to dispose of the timber thereafter. In other words, the grantor's power over the timber was gone. So the same condition which terminates the license in case of transfer by deed is present in case of a valid contract of sale, and the effect upon the unexecuted license must be the same. It is true that in the present case the title to the timber was by the contract reserved in the grantor until the purchase money should be fully paid. But this reservation of title was simply to secure the payment of the purchase money. The contract provided in express terms that Bruley should enter on the land and cut and manufacture the timber, and, upon payment of the purchase price, should receive a warranty deed of the property. The reservation of title in the timber simply amounted to a mortgage security, and gave no right to Lowe to dispose of the timber to others, or do anything with it save to resort to it to enforce payment of the purchase money. We conclude that, so far as the undivided half of the timber formerly owned by Jesse Lowe is concerned, Garvin's license was terminated prior to the cutting thereof, and hence that Bruley became the owner of that half. As to the other half of the timber, there was no valid contract to convey the same made before the timber was cut; and, the jury having found that no notice of revocation of the license was given prior to the cutting, the license was fully executed prior to the revocation, and Bruley acquired no title thereto.

One question arises upon the rulings on evidence. The plaintiff in error (defendant below) called as a witness Judge R. B. Salter, the county judge of Clark county, and a member of the bar, and endeavored to prove a conversation had by him with Garvin upon a railway train in December, 1896, with reference to the rights in the timber in ques-

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tion. This testimony was ruled out, upon objection upon the ground that it was a private communication, under § 4076, Rev. Stat. 1898. It appeared by answer to preliminary questions that Judge Salter understood that Garvin stated the facts to him because he knew he (Salter) was an attorney, and would give him an opinion; that a lawsuit was contemplated about the matter; that he gave his opinion to Garvin after hearing his statement; that he supposed Garvin was seeking his advice, but that he was not retained, and received no fee; and that Garvin was not his client. While the question as to the admissibility of this evidence is not free from difficulty, we think the ruling of the court was correct. In order to entitle a client to the statutory privilege, it is not absolutely essential that a fee should be paid, or that there should be an actual retainer. The exclusion of the evidence is founded upon public policy, in the furtherance of justice, to the end that a man may have free and unrestrained communication with his legal adviser. There can be no reasonable doubt that Salter was, for the time being, Garvin's legal adviser. Garvin unquestionably sought him and stated his case to him in his professional capacity, in order to get legal advice thereon. The subject is quite fully treated in the case of *Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627, where a similar conclusion was reached under circumstances almost identical with those now before us. *Crisler v. Garland*, 11 Smedes & M. 136, 44 Am. Dec. 49; 3 Jones, Ev. § 767, and notes.

Some exceptions are taken to portions of the charge. We have examined them, and find no prejudicial error. They are not deemed of sufficient importance to require treatment at length.

Upon the verdict and undisputed facts, Garvin should have had judgment for one half the damages found, to wit, \$44.06. The action being in tort for the recovery of money only, and his rightful recovery being less than \$50, he was not entitled to costs, but the defendant below was. Rev. Stat. 1898, § 2918; *Bugbee v. Lombard*, 94 Wis. 326, 68 N. W. 953.

As to the sum of \$44.06, the judgment is affirmed, and the remainder of the judgment is reversed, and the case is remanded, with directions to allow the plaintiff in error to tax his costs in the trial court, and enter judgment therefor against the defendant in error. The plaintiff in error will be allowed to tax the clerk's fees in this court, and his necessary disbursements for printing, but no other costs in this court are to be taxed.

NORTH CAROLINA SUPREME COURT.

A. M. BASKET *et al.*

v.

John R. MOSS *et al.*, *Appts.*

(115 N. C. 448.)

1. An agreement for expenses and compensation for services to influence or procure appointment to office is void.
2. An injunction may issue against the exercise of the power of sale under a mortgage which is void as against public policy.
3. The rule denying a remedy to a person in *pari delicto* will not prevent equitable relief against the enforcement of the power of sale in a mortgage which is against public policy because it was given in compensation for services to influence or procure appointment to a public office.

(December 27, 1894.)

NOTE.—*Allowing injunction, in favor of party in pari delicto, against enforcing or otherwise proceeding with illegal contract.*

- I. Introductory.
- II. Contracts for assistance in obtaining office.
- III. Contracts as to confederate money.
- IV. Contracts relating to marriage.
 - a. In general.
 - b. Marriage brokerage bonds.
- V. Contracts for illicit intercourse.
- VI. Betting and gambling contracts.
 - a. In general.
 - b. In case of assignment.
 - c. Relief at law generally.
 - d. Judgments.
- VII. Contracts for compounding crimes.
- VIII. Miscellaneous.

I. Introductory.

The main case, to the effect that an injunction may be granted in favor of a person in *pari delicto* against enforcing an illegal contract, is supported by quite a large number of cases,—especially in England,—holding that the public interest will be best subserved by preventing either party from recovering anything from the other under an illegal contract, although the tendency of the later cases in this country seems rather to be to the effect that the best method is to leave both parties entirely without any relief at law or in equity.

The cases very generally hold that where a contract has been executed no relief will be granted to either party. But the courts do not exactly agree as to when the contract is executed, some courts holding that it is executed when a note or deed of trust has been given, and others holding that the contract in such case is executory only.

The cases are quite general in holding that in case of executory contracts equitable relief will be granted if the public interests will be subserved thereby; but there is a lack of uniformity as to what will best subserve such interests. The tendency of the later cases, however, in this country, as has been previously said, seems to be to the effect that the best method is to leave the parties without relief of any kind.

In cases, also, where the illegal contract is broken off by one of the parties before any illegal act has been done, such party is entitled to an injunction against the enforcement of the contract by the other party.

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APPEAL by defendants from a decree of the Superior Court for Vance County restraining the sale until final judgment in a proceeding brought to enjoin the sale of land under a deed of trust and to set aside such deed. *Affirmed.*

The case sufficiently appears in the opinion.

Mr. T. T. Hicks for appellants.

Mr. A. C. Zolliecoffer for appellees.

Clark, J., delivered the opinion of the court:

The public has a right to some better test of the capacity of their servants than the fact that they possess the means of purchasing their offices. The Code (§ 1871) provides: "All bargains, bonds, and assurances, made or given for the purchase or sale

In some cases, also, an injunction has been denied on the ground that there was a sufficient defense at law.

There is also a class of cases where parties are both in fault, but one more than the other; and in this class of cases relief has generally been given. These, however, do not fall within the scope of this note.

II. Contracts for assistance in obtaining office.

The cases seem to be quite general to the effect that the public interest will best be subserved by granting an injunction in such a case.

Thus, in *Law v. Law*, Cas. t. Talb. 140. 3 P. Wms. 391, a perpetual injunction was granted against enforcement of a bond given for procuring a position in the office of the commissioners of excise on the ground of public policy, as such engagements were likely to cause corruption and extortion in office.

In *Hanington v. Du-Chatel*, 1 Bro. Ch. 124, a perpetual injunction was granted against an action on a bond for recommending the obligor for a vacancy to the office of page to his majesty, on the ground that, although such position was not an office within the statute of 5 & 6 Edw. VI., it was a matter of public policy to discountenance the sale of such offices. The claim was also made that the illegality of the contract might have been pleaded at law, but the court, while expressing a doubt on the subject, held that, as the question had never been determined, the injunction should be granted.

And in *Whittingham v. Burgoyne*, 3 Anstr. 900, the payment of money levied under an execution on a judgment upon a draft given for procuring a promotion in the army, was enjoined, the court holding that where one sells his interest to procure another an office of trust or service under the Crown it was a contract of turpitude, and that the fact that the plaintiff was *particeps criminis* did not prevent relief, as public policy requires the interference of the court to check vicious practices.

And in the main case an injunction was granted against the sale of land under a power in a deed of trust given in consideration of the grantee's promise to secure the grantor's appointment as postmaster, the court holding that the deed of trust was void as against public policy and could not be enforced, and that reasons of public policy forbidding such species of corruption were too profound and too important to the public welfare to be evaded by

of any office whatsoever, the sale of which is contrary to law, shall be void." Notwithstanding the office is an office under the United States government, if an action were brought in our courts to recover upon a bond or mortgage given for such consideration, our courts would hold it void. Such agreements are void at common law, as well as by statute. So, also, contracts to procure appointments to office are void (*Mechem*, Pub. Off. § 351), or to resign office in another's favor (*Id.* § 357; *Meacham v. Dow*, 32 Vt. 721; *Graeme v. Wroughton*, 11 Exch. 146). Public offices are public trusts, and should be conferred solely upon considerations of ability, integrity, fidelity, and fitness for the position. Agreements for compensation to procure these tend directly and necessarily to lower the character of the appointments, to the great detriment of the

the simple device of a power of sale. *Shepherd*, Ch. J., dissented, however, on the ground that public policy would be best subserved by leaving both parties where their illegal conduct had placed them.

III. Contracts as to confederate money.

The enforcement of contracts relating to confederate money has also been enjoined in some cases.

Thus, in *Humes v. Ward*, decided in 1860, and cited in *Hale v. Sharp*, 4 Coldw. 279, a sale under a deed of trust to secure confederate treasury notes borrowed, was enjoined.

And *Hale v. Sharp*, 4 Coldw. 275, *supra*, holds that the right of the court to enjoin a sale under such a deed on the ground of public policy is not affected by the fact that an award has been made by arbitrators. In this case the defendant also claimed that the relief should be denied on the ground that the contract was executed, but the court held that it was executory, as it had been executed on one side only.

These decisions were afterwards overruled, in effect, in *Sherfy v. Argenbright*, 1 Helsk. 128, 2 Am. Rep. 690, the court following the decisions of the Federal courts holding that the use of such money under the circumstances was not illegal.

IV. Contracts relating to marriage.

a. In general.

An injunction has been granted in England in several cases of secret agreement relating to marriage.

Thus, in *Gale v. Lindo*, 1 Vern. 475, the collection of a bond given to the obligor's brother to repay money given by him to her to make up her marriage portion was perpetually enjoined at the instance of her executor after her death.

And in *Lamlee v. Hanman*, 2 Vern. 409, an injunction was granted against an action on a bond secretly given by the obligor to his mother just before his marriage, conditioned to pay a specified annuity to her in addition to the annuity mentioned in the son's marriage settlement.

And in *Turton v. Benson*, 1 P. Wms. 490, 2 Vern. 764, Prec. in Ch. 522, 10 Mod. 435, 1 Strange, 240, a perpetual injunction was granted against a bond executed by the obligor just before his marriage without his parents' knowledge, to pay back to his wife's father part of the portion allowed the wife on the marriage, even though such bond had been as-
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public. Hence such agreements, of whatever nature, have always been held void, as being against public policy. *Meguire v. Corcine*, 101 U. S. 108, 25 L. ed. 899; *Providence Tool Co. v. Norris*, 2 Wall. 45, 17 L. ed. 868; *Gray v. Hook*, 4 N. Y. 449; *Gaston v. Drake*, 14 Nev. 175, 33 Am. Rep. 543; *Filson v. Himes*, 5 Pa. 452, 47 Am. Dec. 422; *Faurie v. Morin*, 4 Mart. (La.) 39, 6 Am. Dec. 701; *Liness v. Hesing*, 44 Ill. 113, 92 Am. Dec. 153. Says *Ames*, Ch. J., in *Eddy v. Capron*, 4 R. I. 394, 67 Am. Dec. 541: "By the theory of our government, . . . appointments to . . . [office] are presumed to be made solely upon the principle of *detur digniori*, . . . and any practice whereby the bare consideration of money is brought to bear in any form upon such appointment to or resignation of office conflicts with and degrades this great

signed by the obligee for the benefit of his creditors.

And in *Webber v. Farmer*, 4 Bro. P. C. 170, a perpetual injunction was granted against proceeding at law on a defeasance for reconveyance of land on repayment of the amount paid, such conveyance and defeasance having been executed to enable the grantee to marry and secure a marriage portion.

And in *Roberts v. Roberts*, 3 P. Wms. 66, an injunction was asked against the enforcement of a bond privately given by one intending marriage to pay to his son £1,000, which amount the latter had released to enable the father to effect the marriage. The court in this case stated that in such circumstances an injunction would ordinarily be given, but refused it in this instance, because, at the previous marriage of the son, the father had agreed to pay the £1,000, and the son had given back a secret agreement not to insist on such payment, and the court held that in such case, as the son's marriage occurred first, it should have the preference.

b. Marriage brokerage bonds.

In several instances the enforcement of marriage brokerage bonds has also been enjoined in England.

Thus, in *Drury v. Hooke*, 1 Vern. 412, 2 Cas. in Ch. 176, a perpetual injunction against such a bond was granted, the marriage having been had without the consent of the woman's parents.

And in *Williamson v. Gihon*, 2 Sch. & Lef. 357, an injunction was granted to restrain execution on a judgment upon a bond voluntarily given without previous agreement for prior services in aiding the obligor in an elopement and marriage.

And in *Shirley v. Martin*, cited in *Roche v. O'Brien*, 1 Ball & B. 357, an injunction was granted against enforcing a bond against a fortune hunter, given for assistance rendered him in marrying a lady of fortune, on the ground that it was a marriage brokerage bond, and could not be made valid in equity.

And in *Cotton v. Catlyn*, 2 Eq. Cas. Abr. 525, the court stated that one to whom a note was given for assistance rendered to the maker in marrying the former's mistress would have been enjoined from taking any advantage thereunder and an injunction granted was continued as against indorsees of the note, whose good faith was questioned.

And in *Smith v. Aykwell*, 3 Atk. 566, the court granted an injunction against an assignment of a note alleged to have been given

principle. . . . The services performed under such appointments are paid for by salary or fees presumed to be adjusted by law to the precise point of adequate remuneration for them. Any premium paid to obtain office . . . interferes with this adjustment, and tempts to "peculation, overcharges, and frauds, in the effort to restore the balance thus disturbed." Besides, the moral sense revolts at traffic, to any extent, in the bestowal of public office. It is against good morals, as well as against the soundest principles of public policy. If public offices can be sold or procured for money, the purchasers will be sure to reimburse themselves by dispensing the functions of their offices for pecuniary consideration. The law wisely guards against the first step in that direction. For that reason, not only the sum agreed to be

paid directly to the holder of this office to resign, but the amounts advanced for expenses and compensation of persons to go to Washington to procure the authorities there to accept the resignation of one party and the appointment of the other, are not recoverable, for the same reason that agreements to pay for lobbying the passage of bills before a legislative body are void. *Lawson, Contr. § 309, and Mechem, Pub. Off. § 360, and cases cited.* All agreements for expenses and compensation of persons seeking to influence or procure appointments to office are void. *Lawson, Contr. § 310.* The courts "condemn the very appearance of evil, and it matters not that in the particular case nothing improper was done or was expected to be done. It is enough that the employment tends directly to such results." *Clippinger v. Hepbaugh, 5 Watts & S. 315,*

on a marriage brokerage contract, and supported by an affidavit to that effect, although it refused to extend the injunction so as to prevent the payee from proceeding at law on the note.

V. Contracts for illicit intercourse.

There are quite a large number of English cases on this subject, and they very generally hold that where the contract is made in consideration of past illicit intercourse it is valid, but that where it is made in consideration of future cohabitation it is invalid; and an injunction against its enforcement has usually been granted, except that in some cases it has been refused on the ground that the remedy at law is adequate.

Thus, in *Boddy v. ———*, 2 Cas. in Ch. 15, an injunction against an action on a bond for the support of a bastard child, given to the mother's sister, was refused on an allegation by the defendant that plaintiff, after having promised to marry her, abused and left her, and the court refused to inquire into a claim as to the defendant's unfaithfulness made in the plaintiff's reply, on the ground that it was not the duty of the court to inquire into such matters.

In *Hill v. Spencer*, 2 Ambl. 641, and 836, an injunction against proceeding at law on a voluntary bond given to a common prostitute, by one who had previously cohabited with her, was refused, the court stating that where such bonds had been given for future cohabitation, relief had been granted, but that there was nothing to prevent one from giving a voluntary bond to such a person.

But in *Clarke v. Periam*, 2 Atk. 333, 9 Mod. 340, the court, with the consent of the parties, granted a perpetual injunction against proceedings at law on a bond given to a common prostitute, as a *præsum pudicitie*.

And in *Benyon v. Nettlefold*, 2 Eng. L. & Eq. 117, 3 Macn. & G. 94, 20 L. J. Ch. N. S. 186, 13 Jur. 209, an injunction against an action on a deed, valid on its face, was granted until a discovery could be had from the plaintiff in such action, to show that the deed had been given in consideration of future illicit intercourse with the woman for whose benefit it was executed.

And in *Sims v. Eli*, 13 Jur. 480, 17 Sim. 1, 18 L. J. Ch. N. S. 350, an injunction against proceeding at law on an indenture, legal on its face, but in fact given in consideration of future illicit cohabitation, was granted, as the grantor had never acted on the arrangement, and the whole thing had been broken off by 48 L. R. A.

him before any illegal act had been done thereunder.

But in *Batty v. Chester*, 5 Beav. 103, an injunction against prosecuting an action on a deed given in consideration of future cohabitation with the grantee was refused on the ground that plaintiff had accompanied his claim for relief with a claim that he was released from liability because the defendant had ceased to cohabit with him, thus relying, in part at least, on the original immoral agreement. Instead of relying wholly on its immorality, the court stating that relief could have been granted if the plaintiff had relied wholly on such immorality.

In *Gray v. Mathias*, 5 Ves. Jr. 286, an injunction granted against an action on a bond to pay a woman an annuity in case the obligor should cease to cohabit with her was reversed on the ground that no relief should be granted in equity, as there was a valid defense at law because of the invalidity of the bond.

And in *Smyth v. Griffin*, 8 Jur. 1131, 14 L. J. Ch. N. S. 28, affirming 13 Sim. 245, 7 Jur. 101, 12 L. J. Ch. N. S. 193, an injunction against an action on a bond with warrant of attorney to enter judgment, and a judgment entered thereon, asked on the ground that the bond was given in consideration of future illicit cohabitation, and secured the payment of an annuity to commence when such cohabitation should cease, was denied on the ground that there was a sufficient defense at law, as the bond was void on its face, and that the fact that such bond was in the defendant's possession could make no difference as she could be required to produce it on the trial of the action at law.

VI. Betting and gambling contracts.

a. In general.

In most cases of this kind an injunction has been granted, either on the ground that public interest would best be subserved thereby, or that the statute makes such a contract absolutely void. The later cases in this country, however, show a tendency to refuse any relief to either party in these, as well as in other cases.

In *Lloyd v. Gurdon*, 2 Swanst. 181, an injunction was granted against indorsing, negotiating, or parting with bills of exchange given for money won at play.

And in *Rucker v. Wynne*, 2 Head, 617, an injunction was granted against maintaining an action on a check given for a gambling debt, the court stating that the best method to dis-

40 Am. Dec. 519; *Wood v. McCann*, 6 Dana, 366; *Mills v. Mills*, 40 N. Y. 543, 100 Am. Dec. 535; and numerous other cases cited in notes to Mechem, Pub. Off. § 360; Lawson, Contr. § 311, and cases cited.

If an action had been brought to recover these sums, or to foreclose a mortgage given to secure payment thereof, the court would dismiss the action. The defendant contends, however, that as he was careful to take a mortgage, with a power of sale, the courts will not interfere by injunction, but will let him proceed to collect his ill-gotten gains. This would simply legalize the practice which is denounced both by statute and common law. Reasons of public policy forbidding this species of corruption are too profound, and too important to the public welfare, to be evaded and nullified by so simple a device. A mortgage given to secure a sum

of money upon an agreement against public policy is void. Code, § 1871; *Teal v. Walker*, 111 U. S. 252, 28 L. ed. 419, 4 Sup. Ct. Rep. 420; *Wilkey v. Collier*, 7 Md. 273, 61 Am. Dec. 340; *Crowder v. Reed*, 80 Ind. 1. The sale under a void mortgage would be a cloud on the title, and an injunction lies especially when the invalidity does not appear upon the face of the mortgage, but requires extrinsic evidence to prove it. 1 High, Inj. § 469; *Yager v. Merkle*, 20 Minn. 420, 4 N. W. 819. In cases where the consideration is immoral, the deed will be set aside. 2 Addison, Contr. 716. Pom. Eq. Jur. §§ 939-942, calls attention to the fact that the rule *in pari delicto* is often misunderstood, and its application is, properly and correctly, that in such cases *potior est conditio possidentis*,—that is, that the court will permit nothing to be done which will

courage gaming was to remove the temptation by denying the defendant the profits of his violation of the law.

And in *Milltown v. Stewart*, 3 Myl. & C. 18, 6 L. J. Ch. N. S. 298, Affirming 8 Sim. 371, an injunction was allowed in Ireland against bringing suit on a bond on the ground that it was given for a gambling debt. A decree *nisi* for taking the bill *pro confesso* was served on the defendant, who died two days afterwards. Four years later suit was brought in England on the bond by the defendant's representatives, and an injunction was granted, such representatives having destroyed the books of the original defendant, and being unable to tell the consideration for the bond.

In *Petition v. Hipple*, 90 Ill. 420, 32 Am. Rep. 31, an injunction was granted against a stakeholder paying over money to the winner of a bet on the result of an election, the court holding that a court of chancery has jurisdiction to restrain the enforcement of gaming contracts, though both parties have been guilty of a breach of a penal statute matter.

But in *Beer v. Landman*, 38 Tex. 450, 31 S. W. 805, an injunction against the collection of notes given in settlement of a balance due on a gambling transaction arising out of cotton futures was denied on the ground that the court would not give relief to a party *in pari delicto*.

And in *Kahn v. Walton*, 46 Ohio St. 105, 20 N. E. 203, an injunction against the payment by a bank of a check given to a stock broker for commissions and advances on a contract for speculating on the rise and fall of prices of goods, bought and sold without an intention to deliver them, was refused on the ground that the parties, being *in pari delicto*, would be left by the courts where they found themselves, the court saying that this was the modern doctrine, and that such method would tend to discourage such transactions more than that of giving relief to one of the parties from the consequences of his own wrongful conduct. The court also said in this case that there would have been place for repentance and recovery if it had taken place before the unlawful act had been performed. Minshall, J., dissented on the ground that almost without exception relief had been granted in case of gaming contracts.

b. In case of assignment.

An injunction has usually been granted against the enforcement of gambling contracts notwithstanding an assignment, unless the element of estoppel has entered in.

Thus, in _____ v. Blackwood, 3 Anstr. 18 L. R. A.

851, an injunction to restrain the ultimate negotiation of a note given for money lost at play, which had been colorably indorsed before, was granted on an affidavit made before service of subpoena.

And in *Barker v. Callihan*, 5 Ala. 708, an injunction was granted to restrain the maker of a note won at play with the payee from paying the same to any other person than such payee, although the note had been transferred to one with notice of the facts in the case, the court holding that the fact that the parties were *in pari delicto* would not prevent relief.

And in *Lyle v. Lindsey*, 5 B. Mon. 123, the court, relying on the Kentucky statute authorizing the recovery by the loser of money lost at play, granted an injunction against enforcing a judgment on a note given by the loser at play to a creditor of the winner who took with knowledge of the unlawful gaming. In this case judgment had been rendered on the note, but the decision does not seem to have been affected by such fact.

And in *Tantum v. Arnold*, 42 N. J. Eq. 60, 6 Atl. 316, an injunction was granted against an assignee with notice, who had paid no value therefor, disposing of notes and mortgages given by a married woman to a broker to enable her husband to carry on with such broker speculations in stocks on margins, under the New Jersey statute making such transactions and the securities to facilitate them utterly void.

And, even though the assignment was for value and without notice, an injunction has been allowed.

Thus, in *Portarlington v. Souby*, 3 Myl. & K. 104, an injunction was granted to restrain the assignees of a bill of exchange given for money lost at play from suing thereon in Ireland. The bill had been assigned under circumstances which ought to have occasioned inquiry on the part of the assignees, but the court held that the injunction would have been proper, even though there had been no such circumstances and the assignees had not known of the illegal consideration.

And in *Baker v. Williams*, cited in *Rawden v. Shadwell*, 1 Amb. 269, note 5, proceedings at law were stayed on a note given for a gambling debt and indorsed to one claiming to have taken it without knowledge that it was given for that purpose.

And in *Chapin v. Dake*, 57 Ill. 205, 11 Am. Rep. 15, the payment to an innocent holder of drafts indorsed and delivered in payment of a gambling debt was enjoined, the court holding that the indorsement was void under the Illinois

enable a party to collect from the other the fruits of his wrong. When he sues to recover, the law will not give him judgment. When he has shrewdly attempted to evade this by taking a mortgage with a power of sale, the court will, by injunction, prevent his collecting on a mortgage denounced as void by reasons of public policy. In § 941 he says: "Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him. In pursuance of this principle, and in compliance with the demands of a high public policy, equity may aid a party equally guilty with his opponent, not only by canceling and ordering the surrender of an executory agreement, but even by setting aside an executed contract, conveyance, or transfer, and decreeing the recovery back of money paid or prop-

erty delivered in performance of the agreement." Also, in § 940, he says that whenever the defensive remedy at law will not be equally certain, perfect, and adequate, the equitable remedy will be granted by injunction and the like. "The equitable relief so conferred does not violate the general maxim concerning parties *in pari delicto*; on the contrary, it carries that maxim into effect." So in the present case the injunction against sale under the void mortgage taken against public policy enforces that maxim, by preventing either party recovering anything from the other. This is also the well-settled rule in England. In *Lloyd v. Gurdon*, 2 Swanst. 181, Lord Eldon granted an injunction to restrain the negotiation of bills of exchange which were made void by statute (9 Anne, chap. 14), which is in the very tenor of § 1871 of the Code, applicable

to statute against gaming, and that no more effect should be given to it than to a forged instrument.

In most of the following cases a judgment had been rendered on the obligation given in consideration of the illegal contract, but in most instances such fact did not influence the decision of the court.

In *Dade v. Madison*, 5 Leigh, 401, the court held that an injunction against a judgment on an acceptance was properly dissolved as to an assignee, on the ground that it was not sufficiently proved, as to him, that the acceptance was for a gambling debt, but stated that if such fact had been proved the mere fact that the assignee had not been informed that it had been given for gaming would make no difference, as the Virginia statute rendered all gaming contracts void.

In *Gough v. Pratt*, 9 Md. 526, an injunction was granted against enforcement of a judgment by a bona fide assignee on a bond given for a gambling consideration, on the ground that under the statute of Anne, chap. 14, such bond was absolutely void, and that such action would put a wholesome restraint on gaming contracts.

And in *Martin v. Terrell*, 12 Smedes & M. 571, an injunction was granted against the enforcement of a judgment by an assignee for value on a note given in renewal of a note given for a bet lost on a horse race, under the Mississippi statute making any note given for money won at a horse race utterly void.

And in *Lucas v. Waul*, 12 Smedes & M. 157, an injunction was granted against the enforcement of a judgment on a note given for money lost at play, on the ground that the original contract and judgment were absolutely void, and that the Mississippi statute placed a taint on the indebtedness which nothing can purify, and that the matter stood as if no indebtedness ever existed. The court also held that the fact that the note had passed into the hands of a bona fide holder for value did not change the rule.

And in *Woodson v. Barrett*, 2 Hen. & M. 80, 3 Am. Dec. 612, it was held that the assignee of a note given for money won at gaming, although for value and without notice of the nature of the debt, could not recover, and that a perpetual injunction should be awarded against a judgment thereon. The court in this case states that the circulation of gaming bonds is an evil to be discountenanced no less than the giving of them, and that no means are more likely to prevent the giving of them than to put an effectual stop to their circulation.

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Where the obligor, however, had led the assignee to believe that the obligation was valid and would be paid, a recovery by the assignee was allowed.

Thus, in *Hoomes v. Smock*, 1 Wash. (Va.) 389, it is held that a judgment on a bond for money lost at gaming would be enjoined as against an assignee, unless he had been induced to take the assignment by the obligor under the belief that it was a valid obligation.

And in *Bucknell v. Myler*, cited in *Kenney v. Browne*, 3 Ridgeway, P. C. 513, the court stated that an injunction against enforcing a judgment by confession under a power of attorney in a bond for money won at billiards would have been granted, as against the obligee or assignee for value, if the obligor had not acknowledged to the latter that the debt was fair, and that he would be safe in taking the security; but because of such inducement the injunction was refused.

And in *Pettit v. Jennings*, 2 Rob. (Va.) 676, an injunction against a sale by an assignee under a deed of trust to secure a bond for a gambling debt was held to have been properly dissolved on the ground that the assignee did not know that the bond had been executed for such a debt, and had been induced by the obligor to purchase on the assurance that there was no objection to it, and that it would be duly paid.

And in *Nelson v. Armstrong*, 5 Gratt. 354, an injunction against a judgment was continued until it could be ascertained whether the drafts on which the judgment was rendered were given for a gambling debt as claimed, and if so whether the assignee of the drafts was induced to accept them by the concealment or misrepresentation of the maker that the consideration of the debt was good and lawful.

But in *Finn v. Barclay*, 15 Ala. 626, an injunction was granted against the enforcement of a judgment on a note showing on its face that it was founded on a gaming consideration, notwithstanding a promise by the maker to an assignee of the note to pay the same, where such assignee had previously acquired it as collateral security without paying anything of value therefor, although, in reliance on such promise, he released the debt secured by the note.

c. Relief at law generally.

The cases are not uniform as to whether the fact that there is a remedy at law will prevent the granting of an injunction. The English cases, especially, holding that such fact will not prevent injunctive relief.

to the present transaction. Lord Hardwicke granted the injunctive relief in a similar case (*Smith v. Aykwell*, 3 Atk. 586); and the vice chancellor, in *Milltown v. Stewart*, 8 Sim. 371, which was affirmed by Lord Cottenham (3 Myl. & C. 18). In such case, before the master of the rolls, Sir John Romilly, where part of the consideration was for money loaned, and part was for an immoral consideration, the whole mortgage was ordered to be canceled; the court declining to pass upon the question whether the mortgagee could recover at law for the valid part of the consideration, *i. e.*, the money loaned. *Wylliams v. Bullmore*, 33 L. J. Ch. N. S. 461. In the present case, upon the defendant's own showing, \$37.50 is the only valid part of the sum attempted to be secured. Whether the mortgage can be upheld to that extent is not before us, as the plaintiff, in

his reply, expresses his willingness to pay said sum. The plaintiff recovering judgment for the cancellation of the mortgage, the defendant should be taxed with the costs. The injunction was properly continued to the hearing.

Affirmed.

Shepherd, Ch. J., concurring:

I concur in the conclusion of the court that the agreement which the mortgage is given to secure is contrary to public policy, and therefore illegal, and I am also of the opinion that the injunction should be continued until the final hearing. It is alleged that the plaintiff Joseph Basket has a resulting trust in the land included in the mortgage, and as it does not appear that he had any connection with the illegal transaction between A. M. Basket, the mortgagor

Thus, in *Newman v. Franco*, 2 Anstr. 519, the court overruled a demurrer, on that ground, to a bill for an injunction against an action on bills of exchange given for money lost at play.

And in *Andrews v. Berry*, 2 Anstr. 634, a demurrer to a bill to restrain the negotiation of a note for money won at play, taken on the ground that under the statutes of 9 Anne, chap. 14, and 18 Geo. II. chap. 34, relief in equity could be granted only when it was sought to recover back money lost at play and paid over, was overruled.

But in *Wilkinson v. L'Eaugier*, 2 Younge & C. 366, an injunction against an action on an I. O. U. for money lent for purposes of gambling in France was denied, the court holding that the question whether there could be a recovery might be tried in the action at law.

And in *Beer v. Landman*, 88 Tex. 450, 31 S. W. 805, an injunction against the collection of notes given in settlement of a balance due on a gambling transaction arising out of cotton futures was denied on the ground that if there was any defense it must be set up in an action at law.

d. Judgments.

Many decisions have been rendered in which the fact that judgment had been taken did not seem to affect the decision of the court in any manner.

Thus, in *Gill v. Webb*, 4 T. B. Mon. 209, an injunction was granted against the enforcement of a judgment on a note for money lost at cards.

And in *Weakley v. Watkins*, 7 Humph. 356, the court refused an injunction against the enforcement of a judgment on a note executed as a wager on a pending election, stating that there was no difference in the position of the winner and loser so far as their right to become active movers in the courts on such contracts was concerned. This case was, however, criticized and overruled in effect in the later case of *Rucker v. Wynne*, 2 Head, 617, *supra*.

And in *Smith v. Kammerer*, 152 Pa. 98, 25 Atl. 165, the court refused an injunction against proceedings for the collection of a judgment on notes secured by chattel mortgage given as security for indebtedness incurred in gaming in wheat and pork, and to provide a margin in further speculations.

For other cases of this kind, see also *supra*, VI. b.

In several cases an injunction has been granted on the ground that the statute expressly provided that all gaming contracts

should be void, or authorized the injunction of judgments on such contracts.

Thus, in *McAuley v. Mardis*, Walk. (Miss.) 807, an injunction was granted against the enforcement of a judgment on a note for a gambling consideration, although the defense might have been made in the action at law, as the Mississippi statute gives chancery jurisdiction to enjoin judgments at law in all cases of gambling consideration.

And in *Cheatam v. Young*, 5 Ala. 353, the court held that an injunction should be granted against a judgment on a note for a gambling debt, stating that as the sole consideration for the note was such debt the court had jurisdiction, and that under the Alabama act of 1812, giving jurisdiction to enjoin judgments at law in all cases of gambling consideration, it was unnecessary to show any reason for not setting up the defense in the action at law.

And in *Finn v. Barclay*, 15 Ala. 626, an injunction was granted against the enforcement of a judgment on a note given for double the value of a horse, with the understanding that its payment should depend on the result of a presidential election, although no offer was made to pay the value of the horse, as the Alabama act of 1812 gave the court jurisdiction to enjoin judgments on gaming contracts, and the act of 1807 declares such contracts void.

In *Lyon v. Respass*, 1 Litt. (Ky.) 133, an injunction was granted against the enforcement of a judgment on a note for money lost at play, under the Kentucky statute making such contracts void.

And in *Martin v. Terrell*, 12 Smedes & M. 571, an injunction was granted against the enforcement of a note given for a bet lost on a horse race, the court holding that, as the judgment was absolutely void, equity would interfere though the defense might have been made at law.

And in *Gough v. Pratt*, 9 Md. 526, an injunction was granted against the enforcement of a judgment on a bond given for a gambling consideration, notwithstanding the failure to defend the suit at law, as the statute of Anne, 14, makes such a bond absolutely void.

And in *Emerson v. Townsend*, 73 Md. 224, 20 Atl. 984, an injunction was granted, for similar reasons, against the enforcement of a judgment on a note for money loaned for gambling purposes.

In *Skipwith v. Strother*, 3 Rand. (Va.) 214, it was held that a judgment on a gaming bond would be enjoined because of the original vice in the transaction, even though the party giving it had failed to defend in the action at law.

(the holder of the legal title), and the mortgagee, I see no reason why the equitable aid of the court should not be extended to him. I cannot agree, however, in that part of the opinion which declares that A. M. Basket is entitled to equitable relief. "Wherever a contract or other transaction is illegal, and the parties thereto are, in contemplation of law, *in pari delicto*, it is a well-settled rule, subject only to a few special exceptions, depending upon other considerations of policy, that a court of equity will not aid a *particeps criminis* either by enforcing the contract or obligation while it is yet executory, or by relieving him against it by setting it aside, or by enabling him to recover the title to property which he has parted with by its means. The principle is thus applied in the same manner when the illegality is merely a *malum prohibitum*, being in contravention

to some positive statute, and when it is a *malum in se*, as being contrary to public policy or to good morals. Among the latter class are agreements and transfers, the consideration of which was violation of chastity, compounding of a felony, gambling, false swearing, the commission of any crime, or breach of good morals." 1 Pom. Eq. Jur. § 402. "Where the party seeking relief is the sole guilty party, or where he has participated equally and deliberately in the fraud, or where the agreement which he seeks to set aside is founded in illegality, immorality, or base and unconscionable on his own part,—in such cases courts of equity will leave him to the consequences of his own iniquity, and will decline to assist him to escape from the toils which he has studiously prepared to entangle others, or whereby he has sought to violate with impunity the best

In *Roberts v. Taylor*, 7 Port. (Ala.) 251, an injunction was granted to one indorsing a note for money lost at play against payment by the maker of the amount to the indorsee, although the latter had recovered judgment thereon against the maker, the court holding that as the indorsement was absolutely void under the Alabama statute the court would interfere, since the money had not been actually paid over.

In *Abrams v. Camp*, 4 Ill. 290, an injunction against the enforcement of a judgment on a note given for money lost at cards was refused on the ground that under the Illinois statute, making such notes void, there was a good defense to the action at law, and that the refusal of the plaintiff in such action to testify on the ground that it would criminate him was insufficient to warrant an injunction, as other witnesses should have been called to prove such fact.

This case, however, was overruled in *Mallett v. Butcher*, 41 Ill. 382, which held that the injunction should have been granted, as the statute rendered such contracts void.

For other cases where an injunction against a judgment has been rendered notwithstanding an assignment of the obligation sued on, see *supra*, VI. b.

In other cases an injunction has been granted on the ground that a court of equity has jurisdiction equally with a court of law.

Thus, in *Clay v. Fry*, 3 Bibb, 248, 6 Am. Dec. 654, a judgment rendered without defense on a note for money lost at play was enjoined, the court holding that as the defense was available either at law or in equity, the failure to set it up in the action at law did not prevent equitable relief.

And in *Paulding v. Watson*, 21 Ala. 279, an injunction was granted against the enforcement of a judgment by default on a note given for a gaming consideration, although more than seven years had passed since its rendition, and no excuse was given for not making the defense at law.

In *McKinney v. Pope*, 3 B. Mon. 93, the enforcement of a judgment on a note was enjoined to the amount of sums won at play by the payee from the maker, the court holding that under the Kentucky act of 1833 money lost at gaming might be recovered in chancery, and that as the statute was passed to afford relief to the loser, and also to suppress gambling for the public good, equity had jurisdiction to grant the injunction.

In *Brown v. Watson*, 6 B. Mon. 588, an injunction was granted against the enforcement 48 L. R. A.

of a judgment on a note given for a horse, by one who had previously delivered it to the seller under a bet by which the horse was to be forfeited if the owner should fail to run a race with it on terms agreed on. The court held that the transaction was within the above act of 1833, under which the court had jurisdiction to grant such relief.

And in *Thomas v. Watson*, Taney, 297, Fed. Cas. No. 13,913, an injunction was granted against the enforcement of a judgment confessed on a note on a gambling consideration, on the ground that public policy required the suppression of the vice of gambling, and that the mere confession of a judgment should not be permitted to interfere with such policy.

And *White v. Washington*, 5 Gratt. 643, holds that a judgment on a gaming debt may be enjoined where the debtor was surprised on the trial in the action on the debt, although he did not apply for a new trial in such action, as a court of equity has from the beginning a more complete jurisdiction in such a case, and treats all judgments on a gaming consideration as mere securities where there has not been a defense or a full and fair trial.

But in *Moffett v. White*, 1 Litt. (Ky.) 324, an injunction against the enforcement of a judgment for money lost at cards was refused on the ground that there had been an unsuccessful effort to establish such defense in the action at law, the court, however, stating that if no defense had been made the relief would have been granted, as the party had the right to elect to defend either at law or in equity.

Relief has, however, been refused quite generally on the ground that the defense that the obligation was invalid should have been made in a court of law.

Giddens v. Lea, 3 Humph. 133; *Jones v. Jones*, 4 N. C. (Term Rep.) 110; and *Owens v. Van Winkle Gin & Mach. Co.* 96 Ga. 408, 31 L. R. A. 707, 23 S. E. 418,—are cases of this kind.

VII. Contracts for compounding crime.

It seems that as to contracts of this nature the courts of this country have regularly refused to grant an injunction unless some special reason therefor is shown.

Thus, in *Booker v. Wingo*, 29 S. C. 116, 7 S. E. 49, an injunction against a suit on a note given to induce the payee to use his influence to have a criminal prosecution against the maker's husband stopped, was granted. But the ground of such decision was that the maker was a married woman, and therefore the note

interests and morals of social life. . . . Courts of equity could not, without staining the administration of justice, interfere to save the party from the just results of his own gross misconduct, when the failure of success in the scheme would manifestly be the sole cause of his praying relief." 2 Story, Eq. Jur. § 697; Adams, Eq. 418. These principles are so well established that it is hardly necessary to produce authority in their support, and that they have been recognized by this court is plainly evident by a reference to the cases of *York v. Merritt*, 77 N. C. 213; *Sparks v. Sparks*, 94 N. C. 527, and authorities cited. There are, it is true, limitations to the rule, as where parties are not equally in fault, or, as in the case of usury, where the borrower is considered as *in vinculo*, or where the security is for past cohabitation; and there are cases

where, under peculiar circumstances, considerations of public policy will be best subserved by granting relief. These and other instances will be found in the text-books and notes to which I have referred, and there seems to be some confusion in the decided cases upon the subject. No satisfactory authority, however, can, in my opinion, be found, to take the present case out of the general rule. If, as we have seen, the court will not interfere where the consideration is the compounding of a felony or the commission of a crime, it is difficult to understand why it should extend its relief where the consideration is for the commission of the offense alleged in the complaint. Certainly, considerations of public policy are as grave in the former cases as in the latter. Again, it will hardly be contended that the plaintiff A. M. Basket is not equally in fault.

was void as to her, although the court states in the opinion that the contract was still executory.

And in *James v. Roberts*, 18 Ohio, 548, an injunction was granted to restrain the collection of a note and mortgage executed under threats of a groundless prosecution. The relief, however, was granted on the ground that a true public policy required that all groundless prosecutions should, if possible, be prevented, and every facility afforded the innocent to escape such a calamity, and that an innocent person might properly ask to be relieved from the consequences of a groundless charge.

And in *Porter v. Jones*, 8 Coldw. 313, an injunction was granted against an action at law on a note given in consideration of the compounding of a felony, on the ground that public policy would be subserved thereby, the court stating that if the contract were executed no relief would be granted, but that as it was executory only the court might, in its discretion, grant relief where the public interests would be promoted thereby.

In *Whitenack v. Ten Eyck*, 3 N. J. Eq. 249, an injunction against assigning or bringing suit on notes was refused on the ground that the evidence failed to show that they were given to compromise a public offense as claimed.

In *Williams v. Englebrecht*, 37 Ohio St. 383, the court states that an action will not lie to restrain an action of ejectment on a mortgage given to compound a felony, although the question really before the court was whether such a defense was available in an action by the mortgagee to recover possession of the land.

In *Gotwalt v. Neal*, 25 Md. 484, an injunction to restrain the defendant from disposing of land deeded to him by plaintiff to induce him not to institute threatened prosecutions for embezzlement, was refused on the ground that, as the parties were *in pari delicto*, no relief should be granted to either party.

In *Allison v. Hess*, 28 Iowa, 388, a deed of land was given in consideration that the grantee should give back to the grantor a lease for eight months, and not appear as a witness in a criminal prosecution against the latter's son, and it was held that an action of forcible entry and detainer under the lease would not be enjoined at the instance of the grantor, on the ground that the parties were *in pari delicto*, and no affirmative relief should be afforded to either.

And in *Turley v. Edwards*, 18 Mo. App. 676, the court states that an action cannot be maintained to enjoin the collection of notes, and

enforcement of a deed of trust securing the same, given to prevent a threatened arrest and prosecution of the maker's son, if he knowingly and without compulsion entered into such transaction so as to be *in pari delicto*.

And *Adams v. Barrett*, 5 Ga. 404, holds that an action of ejectment by one to whom a deed had been executed in consideration of the abandonment by the grantee of a criminal prosecution against the grantor would not be enjoined on the ground that a court of equity will not grant any relief to a party *in pari delicto* against the consequences of a consummated contract, the court holding that the contract was executed by the delivery of the deed.

And in *Rock v. Mathews*, 35 W. Va. 537, 14 L. R. A. 508, 14 S. W. 137, an injunction against a sale under a deed of trust to sureties on a postmaster's bond to enable them to settle an embezzlement by the postmaster and prevent a prosecution against him, was refused on the ground that the parties were *in pari delicto*, the contract was fully executed, and that in such case the court would leave the parties where it found them.

And in *Cowles v. Raguet*, 14 Ohio, 38, land had been sold under a second mortgage subject to a prior mortgage, but for full value. The court held that the surplus after paying the second mortgage should be used to redeem from the first mortgage, although it was void as having been given to induce the mortgagee to refrain from instituting a criminal prosecution against the mortgagor's son, even though the mortgagor objected to the redemption. In this case the court held that the mortgage was an executed, and not an executory, contract, and that a refusal to permit the redemption would amount to an injunction against an executed illegal contract; and that it is the policy of the law in cases of such contracts to leave the parties where it finds them.

In England, on the contrary, an injunction has been granted in such cases.

Thus, in *Osbaldiston v. Simpson*, 13 Sim. 513, 7 Jur. 736, an injunction was granted against negotiating or suing on notes given to prevent a prosecution for cheating at cards.

And in *Williams v. Bayley*, L. R. 1 H. L. 200, 35 L. J. Ch. N. S. 717, 14 L. T. N. S. 802, 12 Jur. N. S. 875, an injunction was granted to restrain an action on an agreement entered into by a father to prevent a prosecution of his son for forgery, although no direct threat was made and no distinct promise not to prosecute was given, the court holding that it was in effect the compounding of a felony, and that

Indeed, it appears from the written agreement executed contemporaneously with the mortgage, that he was the moving party in the transaction. The proposition was made by him, and it is perfectly clear that his guilt is equal, if not greater, than that of the defendant. Again, if it be conceded that he is entitled to relief on the ground that a part of the contract (the note) is executory, the court would only grant it upon terms; and as the mortgagee has, under the agreement, so credited the note that everything is eliminated except certain expenses and counsel fees and a pre-

existing debt, leaving only a balance of about \$200, it would seem very clear that the court, even if it interfered, would not place him in any better condition. The expenses and counsel fees were actually expended in furtherance of his own proposition, and it would seem a complete reversal of the maxim, *In pari delicto melior est conditio defendantis*, to so use the equitable power of the court as to extricate the plaintiff from the position in which he has placed himself, and put the entire expense of carrying out his own proposition upon the shoulders of the defendant. No clearer case can, in my opin-

for purposes of public utility it should be stamped with invalidity.

VIII. Miscellaneous.

In *McGuire v. Ashby*, 1 Rand. (Va.) 76, an injunction was granted to prevent a sale under a deed of trust given for the benefit of an unchartered bank, and therefore void under the Virginia statutes. The court in this case said that a court of equity, as well as a court of law, would interfere to prohibit the effect of contracts made in violation of laws enacted for the public good.

In *Carey v. Smith*, 11 Ga. 539, an action to enjoin the assignee of an insolvent bank from recovering from a stockholder, who participated in the bank's doing business before its capital stock was paid in, on his liability for the redemption of bank bills issued, the court said that where parties are concerned in illegal transactions, whether *mala prohibita* or *mala in se*, courts of equity will not interfere to grant any relief.

In *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847, an injunction was allowed against the use of a proxy irrevocable for five years to vote corporate shares of stock, executed in pursuance of an agreement by the one to whom the proxy was given to so vote the shares that one of those giving the proxy should be continually employed as manager of the corporation at a specified salary. The court in this case held that the complainant was seeking to undo, as far as possible, the wrong done by virtue of the illegal agreement, and that in such case the maxim *In pari delicto potior est conditio defendantis*, did not apply.

In *Roberts v. Roberts*, 4 Eng. Exch. Rep. 448, the court granted an injunction against an action of ejectment pending a suit to set aside the deed on the ground that it had been executed solely for the fraudulent purpose of giving the grantee, who was the grantor's brother, a colorable qualification to kill game. The injunction was subsequently dissolved and the ejectment suit tried, the case being reported in 2 Barn. & Ald. 867, resulting in a verdict in favor of the plaintiff therein on the ground that the defendant could not prove his own fraud to set aside a deed valid on its face.

In *McWilliams v. Phillips*, 51 Miss. 196, a note had been given to the county treasurer in consideration of a license to sell liquor in violation of a statute requiring payment in money. The maker brought an action to enjoin foreclosure of a mortgage securing the note, and an injunction was granted, the court holding on affirming the injunction order that the note was void and the parties *in pari delicto*. The opinion states that the complainant appeals to the court on the ground that the parties are equally guilty, and therefore the court ought not to allow one party to get the fruits of the illegal act, and the holding of the court is 48 L. R. A.

that such defense may be set up against an executory illegal contract, but not where it has been fully executed.

In *Yard v. Pacific Mut. Ins. Co.* 10 N. J. Eq. 480, 64 Am. Dec. 467, an injunction against an action at law on bonds given for capital stock of an insurance company asked for on the ground that the company should have required payment in cash, and could not legally take individual obligations in lieu of stock and proceed with its business before the stock was actually paid in, was refused on the ground that the complainant was a party to the illegality, and could not invoke the aid of equity to relieve him from his own voluntary acts, and that public policy required the enforcement of payment rather than the contrary.

The chancellor in the court below held that a court of equity ought not to interfere with the proceedings at law to aid the complainant in the legal defense, if it was one sought to be set up against payment of the bonds.

In *Ellicott v. Chamberlin*, 38 N. J. Eq. 604, 48 Am. Rep. 327, an injunction against an action on a note given by a legatee to the executor in consideration of the latter's renouncing his trust was refused on the ground that, although such contract was illegal as against public policy, the defense could be set up in a court of law.

In *Simpson v. Howden*, 3 Myl. & C. 97, 1 Jur. 708, the court refused to entertain a suit to enjoin an action at law on an agreement by promoters of a railroad to pay a specified amount to an owner of land on the intended line in consideration of his not opposing the bill, and with the understanding that a bill to change the line should subsequently be passed, as the question as to the legality of the agreement might be decided at law.

In *Evans v. Richardson*, 3 Meriv. 469, an injunction against an action on a contract between a citizen of the United States and a citizen of the United States and also of England for the exportation of goods from England to America during time of war was dissolved on the ground that the contract was illegal, and that the parties should therefore be left to their remedy at law.

In *Creath v. Sims*, 5 How. 192, 12 L. ed. 111, and *Sample v. Barnes*, 14 How. 70, 14 L. ed. 330, the plaintiff asked for an injunction to stay proceedings upon a judgment on a note for the purchase price of slaves on the ground that their purchase was designed to be, and was, a fraud on the Constitution and laws of Mississippi forbidding the introduction of slaves as merchandise. The injunction was refused on the ground that the parties were *in pari delicto*, and must be left in the position in which they had placed themselves. Although judgments had been rendered in these cases the decisions do not seem to have been affected thereby.

J. H. H.

ion, be conceived for the application of the rule, than the present.

Furthermore, it is a fundamental principle that a court of equity never interferes where there is a complete defense at law. High, Inj. § 473. In the present case it is said that the mortgage is utterly void. If this be so, there is no occasion for equitable relief, not even on the ground that it is necessary to discover and preserve the evidence of its illegality, as the contemporaneous agreement executed by all of the parties is plenary proof of the vitiating element. 2 Story, Eq. Jur. § 700. This consideration, as well as the firmly established rule, *in pari delicto*, etc., is also a complete bar to the prayer that the deed be canceled on the ground that it is a cloud upon plaintiff's title. *Ibid.* Public policy will be far better subserved by leaving the plaintiff where his illegal conduct has placed him, than by encouraging him in another attempt to violate the law by the assurance that a court of equity will always stand ready to relieve him against the consequences of his unsuccessful experiments. "The suppression of illegal contracts is far more likely, in general, to be accomplished by leaving the parties without remedy against each other, and by thus introducing a preventive check naturally connected with a want of confidence, and a sole reliance upon personal honor. And so accordingly the modern practice is established." 1 Story, Eq. Jur. § 293. The case of *Patterson v. Donner*, 48 Cal. 369, cited in the opinion to the effect that a mortgage given to secure money upon an agreement against public policy does not divest the title, does not aid the plaintiff; for, if the title is not divested, there is certainly no occasion for resorting to a court of equity, where the illegality is evidenced, as

in this case, by the contemporaneous agreement referred to. The case, however, decides the other way. It holds that the title passes, but that the performance of the illegal condition will not divest the title of the grantee. The case cited from Indiana is equally inapplicable, as it was an action at law to enforce an illegal executory agreement; and it was, of course, held that the defendant could plead the illegality of the consideration. The case from Maryland is also inapplicable, as it was an action to foreclose a mortgage given upon an illegal consideration, and the court refused relief. It is no authority that the court would have aided the mortgagor, had he been seeking a decree for cancellation. The case of *Williams v. Bullmore*, 33 L. J. Ch. N. S. 461, cites no authority. It seems, however, that the mortgagee was seeking foreclosure, and that this action was consolidated with one brought by the mortgagor for cancellation. Under these circumstances, there was a decree for cancellation. It is doubtful whether the court would have made such a decree had not the mortgagee been seeking foreclosure. However this may be, it cannot be regarded as sufficient authority to overturn the well-established rule embodied in the maxim which I have quoted. There is nothing in the reference to Pomeroy's Equity Jurisprudence which at all countenances relief under the circumstances of this case. The defendant has already agreed to terms as favorable as would be imposed by a court of equity. I think that A. M. Basket has no standing in a court of equity, and that under the circumstances he is entitled to no relief. To interfere in his behalf would be giving aid and comfort to the moving party in this illegal transaction.

WISCONSIN SUPREME COURT.

Theodore KERSTEN, *Respt.*,

v.

City of MILWAUKEE, Impleaded, etc.,
Appt.

(.....Wis.....)

1. Assessing lots for so-called benefits in proportion to their frontage, and making the aggregate of benefits closely approximate the total cost of the work, are circumstances too significant not to arouse suspicion that benefits were not considered, although the board making the assessment say they viewed the premises and exercised their judgment,—especially when there was a deep cut opposite some of the lots, and a deep fill opposite others.
2. An assessment purporting to be made according to benefits will not be sustained, although the board making it say they viewed the premises and exercised their

judgment. If the facts and circumstances show quite conclusively that they could not have exercised their judgment in arriving at the result.

3. The remedy by appeal from a wrongful assessment under the charter of Milwaukee, subchap. 7, § 11, is not exclusive of a remedy in equity, where the assessment is shown to be arbitrary and fraudulent.
4. A petition from abutting lotowners is not a necessary condition of the improvement of an alley, under the charter of Milwaukee, subchap. 7, § 6, when the council follow the technical course of procedure therein mapped out.
5. An assessment for grading an alley, based solely on the cost of the work in front of the abutting lots, without regard to benefits, and apportioned by the front foot, is arbitrary and void.
6. An injunction against a wrongful assessment for the grading and pav-

NOTE.—As to necessity of special benefits to sustain local assessments, see *Asberry v. Roanoke* (Va.) 42 L. R. A. 636, and *note*; *Detroit v. Chapin* (Mich.) 42 L. R. A. 638; *Weed v. 48 L. R. A.*

Boston (Mass.) 42 L. R. A. 642; *Rolph v. Fargo* (N. D.) 42 L. R. A. 646; *Hutcherson v. Storie* (Tex.) 45 L. R. A. 289; and *Schroder v. Overman* (Ohio) 47 L. R. A. 156.

ing of an alley, where the work has been legally authorized, should not include an order for the restoration of the alley to its original condition, but should extend only to a stay of proceedings under the invalid assessment, and under Rev. Stat. 1898, § 1210e, the court may direct a reassessment.

(February 2, 1900.)

APPEAL by defendant city from a judgment of the Superior Court for Milwaukee County in favor of plaintiff in an action brought to enjoin the grading of an alley in the rear of plaintiff's property. *Reversed.*

Statement by **Bardeen, J.:**

This action was brought by the plaintiff to restrain the city of Milwaukee and its contractors from grading an alley at the rear of his lot in Muskego Avenue Heights, in the eleventh ward of the city, said lot being described as "lot 15 of block 1," and has a frontage on the alley of 28.23 feet. The alley runs south from Burnham street to a point about 110 feet from the south line of the block, and then turns west, and opens into Eighteenth avenue. A profile of the alley shows that before it was improved the surface of the ground was very irregular, there being hills and depressions to such an extent as to render it impassable. Towards the north end was a hill, and near the turn where plaintiff's lot was situated there was a depression requiring a fill of several feet. The grade of the alley was duly fixed and established by an ordinance of the common council on June 8, 1896. On August 3, 1896, the board of public works recommended to the council that this alley be graded and paved from a point 235 feet south of the south line of Burnham street to its western terminus on Eighteenth avenue, and made the proper estimate of cost. On the same day a resolution was introduced in the council, which recited that it was necessary for the public interests to grade and pave this alley, for the reason that it was "inadequate, inconvenient, and unsafe for the public use thereof, for the passage of foot passengers and vehicles, and for the drainage of water therefrom," and that it was necessary to cause said work to be done without a petition therefor from the owners of the property fronting thereon, for the reason that they had negligently failed to make said alley "in a safe and suitable condition for public use, and had negligently failed to present to this common council a lawful petition therefor;" and the board was authorized to have the work done in accordance with their recommendation. The resolution was countersigned by the city comptroller, and referred to a committee on August 3, who recommended its adoption. It was again referred to a special committee on August 17, who likewise recommended its adoption, and was duly adopted by the council at a meeting held on August 31, 1896. No petition for the work was ever presented to the council. After the adoption of this resolution, the board of public works made an assessment of benefits against the adjoining lots,

which the court finds was arbitrary and fraudulent, for the reason that the board did not consider the benefit to the owners of adjoining property, and did not consider, with reference to the lots, the injury which might result to the owners by reason of said work, but made an arbitrary assessment, based solely upon the cost of the work in front or abutting upon said lots, respectively, at the uniform rate of \$1 per foot front. Bids were duly called for, and on June 11, 1897, the board entered into a contract for doing the work with the defendants Riemer and Miller. On the following day the contractors commenced their work. This action was commenced, and an injunction sought, which was denied by the court. During the pendency of the suit the work proceeded, and earth was filled in at the rear of plaintiff's lot from 4 to 6 feet deep. In doing the work the contractors placed earth, which extended upon the plaintiff's lot, for the lateral support of the embankment in the alley, from 11 inches to 13 feet. A fence at the rear of the lot was broken down, and access to a watercloset at the rear end of the lot was obstructed. The court found that the plaintiff's property had been damaged to the extent of \$500, and that he had sustained no benefits therefrom; that all of the lots on the east side of the alley running north and south were similarly affected and encroached upon, and no damages in any instance had been awarded. The maps and profiles in evidence show quite a large hill at the north end of the proposed improvement, and lesser hills and depressions along the line of the alley, so that along some of the lots there would be a cut of considerable depth, and others a fill of several feet. The court found, as conclusions of law, that the assessment of benefits made by the board of public works was in violation of the charter of the city, a fraud upon plaintiff, and consequently void; that the work done was performed without lawful authority, and created an obstruction in the alley, and was a nuisance; that the taking of plaintiff's property for the purpose of grading the alley was without lawful authority, and constituted a continuing trespass. A judgment for plaintiff was entered in substance as follows: (1) That the city and its contractors and servants be perpetually enjoined from filling, paving, or otherwise obstructing the alley under the resolution of the council or assessment of benefits mentioned. (2) That the same parties be perpetually enjoined from depositing earth or other materials upon plaintiff's lot, or otherwise encroaching thereon. (3) That the city and its contractors be required to restore said alley for its entire length, covered by the resolution for grading, "to its original grade and condition as the same was immediately prior to the grading, filling, and paving thereof," by removing therefrom the earth, etc., deposited thereon in doing such work. (4) That the city and its contractors be required to restore the plaintiff's premises to their original condition they were in prior to said work. (5) That the city be restrained from issuing any certificates to the

contractors by reason of the assessment of benefits made by the board herein referred to. (6) That the plaintiff recover costs. Due exceptions to the findings were filed, and the city appeals from those portions of the judgment herein numbered 1 and 3.

Messrs. Carl Runge and A. B. May, for appellant:

The power to establish grades of alleys and streets must be exclusive in the common council.

Brundt v. Milwaukee, 69 Wis. 386, 34 N. W. 246.

Of the necessity or expediency of its exercise, the governing body of the corporation, and not the court, is the judge.

2 Dill. Mun. Corp. 4th ed. § 686.

Where public safety and public conveniences require the street to be graded to render it safe and suitable for public use, the city is not liable for damages unless the statute expressly provides for them.

Wallich v. Manitowoc, 57 Wis. 9, 14 N. W. 812; *Smith v. Eau Claire*, 78 Wis. 457, 47 N. W. 830.

The city is not liable for damages if the street be embanked or raised in reducing it to the grade line, so as to cut off or render difficult of access adjacent property.

2 Dill. Mun. Corp. 4th ed. § 990; *O'Connor v. Pittsburgh*, 18 Pa. 187.

All the proceedings required by the charter were complied with for the grading of the alley in question.

All of the board were present to view the premises, and they assessed the benefits and damages after such view, and the assessment was the judgment of the three commissioners, and not reviewable here.

Johnson v. Milwaukee, 40 Wis. 324.

The assessment of damages by the board was of a quasi-judicial nature, involving the exercise of deliberate judgment and large discretion, and the honest and careful exercise of such judgment and discretion is not subject to revision by the court except on appeal,—in this case provided by charter.

15 Am. & Eng. Enc. Law, p. 1148; *Fath v. Koeppl*, 72 Wis. 289, 39 N. W. 539.

The grading and paving were not performed without lawful authority, and as performed do not create and constitute an obstruction, and the said alley is not a nuisance.

Colclough v. Milwaukee, 92 Wis. 188, 65 N. W. 1039; *Smith v. Eau Claire*, 78 Wis. 457, 47 N. W. 830.

If the assessment of damages by the board was not satisfactory to respondent, he had a remedy under the provisions of the charter by appeal, and is not entitled to an injunction.

Nichols v. Salem, 14 Gray, 490; *Reckner v. Warner*, 22 Ohio St. 275.

On petition for rehearing.

Where a litigant makes his choice of remedies, he is bound by that choice, and cannot change a suit in equity to one at law or vice versa.

Fredrich v. Flinth, 64 Wis. 185, 25 N. W. 48 L. R. A.

28; *Brothers v. Williams*, 65 Wis. 401, 27 N. W. 157; *Fischer v. Laack*, 76 Wis. 314, 45 N. W. 104.

If the respondent is not entitled to any damages under the charter, then he is clearly not entitled to any damages in any court or in any proceeding.

The mere grading of the alley is not a taking of respondent's land, and the city is not liable for the consequential damages, there being no provision in the charter for the payment of damages of that kind.

Alexander v. Milwaukee, 16 Wis. 247; *Harrison v. Milwaukee County Supers.* 51 Wis. 663, 8 N. W. 731; *Smith v. Eau Claire*, 78 Wis. 459, 47 N. W. 830; *Colclough v. Milwaukee*, 92 Wis. 185, 65 N. W. 1039.

Mr. Edgar L. Wood, for respondent:

The cost of raising or lowering damaged premises to correspond with the altered grade of a public highway is an element of damage and proper to be included, but is not the sole test or evidence of the damage sustained.

Weinzer v. Racine, 74 Wis. 171, 42 N. W. 230.

The alleged assessment of benefits and damages made by the board of public works comes within the repeated condemnation of this court, and is void, and all subsequent proceedings founded upon it are likewise invalidated by it.

Liebermann v. Milwaukee, 89 Wis. 346, 61 N. W. 1112; *Brown v. Oneida County*, 103 Wis. 149, 79 N. W. 216.

The honest opinion and judgment of assessors, boards of review, and other taxing officers is conclusive upon the question of valuation, benefits, and damages; but where the inequalities or overvaluations are shown to be so great as to be evidence of bad faith or failure to exercise judgment, and are shown to be grossly unfair and unequal, and fail to take into consideration all of the requirements of the law and the charter, and assess property on any other rule than that of benefits, taking into consideration the actual damages, they will be set aside as void by a court of equity; and such proceedings will be held to a strict compliance with the law on all points affecting the substantial justice of such assessment.

Pittelkow v. Milwaukee, 94 Wis. 651, 69 N. W. 803; *Boyd v. Milwaukee*, 92 Wis. 458, 66 N. W. 603; *Hayes v. Douglas County*, 92 Wis. 441, 31 L. R. A. 213, 65 N. W. 482; *Dietz v. Neenah*, 91 Wis. 426, 64 N. W. 299; *Liebermann v. Milwaukee*, 89 Wis. 346, 61 N. W. 1112; *Wright v. Forrester*, 65 Wis. 341, 27 N. W. 52; *Watkins v. Milwaukee*, 52 Wis. 101, 8 N. W. 823; *Watkins v. Zwietusch*, 47 Wis. 513, 3 N. W. 35; *Johnson v. Milwaukee*, 40 Wis. 315; *Dean v. Borchsenius*, 30 Wis. 236; *Dean v. Charlton*, 27 Wis. 522; *Foot v. Milwaukee*, 18 Wis. 275.

The charge of special assessments for local improvements against adjacent property can be sustained as a lawful exercise of the power of taxation only when such assessment is made and levied upon the basis of benefits actually received from such improvement by the property assessed.

Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Weed v. Boston*, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204; *Detroit v. Judge of Recorder's Ct.* 112 Mich. 588, sub nom. *Detroit v. Chapin*, 42 L. R. A. 638, 71 N. W. 149; *Asberry v. Roanoke*, 91 Va. 562, 42 L. R. A. 636, 22 S. E. 360.

The board did not base their conclusion upon the question of increase or decrease in the value of the property, but solely upon an arbitrary assumption that the construction of the alley was a benefit to the amount of \$1 per running foot.

Drummond v. Eau Claire, 85 Wis. 563, 55 N. W. 1028.

Where the actual damages are so grossly disproportionate to the findings of the board of public works as to leave no inference but that the action of the board, while an apparent compliance with the charter provision, was, in fact, an actual disregard of such rule,—a total failure to exercise any judgment in the premises,—it is such a substantial noncompliance with the charter provision as to render their acts wholly void and nugatory.

Brown v. Oneida County, 103 Wis. 149, 79 N. W. 220; *Boyd v. Milwaukee*, 92 Wis. 458, 66 N. W. 603; *Dietz v. Neenah*, 91 Wis. 426, 64 N. W. 299; *Liebermann v. Milwaukee*, 89 Wis. 346, 61 N. W. 1112; *Johnson v. Milwaukee*, 40 Wis. 315.

The estimate of cost, and the certificate against the plaintiff's property, include the cost and expense of the filling in upon the plaintiff's own lot to furnish lateral support for the alley; and the entire assessment, being based upon a foot-front rule including the entire assessment as to all the lots similarly situated, includes this unlawful and unauthorized element, which so involves the entire assessment as to vitiate the whole.

Boyd v. Milwaukee, 92 Wis. 458, 66 N. W. 603.

The appropriation of the plaintiff's property and that of the adjoining owners to furnish lateral support for this embankment was without authority of law, and was a taking of private property for public use without a pretense of compensation thereof, or proceedings for the condemnation thereof, or the consent of the owner.

Harrison v. Milwaukee County Supers. 51 Wis. 645, 8 N. W. 731; *Vanderlip v. Grand Rapids*, 73 Mich. 522, 3 L. R. A. 247, 41 N. W. 677; *Smith v. Eau Claire*, 78 Wis. 461, 47 N. W. 830.

The proceedings under which the grading and paving of the alley was to be done being void, the plaintiff was not confined to the charter remedy of appeal from the assessment of the board of public works as approved by the common council, but was entitled to proceed by injunction to restrain the doing of the work and the issuance of the certificate therefor against his property.

Crossett v. Janesville, 28 Wis. 426; *Wilson v. Mineral Point*, 39 Wis. 160; *Watkins v. Milwaukee*, 55 Wis. 338, 13 N. W. 222; *Meinzer v. Racine*, 68 Wis. 244, 32 N. W. 139; 70 Wis. 566, 36 N. W. 260; 74 Wis. 166, 42 48 L. R. A.

N. W. 230; *Boyd v. Milwaukee*, 92 Wis. 458, 66 N. W. 603; *Pittelkow v. Milwaukee*, 94 Wis. 656, 69 N. W. 803.

The unauthorized grading and filling of the alley, whether abutting upon the plaintiff's property or otherwise, constitute a threatened nuisance, properly restrainable by injunction.

Buchner v. Chicago, M. & N. W. R. Co. 60 Wis. 273, 19 N. W. 56; *Oshkosh v. Milwaukee & L. W. R. Co.* 74 Wis. 534, 43 N. W. 489.

On petition for rehearing.

It is *res judicata* that the plaintiff has sustained great damages by grading done by the city, without lawful authority, upon the alley adjoining his property.

In such case the plaintiff may recover his full damages in an action brought for that purpose.

Drummond v. Eau Claire, 85 Wis. 560, 55 N. W. 1028; 79 Wis. 102, 48 N. W. 244; *Pittelkow v. Milwaukee*, 94 Wis. 656, 69 N. W. 803; *Addy v. Janesville*, 70 Wis. 405, 33 N. W. 931; *Meinzer v. Racine*, 68 Wis. 245, 32 N. W. 139; 70 Wis. 566, 36 N. W. 260; *Dore v. Milwaukee*, 42 Wis. 118; *Crossett v. Janesville*, 28 Wis. 426; *Owens v. Milwaukee*, 47 Wis. 461, 3 N. W. 3; *Smith v. Eau Claire*, 78 Wis. 463, 47 N. W. 830.

If the plaintiff is entitled to damages, ought not the court in this action to award them, as found, and end the litigation?

Pinkum v. Eau Claire, 81 Wis. 310, 51 N. W. 550; *Turner v. Pierce*, 34 Wis. 658.

Bardeen, J., delivered the opinion of the court:

The court has found that the assessment made by the board of public works was arbitrary, and based solely upon the cost of the work in front of the abutting lots. A similar assessment was before this court for review in the case of *Liebermann v. Milwaukee*, 89 Wis. 336, 61 N. W. 1112. The facts are not the same, but the form of the assessment in that case varies in no material respect from the one under consideration. There it was said that the assessment was void on its face for a failure to show affirmatively that it was made in conformity with the requirement of the charter. But we are not to dispose of this assessment by what alone appears upon the face of the proceedings, as in *Hennessy v. Douglas County*, 99 Wis. 129, 74 N. W. 983. With the accompanying facts and circumstances, it shows quite conclusively that the board could not have exercised their judgment in arriving at a result. That this assessment of benefits to each of the adjoining lots should correspond in each case to as many dollars as the abutting lot had feet of frontage, and that the aggregate of benefits should very closely approximate the total cost of the work, are circumstances too significant not to arouse suspicion. Especially is this so when it is shown that opposite some of the lots there was a deep cut and others a deep fill. It is not enough for the board to say that they viewed the premises, and exercised their judgment, if the

facts negative that assertion. Here the facts cry out so loudly against the conclusion reached that we find no difficulty in agreeing with the court's estimate of the board's procedure. *Hayes v. Douglas County*, 92 Wis. 429, 31 L. R. A. 213, 65 N. W. 482. But we cannot, by any means, agree with the court's judgment. It seems to be conceded that the city has, under its charter, ample power to establish the grade of alleys, and that it did, on May 27, 1896, duly adopt and pass an ordinance fixing and establishing the grade of the alley in question. This was the initial step, without which any attempt to improve the alley would have been without foundation. In following out the line of procedure indicated by § 6 of subchapter 7 of the charter, the board of public works made the proper estimate of the cost of the work proposed to be done, and made the usual recommendation to the council. Thereupon a resolution was introduced in the council, which declared that it was necessary to grade and pave such portion of this alley, for the reason that it was inadequate, inconvenient, and unsafe for public use, and for the drainage of water therefrom; and that it was necessary to cause said work to be done without a petition from the abutting owners, for the reason that such owners had failed to make the alley in a suitable condition for public use. This resolution was first referred to the local committee of the eleventh ward,—being the ward where the alley was located,—who recommended that it be adopted. It was then referred to a special committee of five members, no one of whom was a resident of said ward, who likewise reported recommending its adoption. The resolution was presented to the council August 3, and passed and adopted by the council on August 31 by a vote of thirty-nine members in the affirmative. This was, as we regard it, a proper compliance with the charter requirements. *Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W. 603. The contention that § 6 does not permit the improvement of an alley without a petition from abutting lot-owners is altogether too technical to receive approval. A fair construction of the rather indefinite provisions of that section has led us to the conclusion that such grading may be done without petition, when the council follow, as they did in this case, the technical course of procedure therein mapped out. The initial steps leading up to the improvement of this alley having been taken in conformity to the charter requirements, the city was invested with jurisdiction to proceed. The next step—the assessment of benefits and damages—was, as we have seen, wrongfully taken, and rendered subsequent action void. Section 11 of subchapter 7 provides that the owner of any lot who feels himself aggrieved by any assessment might appeal to the circuit court, and have his grievance therein determined; and it is urged that this gives him an ample and exclusive remedy. In cases where the initial steps have been such as to give the city jurisdiction to proceed, this argument appeals to us with considerable

force; but this court, having held in a long line of decisions that the remedy by appeal is not exclusive where the assessment is shown to be arbitrary and fraudulent, we feel compelled to follow them. *Harrison v. Milwaukee*, 49 Wis. 247, 5 N. W. 326; *Watkins v. Milwaukee*, 52 Wis. 98, 8 N. W. 823; *Liebmann v. Milwaukee*, 89 Wis. 336, 61 N. W. 1112. Admitting that plaintiff may maintain a standing in a court of equity, the trial court should have considered and applied a very important and salutary provision of law, apparently enacted to cover just such cases as this. We refer to § 1210e, Rev. Stat. 1898. This section provides that in actions of this kind, if the court shall determine that such an assessment is invalid by reason of a defective assessment of benefits and damages, it shall stay proceedings in such action until a new assessment therefor be made, and thereupon the proper city authorities shall proceed to make a new assessment, as is required by law in the case of such original assessment. It also gives the plaintiff the right to contest such new assessment, and points out the method of procedure. When the proper assessment is finally determined, the court shall make an order requiring the plaintiff to pay the same as a condition of judgment. The fact that the plaintiff seeks relief for the invasion of his premises need not interfere with the complete application of this statute to the situation. It being found that the city has the right to grade the alley, a court of equity may readily adjust and fix the rights of the parties as to the matters not connected with the reassessment, and give the appropriate relief, and still obey the statute in regard to the procedure for reassessment. Independent of this statute, we cannot quite understand how a court of equity could have felt warranted in requiring the defendants to restore the alley to its original condition. The intrusion upon plaintiff's lot by the city and its contractors was wholly unwarranted, as they have admitted by not appealing from that portion of the judgment requiring them to restore his premises to their original condition. The only other question of which the plaintiff has any right to complain is that a proper assessment of benefits has not been made. Other people besides plaintiff have rights in this alley, and, before the court should have required a restoration to the original condition, some proof as to the situation should have been taken. It is fairly inferable from the case that the original condition was unsafe and dangerous. Suppose it was shown that all the other owners had acquiesced in the change, and had paid their assessment of benefits, would a court of equity be warranted in making a judgment which seriously interfered with their rights, and did not benefit the plaintiff? A mere statement of the query would seem to furnish an answer to it. The judgment in this regard was wholly unwarranted under any view of the case.

We summarize our conclusion as follows: That the city has the power to and has prop-

erly established the grade of this alley; that the action of the council in directing the grading and paving of the alley, under the proofs offered, was proper and legal; that the assessment made by the board of public works was arbitrary and illegal; that the situation presented is such that the court should order a stay of proceedings in so far as relates to the assessment of damages and benefits for the improvement of the alley, and direct a reassessment and proceedings, under § 1210e, Rev. Stat. 1898.

To this end, *those portions of the judgment appealed from are reversed*, with costs, and the cause is remanded for further proceedings in accordance with this opinion.

So ordered.

Rehearing denied March 20, 1900.

Ludwig FRANKE *et al.*, *Respts.*,
v.

Albert MANN *et al.*, *Appts.*

(.....Wis.....)

1. **Prejudicial error must be made affirmatively to appear** in order to cause the reversal of a judgment.
2. **Notice of an attempt to organize a church, and of the time and place of forming the organization**, as required by Rev. Stat. § 1990, is not necessary where the incorporators are not members of a religious organization, but desire to organize a corporation in connection with a church of their own peculiar tenets to be associated therewith.
3. **A religious corporation de facto is created** where an attempt in good faith is made to comply with a statute which authorizes the formation of such corporation, articles are drawn and signed in form as the statute requires, except as to the acknowledgment, and they are recorded, the corporation organized, and the right to exercise the franchise of being a corporation asserted for several years.
4. **A majority of the members of a church corporation organized as a body of Christian believers of a particular sect cannot devote its property to a use inconsistent with the purposes of the corporation by employing a pastor whose teachings are inconsistent with those of the sect to which the church belongs.**

(February 27, 1900.)

A PPEAL by defendants from a judgment of the Circuit Court for Lafayette County in favor of plaintiffs in a proceeding brought to prevent defendants from perverting property of a religious society. *Affirmed.*

NOTE.—As to right of a majority of the members of a religious organization to divert the church property to the support of new and different doctrines, see *Finley v. Brent* (Va.) 11 L. R. A. 214; *Mt. Zion Baptist Church v. Whitmore* (Iowa) 13 L. R. A. 198; *Smith v. Pedigo* (Ind.) 19 L. R. A. 433; *Schlichter v. Kelter* (Pa.) 22 L. R. A. 161; *Bear v. Heasley* (Mich.) 24 L. R. A. 615; *Philo-48 L. R. A.*

Statement by **Marshall, J.:**

Equitable action to prevent members of a religious corporation from perverting the use of its property.

The issues made by the complaint were decided by the trial court substantially as follows:

(1) May 13, 1888, for some years theretofore, and ever since, the German Evangelical Synod of North America has existed in Wisconsin and other states as a religious corporation separate and distinct from all others, and has been and is made up of people whose beliefs on religious and church questions differ materially from those of any other church or sect, particularly from the belief of the members of the Lutheran or German Lutheran Church.

(2) At the time stated Wisconsin was a district of such synod, having a form of government binding the different church societies composing it to the distinct belief of the sect known as the "German Evangelical Church."

(3) May 13th, aforesaid, at the town of Wayne, Lafayette county, Wisconsin, several persons named in the complaint, competent for the purpose, members of the German Evangelical Church and its Synod of North America, for the purpose of forming a religious society of such sect and synod, made a certificate of organization for a church corporation, in good faith, intending to comply with the laws of this state on that subject, but failed to have the execution of such certificate acknowledged, though they caused the same to be recorded in the office of the register of deeds of Lafayette county, May 29, 1888, and thereafter, on May 4, 1897, seven of the fifteen signers of the certificate duly acknowledged the same and caused the certificate thereof to be recorded in the margin of the record of the articles.

(4) The day the articles of organization were signed the signers held their first meeting and duly elected trustees, and thereafter a corporate organization was maintained, the right to be a corporation asserted, and the corporate franchise accordingly used down to the time of the commencement of this action, the defendants, except the defendant Schlichting, being then the trustees.

(5) The corporation, till 1896, submitted to the government and direction of the German Evangelical Synod of North America, and recognized its authority as a superior governing power in all respects according to the ecclesiastical law of the synod. The Wayne Church Society, together with two other such organizations, was presided over during the time mentioned by ministers of the German Evangelical Church, designated for that purpose by the synod of the sect for

math College v. Wyatt (Or.) 26 L. R. A. 68; *Krecker v. Shirey* (Pa.) 29 L. R. A. 476; *Park v. Champlin* (Iowa) 31 L. R. A. 141; and *Smith v. Pedigo* (Ind.) 32 L. R. A. 838.

As to power of local church society to withdraw from the general body of the church, see *Fuchs v. Melsel* (Mich.) 32 L. R. A. 92. and *note.*

North America, and took part, in the manner provided by the rules of the sect, in the district conferences and conventions of the church for the district of Wisconsin.

(6) Substantially all members of the society, including plaintiffs and defendants, signed their names in a book kept for that purpose, as did the members of the other churches of the sect presided over by the same minister, as aforesaid, purporting thereby to adopt the synodical rules and regulations prescribed for such purposes. Such rules were not formally adopted by a vote of the members of the society or by any formal corporate act. The individual members of the society signed the book at the request of the minister as and for a submission of the society to the rules, and such rules were submitted to by the society and the members thereof up to about the year 1896.

(7) The subordinate organizations of the German Evangelical Synod of North America are bound by its constitution and system of government to submit thereto in all matters, including the religious belief of the church and its forms and ceremonies, and not to employ a pastor other than a member of the German Evangelical Church, ordained by the synod of such church for North America, holding its certificate of good character and behavior, and who shall subscribe a written promise to be faithful to the rules and regulations of such society and synod.

(8) The society built a church edifice on lands described in the complaint, donated to the society for that purpose by Wilhelm Taufmann, one of the plaintiffs. The conveyance was made in form to the trustees of the German Evangelical St. Paul's Society of the Town of Wayne, Lafayette county, Wisconsin, for the use of such society. It was accepted by the corporation with knowledge of its provisions by substantially all the members of the society, and without objection as to the use declared. There was some talk by individual members of the church about the property being made free to all sects except Roman Catholics, but that was never favored by the society as such.

(9) The church building was paid for by money contributed by its members, was duly dedicated as property of a society of the German Evangelical Synod of North America, and was used in harmony therewith till some time in 1896, when, on account of difficulty about obtaining a minister to serve the society, defendant Schlichting, a minister of the Lutheran Church and sect, materially different in its religious belief and distinct from that of the Wayne society, was employed to serve it for one year, at the end of which period a majority of the members of the society again employed Schlichting, the minority protesting, on the ground that they desired and were entitled to have a minister in harmony with the society as a member of the German Evangelical Church Synod of North America. Pursuant to such employment, notwithstanding such protest, Schlichting served the society till interfered with by the temporary injunction granted in this action, and in so doing confined his ministrations

in harmony with the sect to which he belonged, the German Lutheran Church, preaching the belief of such sect, which, as before indicated, was materially out of harmony with the religious belief of the German Evangelical Church of the Synod of North America, and assumed the right to, and did, prevent the use of the church edifice by a minister of the society to which the church belonged.

On such facts the court concluded:

(1) The German Evangelical St. Paul's Society of the Town of Wayne, Lafayette county, Wisconsin, since May, 1888, has been a church corporation under the laws of this state, subject to the system of church government of the German Evangelical Synod of North America.

(2) The title to the church edifice and property described in the complaint is held in trust by the trustees of the Wayne society, for the use of such society as an organization of the German Evangelical Synod of North America, and for the exclusive use of such society in harmony with the religious views of the German Evangelical Church and such synod of such sect.

(3) Defendants having perverted the property of such society from its legitimate use, plaintiffs, though constituting a minority of the members of the society, have a right to such redress as will prevent the further perversion of its property, and as will compel the use of such property in conformity with the religious belief of the German Evangelical Church, and the system of government of the synod of such church for the district in which the society is located.

(4) Plaintiffs are entitled to judgment accordingly and as prayed for in the complaint.

Judgment was rendered in accordance with the aforesaid conclusions, from which this appeal was taken.

Messrs. Wilson & Martin for appellants.

Messrs. Orton & Osborn and Thomas Luchsinger, for respondents:

There are no exceptions to the facts or conclusions of law by the circuit court which can be considered on this appeal, for the reason that such exceptions are not incorporated in the bill of exceptions.

Cramer v. Hanaford, 53 Wis. 85, 10 N. W. 15; *Evenson v. Bates*, 58 Wis. 24, 15 N. W. 837; *Treloar v. Osborne*, 98 Wis. 461, 74 N. W. 99; *Newton v. Williams*, 94 Wis. 222, 68 N. W. 990.

This religious society was legally incorporated, notwithstanding the articles of association were not acknowledged.

St. Jacob's Lutheran Church v. Bly, 73 N. Y. 323; *Fadness v. Braunborg*, 73 Wis. 257, 41 N. W. 84.

But, if never a corporation *de jure*, it was a corporation *de facto*.

Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482; *Supreme Court of I. O. of F. v. Supreme Court of U. O. of F.* 94 Wis. 234, 68 N. W. 1011; *Beach, Priv. Corp.* §§ 13, 14; 2 *Morawetz, Priv. Corp.* § 745;

Ashland v. Wheeler, 88 Wis. 617, 60 N. W. 818; *Finnegan v. Noerenberg*, 52 Minn. 239, 18 L. R. A. 778, 53 N. W. 1150; 7 Thomp. Corp. § 8207; *Re Gibbs's Estate*, 157 Pa. 59, 22 L. R. A. 276, 27 Atl. 383; *Eaton v. Walker*, 76 Mich. 579, 6 L. R. A. 102, 43 N. W. 638; *Stout v. Zulick*, 48 N. J. L. 599, 7 Atl. 362; *Baker v. Neff*, 73 Ind. 68; *Williamson v. Kokomo Bldg. & Loan Fund Assn.* 89 Ind. 389; *Renwick v. Hall*, 84 Ill. 163.

A substantial compliance with the law is not essential to a *de facto* corporation. That makes a corporation *de jure*.

7 Thomp. Corp. § 8207; *Finnegan v. Noerenberg*, 52 Minn. 239, 18 L. R. A. 778, 53 N. W. 1150.

As to the qualifications, required by the statute, of corporators, to wit,—that they be persons over twenty-one years of age, and not members of any religious congregation at the time, no proof is required, the articles of incorporation themselves being presumptive evidence of the existence of such qualifications.

Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482.

When property and its uses are involved, courts of equity will consider theological questions, to the end that property acquired for the religious uses of any church, sect, or denomination of Christians may be sacredly preserved for such particular uses and purposes, and that it shall not be perverted to other uses, even by a majority of the members of the organization.

Fadness v. Braunborg, 73 Wis. 257, 41 N. W. 84; *Miller v. Gable*, 2 Denio, 492; *Kreckler v. Shirey*, 163 Pa. 534, 29 L. R. A. 476, 30 Atl. 440; *Ferraria v. Vasconcellos*, 31 Ill. 54; *Mount Zion Baptist Church v. Whitmore*, 83 Iowa, 138, 13 L. R. A. 198, 49 N. W. 81; *White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends*, 89 Ind. 136; *White v. Rice*, 112 Mich. 403, 70 N. W. 1024; *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666; *Lamb v. Cain*, 129 Ind. 486, 14 L. R. A. 518, 29 N. E. 13; *Schnorr's Appeal*, 67 Pa. 138, 5 Am. Rep. 415; *Stebbins v. Jennings*, 10 Pick. 171; *Baker v. Fales*, 16 Mass. 503; *Kniskern v. Lutheran Churches of St. John & St. Peter*, 1 Sandf. Ch. 439; *Smith v. Pedigo*, 145 Ind. 361, 19 L. R. A. 433, 33 N. E. 777, 44 N. E. 363; *Hale v. Everett*, 53 N. H. 9, 16 Am. Rep. 82; *Roshi's Appeal*, 69 Pa. 462, 8 Am. Rep. 275.

The property acquired by the trustees of a religious society not incorporated is bound by the uses and practices of such unincorporated society equally as if it were incorporated.

Fuchs v. Meisel, 102 Mich. 357, 32 L. R. A. 92, 60 N. W. 773; *Lynd v. Menzies*, 33 N. J. L. 164; *Auracher v. Yergler*, 90 Iowa, 558, 58 N. W. 893; *Schwoeiker v. Husser*, 146 Ill. 399, 34 N. E. 1022; *Russie v. Brazzell*, 128 Mo. 93, 30 S. W. 526; *Schlichter v. Keiler*, 156 Pa. 119, 22 L. R. A. 161, 27 Atl. 45.

Marshall, J., delivered the opinion of the court:

Thirty-six exceptions were filed to the finding 48 L. R. A.

ings of fact, but counsel for appellants made no specific assignment of error in regard to such findings in accordance with the rules and settled practice of the court. We find in counsel's brief a statement of their claim in a general way, and a statement that the court erred in so far as the findings and conclusions of law are inconsistent with such view, and on that we are referred to the pages of the printed case where the findings and conclusions of law may be found, and in like manner to the exceptions thereto, particularly to twelve of such exceptions by their numbers. No attempt was made by counsel in their brief to point out evidence that is contrary to the findings or want of evidence to support them, but it is suggested that we carefully study the printed case of 143 pages, with a view of discovering whether any of the exceptions were well taken or not. With such a presentation of the appeal, judicial duty requires only a sufficient examination of the case to determine whether the findings and pleadings support the judgment. Error is presumed against on appeal, and unless, as to the facts at least, that is met by some distinct assignment of error or errors, and some attempt to discuss such assignments and to point out evidence or want of evidence to warrant them or some of them, it will prevail. The general rule is that a judgment on appeal will be affirmed, unless prejudicial error not only exist, but be made to affirmatively appear. *Eaton v. Patchin*, 20 Wis. 486; *Milwaukee Harvester Co. v. Teasdale*, 91 Wis. 59, 64 N. W. 422; *Menz v. Beebe*, 102 Wis. 342, 78 N. W. 601; *Alexander v. Irwin*, 20 Neb. 204, 29 N. W. 385; *Pottawattamie County v. Marshall County*, 56 Iowa, 410, 9 N. W. 326; *McVey v. Johnson*, 75 Iowa, 165, 39 N. W. 249; *Papke v. Papke*, 30 Minn. 260, 15 N. W. 117. That rule means more than that error may be discovered in the record. It requires that the person alleging error must point it out and make it affirmatively appear in accordance with the rules and practice of the court. That requires error to be definitely assigned and a good-faith attempt made to present it to the court for consideration; and where the claim is that a finding of fact is contrary to the evidence, that the evidence, or want of evidence, bearing on the question, be brought to the attention of the court.

From the foregoing it is plain that this court would be justified in disregarding all contentions of the appellants' counsel that the findings of fact are contrary to the evidence. However, the labor put upon the case indicates so clearly that the appeal was taken in good faith, and that the omission to comply with the rules and practice governing the matter was not intentional, that the neglect may be easily excused in the interest of justice, particularly to the parties whose rights are involved. That has been done, and the record examined carefully, and with more labor than would have been necessary, had the evidence or want of evidence relied upon been definitely pointed out.

We are unable to discover any substantial conflict in the evidence on many of the mate-

rial points, and no clear preponderance of evidence against any of the facts found. The evidence appears to be all one way that the church corporation was formed for the purposes of a religious sect known as the "German Evangelical Church," under the jurisdiction and subject to the government of the established body of that church in this country, and in the Wisconsin district thereof, known as the "German Evangelical Synod of North America;" that such sect has distinguishing characteristics of a material character, wherein it differs from all other churches, particularly from the German Lutheran Church, both as regards religious belief and church organization and government; that the land upon which the church edifice was constructed was deeded to the corporation in trust for its use in harmony with the purposes of the organization, and none other; that the edifice was erected and paid for with the same view, and that it was dedicated to religious uses according to the religious belief, customs, and government of the German Evangelical Church, particularly of the synod of such church of North America; that the church society was conducted, and its property used, in strict harmony with the purposes of its organization till a short time before the commencement of this action; that the defendants perverted the property of the society to purposes foreign to the legitimate use thereof, and that there was no practicable way of redressing the wrong to the corporation and the minority of its members, except by invoking the power of the court.

It is said that when the deed of the land on which the church edifice stands was delivered to the society, the grantor promised that it should be free, except to Roman Catholics, and that subscriptions were made to aid in the construction of the edifice with the same view. Further, that the persons who organized the church society were not members of the German Evangelical Church, but were members of the German Lutheran Church. We fail to find evidence in the record to sustain such claims. True, as the court found, there was some talk by members of the church society, respecting the church edifice being free to all sects except Roman Catholics, but the deed was in fact made and delivered to the society for the purposes of its organization, indicated in its articles of organization, and the society accepted it for that use. That fixed the status of the property irrevocably, as regards the power of the corporation over it, acting by defendants, whether by the will of a part or all of its members. *Fadness v. Braunborg*, 73 Wis. 257, 41 N. W. 84; *McBride v. Porter*, 17 Iowa, 203; *Sutter v. First Reformed Dutch Church*, 42 Pa. 503; *Lawson v. Kolbenson*, 61 Ill. 405. The rule in that regard, as it prevails generally, was stated in *McBride v. Porter*, 17 Iowa, 203, in the following language: "The grantees took the title, therefore, subject to this limitation, and it is not in the rightful power of the minority, or of the majority, or even of the whole congregation, to divert the property from the

use and trust for and with which it was thus conveyed. The parties receiving the title took the same subject to the trust and it is peculiarly within the province of a court of equity to enforce the trust, and, in its enforcement, the court will look to the trust specified and intended, and must disregard all questions as to majorities or as to religious creeds and beliefs except so far as shall be necessary to ascertain the trust intended and the application of the property accordingly."

It is further suggested that no notice was given of the purpose to organize a church corporation May 13, 1888, when the articles of organization were signed, as required by § 1990, Rev. Stat., hence that such articles are void, and the findings of fact inconsistent with that view contrary to the evidence. To that there are at least two conclusive answers. Where incorporators are not members of a religious organization, but desire to organize a corporation in connection with a church of their own peculiar tenets to be associated therewith, no notice of an intent to so organize, or the time or place of forming the organization, is necessary. Such were the circumstances under which the society in question was organized, according to findings supported by evidence. But waiving that, there was a statute permitting the formation of such a corporation, an attempt in good faith to comply therewith, and articles were drawn and signed in form as the statute required, except as to the acknowledgment. They were recorded, the corporation was organized, and the right to exercise the franchise of being a corporation asserted. and such franchise in good faith used, all the persons who are parties to this action concurring, except defendant Schlicting, for several years. Such circumstances created a corporation *de facto* at least, which is sufficient for the purposes of this case. *Bergeon v. Hobbs*, 96 Wis. 644, 71 N. W. 1056; *Slocum v. Head* (decided February 2, 1900; Wis.) 81 N. W. 673.

It is further contended, as a reason why the finding of fact, to the effect that a corporation of the German Evangelical Church of the Synod of North America was organized by and pursuant to the articles signed May 13, 1888, is contrary to the evidence, that such was not the intention of those who participated in what occurred at the time. There seems to be but very little room, if any, for controversy on that point. The person who drew the articles of organization, and under whose direction they were signed, was a minister of the denomination of Christians known as the "German Evangelical Church," and a minister of the synod of such church for North America. He framed such articles for the purpose of forming a corporation of his church, and in harmony with the wishes of those who signed them. There is ample evidence as to that. The articles were signed at a meeting at which substantially all who had been accustomed to meet in Wayne to listen to religious teaching of the German Evangelical Church were present. The minister read the articles and ex-

plained them, and did likewise with the rules of the church. There is no sufficient evidence to rebut the presumption that all the signers of the articles knew what they contained. In them is the following language: "The undersigned, . . . and those who are or may become associated with them for the purposes herein specified, have organized themselves into a religious society of the German Evangelical Synod of North America, located in the town of Wayne, county of Lafayette, state of Wisconsin." There is no mistaking the meaning of such language.

The contention that the deed of the land on which the church stands was made for the use of a free church, barring only Roman Catholics, and that the finding is contrary to the evidence on that point, is quite as infirm in its supports as the claim in regard to the intent of the incorporators to form a society of the German Evangelical Synod of North America. As before indicated, the language of the deed vests the title to the property in the grantee for its church purposes, meaning, obviously, such church purposes as the society was organized for. That read into the instrument, in effect, the words "as a religious society of the German Evangelical Synod of North America." If we look to the circumstances under which the deed was executed, the fair preponderance of the evidence is that the grantor and the grantee intended that the property should be devoted exclusively to the purposes for which the grantee was organized; that is, the purposes of a society of the German Evangelical Synod of North America. Before the deed was drawn, the grantor, with several members of the church, took advice as to how it should be worded, particularly as to the grantees, having present at the time the articles of organization of the society. The grantor testified that he made no promise before the deed was delivered, except to give the land to the society. When the deed was delivered it was read carefully, a large number of the members of the society being present, and there was evidence that it was afterwards read publicly in church and was fully approved.

We will not further discuss the evidence, but close this branch of the case by saying that a careful reading of the record leads to a satisfactory conclusion that all of the findings, to the effect that the property in question is held by the church society for its use as an organization of Christians of the belief of the German Evangelical Synod of North America, and as a church society of such synod, are in the main supported by the uncontradicted evidence or the preponderance of the evidence, and that no material question, at least, was determined contrary to the clear preponderance of the evidence.

We come now to the broad question of whether a majority of the members of a church corporation, organized as a body of Christian believers of a particular sect, can devote its property to a use inconsistent with the purposes of the corporation. That question, it would seem, on the most familiar principles, requires a negative answer. It 48 L. R. A.

is the law of such corporations, the same as of all others, that they cannot lawfully divert their property to uses in disregard of the limitations contained in the acts creating them. There is no difference between church and other corporations in that regard. Church corporations are creatures of the law the same as business or municipal corporations, and when it comes to property rights a court of equity has the same power to protect the minority in the one as in the other. If every taxpayer in a city but one were to favor the use of public property for a purely private use, the one, backed by the power of the court, would prevail. If all of the stockholders of a business corporation but one were to favor the use of the corporate property for something entirely foreign to the purposes of the corporation, the one stockholder, with right on his side, and the power of the court to enforce it, would control and prevent the mischief. The power of a religious corporation as to the use of its property is limited by its organic act the same as any other. When it exceeds such limitations its acts are *ultra vires*, and the court, at the suit of a member of it, will apply the proper preventative or restorative remedy where there are no superior equities in the way.

The law as above indicated was definitely declared by this court in *Fadness v. Braunborg*, 73 Wis. 257, 41 N. W. 84. Attention was there called to the wording of the various provisions of chapter 91, Rev. Stat., under which church corporations are created. Section 1990 authorizes the creation of such corporations, each limited, however, in its purposes, to those of a particular sect and a particular society of such sect, or to persons of a particular religious belief and a single society thereof. Other sections place such corporations, in all essential particulars, under the same restrictions as to their business affairs as those of other corporations existing under the statutes. It was said in the *Fadness Case*, in effect, that if officers temporarily in charge of the corporate affairs divert its property from the legitimate uses of the corporation, as limited by the grant of such property to it, or the purposes of its organization as regards the particular religious faith it was organized to promote, a court of equity has ample power to interfere to protect the minority; for, as to such matters, the right of each member of the church society is the equal of every other, and the rights of all are referable to the terms of the trust upon which the corporation property is held, which trust, as indicated, may be declared in the conveyance of the property to the corporation so far as not inconsistent with its corporate powers, or by the articles of organization limiting and defining its rights and those of its members. By submitting to the law of the state in forming a corporation under the statutes, and vesting the title to the property of a church society in it, the members thereof become irrevocably bound by the limitations upon corporate power incident to such artificial bodies.

Eccleson v. Ellingson, 67 Wis. 634, 31 N.

W. 342, is to the same effect. It was there suggested that the policy of the state was to limit the purposes of a church corporation under the statute, to those of a single society, particular sect or body of persons of like religious belief, to avoid just such dangers as threatened the minority of the society under consideration,—the danger of schismatic differences causing contentions among factions for the control and use of the property of the society. The law wisely precludes the hope of factional, exclusive enjoyment of property, furnishing stimulus to church differences. Experience has taught that the cohesive power of mutual material interests, even those that are aids to spiritual enjoyment and welfare, present and future, is generally as powerful to promote, in church affairs, the dwelling together of brothers in harmony, as matters of doctrine. The benefit of that influence is secured where persons are incorporated as members of a particular sect and church, and vest the title to their church property in such corporation. So fenced about, a faction of a church community, however large, can neither withdraw and claim a part of any of the church property, nor remain and divert its use to purposes foreign to the purposes of the corporation.

Cases exist, involving corporate control over property not impressed with a trust for a particular use by the instrument of conveyance or by the act of incorporation, some of which have been brought to our attention, and many more might have been cited; but they do not apply. 2 N. Y. Rev. Laws 1813, chap. 60, § 3, p. 212, that forms the basis for some of such decisions, and which are referred to in other adjudications as authority, was said in *Petty v. Tooker*, 21 N. Y. 267, to expressly confer upon trustees of a church corporation organized under it absolute power of control as regards the religious use to which the property may be devoted. Here the statutes give to trustees of a religious corporation formed under them the same control over its property as is given to other corporations. The power is limited to the particular purposes expressly or impliedly named in the act of incorporation.

What has been said is in harmony with the law regarding trusts for religious uses, whether the trustees be officers of a religious corporation or of an unincorporated ecclesiastical body, as indicated by the numerous authorities cited in the brief of counsel for respondent, among which are the following: *Ferraria v. Vasconcellos*, 31 Ill. 25; *Mount Zion Baptist Church v. Whitmore*, 83 Iowa, 138, 13 L. R. A. 198, 49 N. W. 81; *White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends*, 89 Ind. 136; *Lamb v. Cain*, 129 Ind. 486, 14 L. R. A. 518, 29 N. E. 13; *Miller v. Gable*, 2 Denio, 492; *Schnorr's Appeal*, 67 Pa. 138, 5 Am. Rep. 415; *Stebbins v. Jennings*, 10 Pick. 172; *Baker v. Fales*, 16 Mass. 503; *Smith v. Pedigo*, 145 Ind. 361, 19 L. R. A. 433, 33 N. E. 777, 44 N. E. 363; *Hale v. Everett*, 53 N. H. 9, 16 Am. Rep. 82.

The governing idea in all such cases is 48 L. R. A.

that property held by the trustees of a church society has impressed upon it a character in harmony with the creation of the trust, and that any change of such character is a violation of such trust. If property be conveyed to trustees for use of the corporation, and its organic act proclaims the religious belief of its members, and sect to which it belongs, so as to indicate clearly the particular use intended by the grantor, or the conveyance expressly indicates the particular use intended by the grantor, or the conveyance expressly indicates the limitations upon such use, or if a corporate organization be formed as a society of a particular church and it becomes possessed of property in any way in trust to that end, in either case the property is held in trust for the use so indicated, and such use cannot be perverted without consent of all the parties to the trust.

Our attention is called to *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666, as supporting the view of appellants, but it is in strict harmony with the foregoing. Justice Miller there classified controversies that had been before the courts, concerning rights of property held by ecclesiastical bodies, as follows:

(1) Cases where property forming the subject of controversy was, by the terms of the deed or will of the donor, or other instrument by which the property is held, devoted to the teaching, support, or spread of some specific form of religious doctrine or belief.

(2) Where property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and, so far as church government is concerned, owes no fealty or obligation to any higher authority.

(3) Cases where the religious corporation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control, more or less complete, in some supreme judicatory, over the whole membership of that general organization.

In the first class of cases it was said the property cannot legally be diverted from the purposes of the trust, whether the donee be an independent church or the member of a larger church organization to which it owes obedience. In the second class it was said, where the character of the organization is such that its members, in such manner as may be prescribed by the plan of organization, may freely deal with its property, and such property is not impressed with any trust other than that of the general use for the purposes of the organization as a religious society, its trustees, for the time being, in power, according to the rules of the society, can control the use of the property within the general purposes of its ownership. In the third class of cases it was said, where the control of property is dependent upon the question of doctrine, discipline, ecclesiastical law, rule or custom, or church government, and that has been decided by the highest church tribunal within the organization, the

civil court will accept and follow the ecclesiastical determination.

It will be seen that the idea which prevails at every point is that a trust impressed upon property, if there be one, cannot be legally violated. As was said, in effect, in *Miller v. Gable*, 2 Denio, 492, a single member of a church will prevail against a dozen to prevent a violation of a trust for a particular religious use of the church. And in *Mount Zion Baptist Church v. Whitmore*, 83 Iowa, 138, 13 L. R. A. 198, 49 N. W. 81, a minority of the members of the church, however small, may prevent the perversion of the property held by it in trust to promulgate a particular religious faith.

The instant controversy cannot properly be located in the second class mentioned in *Watson v. Jones*. The Wayne society is not strictly an independent church society. It was made, by its articles of organization, a society of the German Evangelical Synod of North America. Again, the property was conveyed to the church, as has been stated, for a particular use, within the first class of cases mentioned. This is not a case where there is no specific trust impressed on the corporate property in the hands of the church; neither is it a cause dependent upon

a determination of some ecclesiastical question.

Again, we are not dealing with a controversy regarding which of two factions, claiming to belong to the same sect, is entitled to control its property, the decision involving some question of doctrine, or other ecclesiastical question, as in *Wehmer v. Fokenga*, 57 Neb. 510, 78 N. W. 28; nor is it a case where a corporation, organized without reference to synodical relations, afterwards gave allegiance to a particular synod, and later a faction attempted to sever such allegiance, as in *Fadness v. Braunborg*, 73 Wis. 257, 41 N. W. 84, and *Lawson v. Kolbenson*, 61 Ill. 405. The controversy is whether members of a corporation, created as a synodical church society, and expressly limited by its organic act as to its association with other churches, and the trust character of its property, and by the conveyance of such property to it, merely because they are in the majority, can violate that trust and be free from the power of a court of equity to remedy the wrong at the suit of the minority. The answer to that has been indicated. The decision of the circuit court was right.

The judgment must be affirmed.
So ordered.

TENNESSEE SUPREME COURT.

Samantha J. CARLAND, Appt.,
v.

Charles A. AURIN.

(.....Tenn.....)

1. The owner of a city lot has not the right to fill in or raise the surface so as to prevent the natural flow upon it of surface water from the higher ground of an adjoining owner, but is subject to the same rule which governs rural property.
2. The occupant of premises, whether owner in fee, life tenant, or lessee, may maintain an action for damages, measured by the injury to his particular estate or interest in the property, by an obstruction of the flow of surface water therefrom.
3. One who causes noxious vapors to rise upon the land of an adjoining proprietor by wrongfully obstructing the natural drain of surface water therefrom is liable for the damage the same as if such vapors had been wrongfully caused to rise on and from his own land.
4. An allegation that the wrongful creation of a stagnant pond caused the ill health of the plaintiff is sufficient without averring in terms that such wrong was the natural and proximate cause of the sickness.

(November 18, 1899.)

APPEAL by plaintiff from a judgment of the Circuit Court for Knox County in

favor of defendant in an action brought to recover damages for the alleged wrongful obstruction of a natural drain for surface water. *Reversed.*

The facts are stated in the opinion.

Mr. Henry H. Ingersoll, for appellant:

Lower lands are burdened with the servitude of receiving surface water from upper lands adjacent.

Louisville & N. R. Co. v. Hays, 11 Lea, 382, 47 Am. Rep. 291.

And those lower proprietors filling in their lots, or lands, so as to back surface water must provide sufficient culverts for its escape.

Carriger v. East Tennessee, V. & G. R. Co. 7 Lea, 382; *Louisville & N. R. Co. v. Mosman*, 90 Tenn. 150, 16 S. W. 64.

Nuisance injures occupation; therefore action lies to the injured occupant without alleging title to land.

Allou v. Suseng, 1 Coldw. 205.

Messrs. Green & Shields, for appellee:

Surface water is a common enemy which every proprietor may fight or get rid of as best he may.

2 Dill. Mun. Corp. 3d ed. § 1039.

In the case of urban property, a man may protect his premises against the fall of rain or snow, even to the extent of preventing its fall upon his ground altogether.

Cooley, Torts, 2d ed. pp. 574, 681.

The reason of the difference in the rule

NOTE.—As to rights in flow of surface water, see note to *Gray v. McWilliams* (Cal.) 21 L. R. A. 593; also *Sheehan v. Flynn* (Minn.) 26 L. R. A. 632; *Edwards v. Charlotte, C. & A. R. Co.* 48 L. R. A.

(S. C.) 22 L. R. A. 246; *Albany v. Sikes* (Ga.) 26 L. R. A. 653; *Jacobson v. Boening* (Neb.) 32 L. R. A. 229; and *Churchill v. Beethe* (Neb.) 35 L. R. A. 442.

between country property and city property is clearly stated in the New York case of *Vanderwiele v. Taylor*, 65 N. Y. 341.

An owner of vacant and unimproved city lots is not liable to an action for his failure to prevent mere surface water, accumulating thereon from natural causes, from passing thence upon the land of an adjoining proprietor to his injury.

Morrill v. Hurley, 120 Mass. 99.

An owner of a city lot on which surface water accumulates by the raising of a street and the adjacent land, and becomes stagnant, is not liable for the nuisance.

Barring v. Com. 2 Duv. 95.

The damages sought to be recovered for injury to plaintiff's health are not the natural and proximate result of the alleged wrongs, and are too remote.

Waggoner v. White, 11 Heisk. 748; *Southern R. Co. v. Brigman*, 95 Tenn. 628, 32 S. W. 762.

The gist of plaintiff's action is injury to the real estate in her possession. The measure of her damages under this phase of the declaration must be the impairment of the enjoyment of the premises, which would be determined by their rental value or the cost of putting them in repair.

Under the other phase of the declaration a totally different element of damages arises, the gist of which is not injury to the real estate, but injury to the person, to the health. These causes are so diverse as that they can only be asserted by means of separate suits.

Caldwell, J., delivered the opinion of the court:

This is an action of damages brought by the occupant of a city lot against the owner of an adjacent and lower lot, for creating an alleged private nuisance by filling such lower lot with earth, garbage, etc., and thereby obstructing the natural drain of surface water, and backing the same upon plaintiff's lot, and there making a stagnant pond, which impaired the use of the premises, and, through noxious vapors emitted, caused sickness to the plaintiff. The defendant demurred upon four grounds: (1) That, being within the city limits, the defendant had the legal right to fill or raise his lot, as it is alleged he did, though he thereby impeded and prevented the passage of surface water from the plaintiff's lot over his own; (2) that plaintiff, being only the occupant, and not the owner, of the lot alleged to have been injured, cannot maintain this suit; (3) that since the noxious vapors complained of are alleged to have risen from the lot occupied by the plaintiff, and not from that of defendant, there is no cause of action on account thereof against the defendant; and (4) that the plaintiff does not allege that the wrongs complained of were the natural and proximate cause of her sickness.

Two distinct rules have been administered in the various states of the Union with respect to the right of a lower proprietor to obstruct and repel surface water flowing from the land of a higher proprietor; one being called the "common-law rule," and the

other the "civil-law rule." Under what is known as the "common-law rule," the holding is that the right of the lower proprietor to occupy and improve his land, in such manner and for such purposes as he may see fit, either by changing the surface or by the erection of buildings or other structures thereon, is not restricted or modified by the fact that such improvements or occupation will obstruct and repel surface water that would otherwise naturally flow thereon from adjacent and higher land, even though the land of the upper proprietor may be injured thereby. This rule is based largely upon the maxim, *Cujus est solum ejus est usque ad cælum et ad inferos*, and seems to be administered in the states of Connecticut, Indiana, Kansas, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, New York, and perhaps in Texas (except as to railroads), Vermont, and Wisconsin. On the contrary, by the rule of the civil law, the proprietor of the lower land may not obstruct, by any means, the natural flow of surface water, and turn it back, to the injury of the higher lands of his neighbor; the latter owner having, by the law of nature, an easement or servitude of drainage over the lands of the former for the flow of surface waters. This rule is based partly upon the necessity of the situation, and partly upon the maxim, *Sic utere tuo ut alienum non lædas*, and appears to prevail in Arkansas, Alabama, California, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maryland, Michigan, Nevada, North Carolina, Ohio, Pennsylvania, Tennessee, Texas (as to railroads), Virginia, and West Virginia. There have seemingly been some changes from one rule to the other in Arkansas, Missouri, Iowa, New Hampshire, and some of the other states; and South Carolina appears to occupy a kind of middle ground between the two, allowing the lower owner to make any reasonable use of his land which may not unreasonably injure adjacent property above. The two rules are considered, and most of the adjudged cases cited, in 24 Am. & Eng. Enc. Law, pp. 907-922, inclusive; in *Gray v. McWilliams* (Cal.) 21 L. R. A. 593, 608, and note; in *Sheehan v. Flynn* (Minn.) 26 L. R. A. 632, and note; in *Vanderwiele v. Taylor*, 65 N. Y. 341, 345; in *Barkley v. Wilcox*, 86 N. Y. 141; in *Waverly v. Page* (Iowa) 40 L. R. A. 465, and note, and in Cooley, Torts, pp. 574-580, inclusive. Judge Dillon, adopting the remark of Lord Tenterden (*King v. Commissioners of Sewers*, 8 Barn. & C. 355, 360), in reference to the rights of owners along the seacoast, says that the law largely regards surface waters a common enemy, which every proprietor may fight or get rid of as best he may. 2 Dill. Mun. Corp. 4th ed. § 1039. The cases decided by this court are *Carriger v. East Tennessee, V. & G. R. Co.* 7 Lea, 388; *Louisville & N. R. Co. v. Hays*, 11 Lea, 382, 47 Am. Rep. 291; and *Louisville & N. R. Co. v. Mossman*, 90 Tenn. 157, 16 S. W. 64. All of these cases give distinct recognition and application to what is called the "civil-law rule," without so naming it, or mentioning the other rules. In the first of them, the following language

was quoted and adopted from Addison, Torts, Wood's ed. p. 95, viz.: "Land cannot be cultivated or enjoyed unless the springs which rise on the surface and the rains that fall thereon be allowed to make their escape through the adjoining and neighboring lands. All lands, therefore, are, of necessity, burdened with the servitude of receiving and discharging all waters which flow down to them from lands on a higher level; and if the owner or occupier of the lower lands interposes artificial impediments in the way of the natural flow of the water through or across his lands, and by so doing causes the higher lands to be flooded, he is responsible in damages for infringing the natural right of the possessor of such higher land to the natural outflow and drainage of the soil, unless he has gained a right to pen back water by contract, grant, or prescription. So that if the proprietor of the higher lands alters the natural condition of his property, and collects the surface and rain water together at the bottom of his estate, and pours it in a concentrated form and in unnatural quantities upon the land below, he will be responsible for all damages thereof caused to the possessor of the lower lands." Judge Cooley, after noting the fact that some of the states apply the one rule and some the other, says that "no doubt all the states would recognize an exception [to the civil-law rule] in favor of the owner of a town lot, who must be at liberty to cut off drainage across it, or his lot would be worthless for many purposes. In respect to agricultural lands, strong reasons may be given for either view, and it is probable that each will continue to find supporters thereafter as heretofore." Cooley, Torts, *577. Elsewhere it is said: "In some states a distinction has been made between urban and rural property, and it has been held, or, at all events, an opinion has been expressed, that the rule of the civil law that the lower proprietor holds his land subject to the burden of receiving the surface water which naturally drains from the higher lands does not apply to city and village lots." 24 Am. & Eng. Enc. Law, p. 915. In support of the last statement, the author cites cases from Alabama, Iowa, Michigan, and Pennsylvania, four of the states in which the civil-law rule prevails as to rural lands, and two cases 48 L. R. A.

from New York, one of the states in which the common-law rule prevails. In a later case from Iowa, however (*Waverly v. Page*, 105 Iowa, 225, 40 L. R. A. 465, 74 N.W. 938), the civil-law rule was applied in favor of the owner of a city lot, and that, too, as against the municipality itself; and the same rule seems to have been applied as to urban property in Georgia (*Goldsmith v. Eleas*, 53 Ga. 136), in Illinois (*Gormley v. Sanford*, 52 Ill. 159), in Kentucky (*Kemper v. Louisville*, 14 Bush, 37), in Louisiana (*Bowman v. New Orleans*, 27 La. Ann. 501), in Virginia (*Smith v. Alexandria*, 33 Gratt. 208), and in other states. We are unable to see any difference in principle between the reciprocal rights and duties of adjacent urban proprietors and those of adjacent rural proprietors, and hence we do not think it wise to apply one rule to city lots and a different rule to agricultural lands, especially in the same state. Having heretofore, in the three cases mentioned, determined the rights of adjacent rural proprietors by the civil-law rule, and still deeming that the better doctrine, we now apply it to urban lots, and in doing so overrule the first ground of demurrer.

As to the second ground of demurrer, it need only be said that the rightful occupant of a lot, whether he or she be owner in fee, life tenant, or lessee, if injured in his or her possession by the wrong of another, may recover damages for the injury done, that damage to be measured by the injury to his or her particular estate or interest in the property.

If it be true, as averred in the declaration, that the defendant wrongfully caused noxious vapors to rise on and from the plaintiff's lot, and that she was injured thereby, the defendant is liable therefor the same as if such vapors had been wrongfully caused to rise on and from his own lot. Hence the third ground of demurrer is not well taken.

The remaining assignment of demurrer is likewise bad, because it was not incumbent on the plaintiff to aver in terms that the wrongs of the defendant were the natural and proximate cause of her sickness. It was sufficient on this point to aver that the wrongful creation of the stagnant pond by the defendant caused the ill health suffered by the plaintiff.

Reverse and remand.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Fourth Quarter of the Judicial Year Beginning with October 1, 1899. Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS.
- V. FIDUCIARIES OR REPRESENTATIVES.
- VI. TORTS; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS; LIENS; WILLS; TRUSTS.
- VIII. CIVIL REMEDIES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

The adoption of constitutional amendments is held to be a judicial question, although the legislature may have attempted to determine the matter, and a proposed amendment is held not to be adopted where the proposition included several different amendments in one, contrary to the constitutional requirements. (Miss.) 652.

Regulation of business.

See also *infra*, III.

The requirement of a license for a barber is held to be a valid exercise of the police power because the business involves the public health. (Minn.) 88.

An ordinance requiring a license for the sale of cigarettes is held constitutional and within the grant of police power to make necessary police ordinances, and especially to preserve public health. (Ill.) 230.

Ordinances prohibiting the sale of provisions and intoxicants in department stores are held illegal as arbitrary interferences with the rights of the citizen. (Ill.) 261.

A statute making it unlawful to sell goods of more than one class without a license, and requiring a separate license for each class of goods fixed by the statute, is held unconstitutional as an interference with business which is unreasonable and not based on the police power. (Mo.) 265.

A statute prohibiting the gift of trading stamps to purchasers of an article by which they are entitled to obtain certain defined articles from a third person is held unconstitutional as an invasion of individual liberty. (R. I.) 775.

A statute requiring inspection of mines at the cost of mine owners is held to be within the police power, and constitutional provisions making it a duty to pass laws for ventilation and escapement shafts are not deemed restrictive. (Ill.) 554.

One who solicits orders for goods, without carrying or exposing any for sale, except as he carries goods to fill previous orders, is 48 L. R. A.

held not to be a peddler under a statute requiring a license for peddlers. (N. H.) 99.

A territorial statute requiring a license for the sale of coal oil is held unconstitutional as applied to the sale of original packages from another state. (N. M.) 417.

Flax stored in a warehouse is held to be "grain," within the meaning of statutes regulating warehousemen. (Minn.) 92.

Courts.

The right to administer in a state court in an action at law the Federal statute for limitation of liability is sustained in an action for death caused by collision. (Pa.) 33.

Officers.

An acceptance by an officer of another office when the statute prohibits him from holding both of them is held to terminate his *de jure* title to the first office, but not to prevent him from being a *de facto* officer, if he continues to perform its duties. (N. J.) 412.

Taxes.

Discrimination between judgments is held to make a statute for the taxation of personal judgments for money void, where it exempts various classes of judgments, including those rendered on mortgages until after sale. (Kan.) 238.

The situs of railroad cars while held within a state, under lease from a foreign corporation which has no place of business in the state, is held to be in that state for the purpose of taxation. (Utah) 790.

Houses occupied by the professors of an academy and their families are held to be occupied for the purpose for which the institution was incorporated, within the meaning of a statute exempting such property from taxation. (Mass.) 550.

Houses occupied by a college president and professors, where the dominant purpose of the occupation seems to be for the per-

formance of their duties to the institution, are held to be exempt from taxation. (Mass.) 547.

Highways and bridges.

The question whether a bridge may properly be used for the passing of a steam traction engine drawing a water tank is held to be for the jury, depending on the question whether such use is usual in that locality so that it ought to have been anticipated. (Ohio) 455.

A bay window extending more than 4 feet into a street, though at a point 8 feet above the surface, where it does not interfere with travel, is held to be an indictable nuisance, where the statute makes it a nuisance to build any structure that obstructs the highway or lessens its full breadth. (N. H.) 162.

An ordinance making it a penal offense to have a sign suspended over a sidewalk is held void as applied to a sign that does not in any way hinder or endanger the use of the sidewalk. (N. C.) 446.

Assessments.

The power of the legislature to require a town to contribute a portion of the cost of maintaining a highway or bridge wholly outside of its territorial bounds is upheld where the town is specially benefited. (Conn.) 465.

A city is held not to be liable for refusal to proceed to lay a new special assessment for a street improvement after the original assessment has been set aside, where the contractor agreed to look only to the assessment for compensation, and take the risk of its invalidity, while the statute expressly provides that the claim shall not become a public charge in any event. (C. C. A. 7th C.) 326.

An undertaking to maintain a new pavement for a series of years, required as a guaranty of the perfection of the work, is held not to be a contract for repairs within the meaning of a statute requiring contracts for repairs to be let to the lowest bidder. (Mo.) 279, 285.

Property abutting on a cul de sac is held not to be subject to assessment for an extension of the improvement which will convert the cul de sac into an open street. (Pa.) 274.

Sewers.

An ordinance providing that a city shall itself provide the materials and do the work of making sewer connections up to within 3 feet of the building to be connected is held void as an invasion of the rights of property owners. (N. C.) 442.

An annual charge for the use of a sewer is held to be constitutional, although the person charged therefor may have originally paid part of the cost of building the sewer. (Mass.) 277.

Liability of a city for casting sewage upon oyster beds, causing the destruction of the oysters, is sustained on the ground that it 48 L. R. A.

constitutes a taking of property. (N. Y.) 421.

The right of the legislature to confer on cities authority to use tidal streams as outlets for public sewers is sustained. (N. J.) 717, 722.

Counties.

A statute authorizing the recovery of a penalty against a county for death caused by mob violence is held constitutional. (Ohio) 738.

Municipalities.

A city is held not to be liable for a nuisance caused by the pollution of water by employees and a chain gang in operating a rock quarry outside the limits of the city, which the city had no authority to operate, unless it was implied from provisions which, coupled with the power, conferred a denial of liability for its misuse. (Va.) 331.

A municipality is held not to be liable for acts of its officers when participating in a conspiracy or in a mob. (Okla.) 620.

Bonds issued to refund indebtedness are held not to create any new or additional debt within the meaning of a constitutional limitation on municipal indebtedness. (S. D.) 785.

The cost of supplying a city with water is held not to be a necessary expense within the meaning of a Constitution prohibiting indebtedness or taxation, except for necessary expenses, without a two-thirds vote. (N. C.) 444.

The power of the mayor to veto action by the board of aldermen in passing upon the election of one of its members, of which the board is made by statute the final judge, is denied, although the statutes provide that he shall have a negative upon their action in all matters. (N. H.) 613.

Schools.

The right of colored children to attend the same schools as white children is denied where separate schools have been provided for them that are equal in their facilities and accommodations. (N. Y.) 113.

A statute providing for the selection of text-books for all the schools of the state by a commission, and for the purchase thereof from the lowest bidder, is held constitutional. (Tenn.) 167.

The power of the voters of a school district to rescind a vote for a tax to build a school-house is held to be implied in the power to vote the tax, when exercised at a regular meeting subsequent to that at which the tax was voted, but before the collection or levy or certification of the tax. (Iowa) 535.

Appropriations for the expenses of a state normal school maintained by a private corporation are held not to be in violation of the constitutional provision against assuming the debts of, or loaning credit to, any corporation, where they are made in consideration of the gratuitous education of teachers for the common schools, and the Constitution requires the maintenance of such schools. (Ill.) 575.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

See also *supra*, I., as to regulations of business.

A general assignment for creditors, made by a contractor, is held not to constitute an abrogation or breach of his existing contracts. (N. Y.) 685.

A contract by which a sheriff, who is also tax collector, turns over his tax list to another person, who engages to collect the taxes for a certain commission, is held void on grounds of public policy. (N. C.) 441.

A contract to draft a bill, have it introduced in the legislature, advocate its passage before committees, and do all things needful and proper to secure its passage, without any compensation unless the passage of the bill, which is an appropriation act, is procured, and without fixing the fees to be paid in the event of success,—is held void on grounds of public policy. (Neb.) 294.

The denial of a remedy to persons *in pari delicto* is not to require the refusal of equitable relief against the enforcement of a mortgage which is against public policy because given for services to procure an appointment to an office. (S. C.) 842.

Covenant.

A covenant in a deed of a railroad right of way, for the running of certain trains, is held to be binding on a subsequent purchaser of the railroad, although it was not expressly made binding on assigns. (Tenn.) 160.

Sale; stoppage in transitu.

Logs driven down a river by a log-driving company, of which each logowner is by statute a member, are held to be in the possession of such company, and not of the owner; and, although the company is not a common carrier, the logs in transit from a seller to a purchaser are held to be subject to the right of stoppage *in transitu*. (Me.) 50.

Physician's services.

The rule in railroad cases by which an employer is held liable for the services of a physician engaged in case of emergency for an injured employee is denied application in case of an accident at a laundry. (Mich.) 396.

Auction.

A bid at auction by one who is employed to bid by persons interested in having the property bring a good price is held not to constitute "puffing," if the persons for whom he bids are not conducting the sale so as to be able to release him from responsibility for his bid. (Ga.) 345.

Banks.

The rule that a collecting bank is not entitled to send paper directly to the drawer for collection without instructions is followed in a case which holds that instructions to send it to the drawer were in fact given. (Mich.) 583.

The holder of a check drawn by a bank which becomes insolvent before its presentation, upon which the deposit is applied by 48 L. R. A.

the drawee bank to its own claims without knowledge of the check, is held entitled to subrogation to any collateral which the drawee bank may have after its own claims are satisfied. (Ill.) 565.

Carriers.

A recovery for the loss of a sample trunk is sustained on a contract for its transportation as freight, where it was checked as baggage on payment of an excess charge, which was the same for baggage and for sample trunks, and no misrepresentation was made as to its character, while the baggageman had constructive notice of its character, though he checked it in violation of a rule of the carrier which prohibited his doing so without taking a release of liability. (N. Y.) 115.

A usage which will authorize passengers to take small packages of merchandise into passenger cars is held to require strict proof and construction, and not to be established by a practice that had been acquiesced in for a time by railroad employees as a mere matter of accommodation. (N. J.) 744

Insurance.

A member of a mutual benefit society is held not to be obliged to pay assessments, when his contract does not provide that he shall pay them or make any provision as to nonpayment, except for the forfeiture of his certificate. (Ind.) 362.

A liability on an indemnity against liability for damages from claims of injured employees is held to arise as soon as an employee is injured, although the employer is insolvent and cannot pay the claim, and such liability is held assignable. (Or.) 770.

The amputation of a part of a foot is held not to give a right to the whole amount of insurance under a by-law of an association providing for full payment on the "amputation of a limb (whole hand or foot)." (Mich.) 86.

An attempt by a traveling salesman to get upon a moving train is held not to constitute a voluntary exposure to unnecessary danger, as a matter of law. (Ill.) 359.

A mere agreement to buy real property, which is definite only as to the price to be paid, is held not to affect a policy which provides that it shall be void if the interest of the assured becomes other than the entire, unconditional, unencumbered, and sole ownership. (Ark.) 510.

The loss of property after an oral contract to insure it, but before the issuance of a policy, is held to give a right of action only in accordance with the conditions of the standard policy of insurance, and not to authorize a recovery of the value of the property as damages for breach of the contract to insure and deliver a policy, where the failure to deliver the policy caused no damage because the oral contract was itself a complete contract of insurance. (N. Y.) 424.

III. CORPORATIONS AND ASSOCIATIONS.

Consolidation.

The consolidation of railroads is held not to violate a constitutional provision against the ownership by one company of stock of another, or the making of contracts which will create a monopoly or lessen competition, where the competition lessened by such consolidation is merely incidental, at particular points. (Ga.) 351.

A consolidation of street railway companies is held not to violate a constitutional provision against the purchase by one company of shares in another, or the making of contracts between them, when the effect will be to create a monopoly or lessen competition, if the consolidation in question will result in giving increased facilities at less cost to the public. (Ga.) 520.

Regulation of business.

A street railway company which by its franchise is required to sell tickets in quantities at a reduced price on every car from the town which grants the franchise to a neighboring city is held to be under obligation to sell such tickets at that price to a passenger anywhere on the line, though he gets on a car and offers to buy the tickets outside the township. (Mich.) 84.

The doctrine established by the Supreme Court of the United States, that a state statute compelling the issuance of railroad mileage books at reduced rates is unconstitutional because it deprives the carrier of property without due process of law, is held inapplicable to a railroad company which is incorporated and acquires its franchises and property after the passage of the statute. (N. Y.) 669.

A statute compelling railroad companies to carry shippers of stock free to and from the destination of the stock is held unconstitutional as a deprivation of property without due process of law, and a denial of the equal protection of the laws. (Kan.) 251.

Preference of creditors.

A director of a bank which is about to fail, who gives information thereof to a corporation of which he is president, and signs a check for the withdrawal of the money, is held not to violate a statute prohibiting a preference in contemplation of insolvency by

such banks or any officer thereof. (N. Y.) 122.

Inspection of books.

The right of stockholders to inspect books of the corporation is held absolute, and not dependent upon their motive or purpose. It is also held to include the right to take copies from the books and writings. (Ohio) 732.

Lien on stock.

An equitable lien on shares of stock in a national bank under a by-law which is in conflict with the act of Congress on the subject is denied, although a loan was made on the faith of the by-law, and its provisions were printed on the certificates of stock so as to be notice to all persons dealing with them. (N. Y.) 107.

Surety company.

A statute permitting trustees to charge against the estates in their hands such sums as they have paid to a surety company for their bonds is held to give no lien in favor of the company, and the statute is held not to give any unconstitutional privilege to such companies. (Pa.) 587.

News associations.

A corporation engaged in collecting and selling news is held to have a business affected with a public interest, and to be precluded from discriminating between newspaper publishers who may wish to buy its news. A by-law prohibiting a member from receiving news from any other association declared antagonistic is held void as tending to create a monopoly. (Ill.) 568.

Church.

The attempt of the majority of the members of a religious corporation to employ a pastor whose teachings are inconsistent with those of the sect to which the local church belongs is held to be a violation of the purposes for which the church property is held. (Wis.) 856.

Camp-meeting association.

A camp-meeting association which has leased cottages without restriction except as to such rules and regulations as it may adopt is held to have no right to impose a revenue tax on persons soliciting orders for provisions, fruits, etc., on the grounds. (Me.) 272.

IV. DOMESTIC RELATIONS.

See also *infra*, VII.

The remarriage of a divorced woman to one whose ability to support her is unquestionable is held to terminate her right to alimony out of the income of a testamentary trust created for the support of the former husband. (N. Y.) 666.

A decree in conformity to a contract between husband and wife after separation, by which a certain sum per month is given her for maintenance, is held to be final as an irrevocable contract, so that it cannot be modified without her consent on account of the husband's change of financial condition. (Or.) 766.

V. FIDUCIARIES OR REPRESENTATIVES.

Failure of an executor to apply for an extension of a vacancy permit for insured premises which continue vacant on the expiration of the time for which such permit had been granted is held to be negligence which will make him liable for the resulting loss of the insurance in case the property is destroyed. (Ky.) 49.

The power of a court of equity to author-

ize the use of trust property for the benefit of infant remaindermen during the life tenancy is denied where the rights are created by a trust which makes the estate of the remaindermen contingent on the exercise of a power of appointment by the life tenant among such of them as survive. (Wis.) 809.

VI. TORTS; NEGLIGENCE; INJURIES.

Injury to unborn child.

An infant before birth is held to have no such separate existence that an injury then received can give a right of action to the child after birth against the person causing the injury. (Ill.) 225.

Conspiracy.

A conspiracy to ruin the business of a dealer by refusing to deal with him and inducing others to do likewise, when entered into maliciously and not to promote any legitimate interests of the conspirators, is held actionable. (Minn.) 90.

Libel.

A publication in a church paper, made in good faith by officers of the church, in the performance of what they deem their duty to other members of the church, making defamatory statements as to their pastor, is held to be privileged, although it may be read by some who are not church members. (Kan.) 236.

Deceit.

A false statement by the cashier of a bank, authorized by the directors, in a certificate to the insurance commissioners respecting the depositors of an insurance company, on which a license is obtained, and publication of the same statement in the public press, to which the bank was privy, made with a view of selling stock it held as collateral, are held insufficient to make the bank liable for deceit to a person who purchased such stock, which proves to be worthless. (C. C. App. 6th C.) 210.

Killing dog.

The right to kill a trespassing dog is held not to exist merely because the owner has been notified to keep the dog off the premises. (Miss.) 95.

Contagious diseases of cattle.

For the communication of Texas fever by infected cars to cattle transported in them a railroad company is held liable. (Ill.) 175.

Dangerous road.

The want of a barrier on the side of an approach to a bridge is held not to be the proximate cause of an accident when a horse became frightened and unmanageable. (Mich.) 644.

Dangerous pond.

The drowning of children while skating on a pond without permission or invitation of the owner of the premises is held to create no liability on the part of the owner. (Mo.) 291.

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Dangerous wall or building.

In the construction of a wall the person constructing it is held liable for failure to use due care to prevent its falling and injuring persons lawfully on the premises. (N. J.) 106.

One who buys a building and continues to use it, or permit it to be used, with knowledge that it was so negligently constructed that it was liable to fall of its own weight, is held liable for damages caused by its fall to a person lawfully standing in front of it. (S. D.) 157.

Damage by water from roof.

One who discharges water collected from a roof, through an aperture in a gutter, upon a neighbor's land, causing a wall to fall, is held liable without regard to the defective construction of the wall; and his liability is held not to be limited by the exercise of ordinary care. (Mass.) 278.

Pollution of stream by sewers.

A striking and exceptional decision in Indiana in favor of the right of a city to discharge sewage into a stream without liability to injured landowners holds that no actionable wrong will result if it is done in conformity to statute and without negligence. (Ind.) 707.

On the other hand, the right to discharge sewers of a city into a stream to the damage of landowners, without just compensation, is denied in Missouri, notwithstanding the necessity of sewers and the provisions of a statute requiring them to follow the natural drainage of the country, and although private sewers, causing some pollution of the water, but not amounting to a nuisance, had been discharged into the stream for many years. (Mo.) 711.

The drainage of sewers into a river, polluting the waters and causing a nuisance to lower proprietors, is held, in Connecticut, to create a liability on the part of a city for the damages thereby caused, as the injury constitutes a taking of property under the constitutional provision requiring just compensation. (Conn.) 691.

Riparian owners in New Jersey are held entitled to compensation for damage to their property by the pollution of a river at a place above the ebb and flow of the tide, but not at a place where the tide ebbs and flows. (N. J.) 717. See also 722.

Injury to servant.

The conductor of a freight train is held

to be within the scope of his employment when he takes the engine and goes forward to inspect the track, under orders of the road superintendent, after a heavy storm. (Ind.) 531.

A brakeman leaving his working clothes in a caboose according to custom, although he may have a license to go into the caboose to get his clothes for the next trip, is held not to be within the scope of his employment or of his license in jumping on and off such caboose when the train is in motion, in search of his clothes. (Minn.) 796.

An employee whose special business it is to oil a shaft and bearing is held not to be entitled to a warning of the danger of a set screw fastening a collar near the end of the shaft, although it projects in such a manner as to be likely to catch the clothing of persons coming near it. (Mass.) 96.

The performance of service outside of the scope of employment, in obedience to the order of a foreman, is held not to involve an assumption of the risks, unless they are such that an ordinarily prudent man would not encounter them. (Ill.) 753.

On assurance of an employee by the employer that work required to be done is safe, it is held that the servant's knowledge, or a statement by a third person, that the work is not safe, does not necessarily make him guilty of negligence. (Mass.) 542.

A railroad company's violation of a statute requiring the blocking of guard rails and frogs is held to relieve an employee from the

effect of what would otherwise be an assumption of the risk, but not from the effect of contributory negligence. (C. C. App. 6th C.) 68.

A charge that a master should instruct his employee as to the nature, force, and probable effect of an explosion of a pot of molten metal in case it comes in contact with water, and that it is not sufficient to instruct merely that an explosion is likely to follow such contact, is held proper. (Mich.) 649.

Injury by fellow servant.

A servant of a truckman sent by his master to drive the latter's horse in operating hoisting apparatus at a warehouse is held not to be a fellow servant of the warehouseman's employees, by whose negligence in putting the pulley block and tackle in place he is injured. (N. Y.) 673.

A railroad company is held not to be liable to an employee for injuries caused by incompetence of a coemployee on account of negligence in employing him, if his incompetence was not with respect to acts for the performance of which he was employed. (Mo.) 368.

The so-called departmental theory of fellow servants is criticised, and seems to be substantially repudiated, by a recent Missouri case holding that a conductor as well as an engineer of a freight train is a fellow servant of the fireman, when their negligence causes a derailment of the train, by which the fireman is injured. (Mo.) 399.

VII. PROPERTY; RIGHTS; LIENS; WILLS; TRUSTS.

Entireties.

An estate by entireties, and not by joint tenancy, is held to be created by deed to husband and wife jointly. (Ind.) 234.

Family exemptions.

The exemption of property allowed to the head of a family is held properly claimed by a wife, when her husband has been adjudged insane and is confined in a hospital. (S. D.) 155.

Life estates.

Notes given to a life tenant for rent are held to belong entirely to the estate of the life tenant, though not due at the latter's death, and though a crop was still standing on the land at that time, where the lease had expired and the lessee had the right to the crop which was still standing. (Ohio) 735.

Deeds.

Restrictions in a deed as to the building line are held not to be enforceable by a prior grantee of a lot on the same street, subject to the same restrictions, where it did not appear that these were imposed as a part of a general scheme for the benefit of all the purchasers. (Md.) 54.

Adverse possession.

Adverse possession by third persons of land conveyed to a purchaser is held to give no ground of complaint to his subsequent vendee after the former had bought in the outstanding title. (Ky.) 537.

A parol transfer of the right of a person holding adversely is held sufficient to give his transferee a right to tack the two possessions for the purpose of acquiring title by adverse possession. (Wis.) 830.

Fisheries.

A right to fish in a pond on private land is held not to arise by prescription or by custom because of long usage by the public. (N. J.) 616.

Railroad trade fixtures.

Railroad improvements put on a right of way purchased from a mortgagor are held to be trade fixtures which do not become subject to the mortgage, but may be removed on foreclosure. (Kan.) 241.

Partnership realty.

A conveyance of an undivided half of partnership lands to a copartner for partnership uses and as partnership property, requiring payment to the grantor of the portion belonging to him on closing up the business, is held to disclose an intention to change the grantor's interest from lands to surplus. (N. Y.) 299.

Oil wells.

The right to use a gas pump to increase the production of an oil well is upheld, although it diminishes the production from wells on adjoining property. (Pa.) 748.

Failure to bore a well for oil and gas within ninety days is held ground of forfeiture of a lease, where the only substantial con-

sideration therefor was the prospective royalties, although the lease purported to be made for five years, and longer if oil or gas was found in paying quantities, and provided a forfeiture of \$50 if the well was not completed within ninety days. (C. C. A. 4th C.) 320.

License to cut timber.

A written contract for the sale of an undivided interest in land is held to revoke *pro tanto* a license to another person to cut timber thereon. (Wis.) 839.

Surface water.

A city lot which the owner attempts to fill in or raise is held to be subject to the civil-law rule prohibiting the obstruction of surface water from adjoining property, to the same extent as if the premises were rural. (Tenn.) 862.

For pollution of water, see *supra*, VI.

Liens.

See also *supra*, III., as to lien on stock.

A lien upon a street railway for a paving assessment to which the company is subject under its charter is held to be superior to the lien of a mortgage upon the property. (Ind.) 41.

Judgment.

A judgment is held to create no lien on lands previously conveyed in fraud of creditors. (Ark.) 334.

Mortgage.

A bona fide purchaser of a mortgage given without consideration, though unaccompanied by any negotiable obligation, is held to have a valid lien as against creditors of the mortgagor. (Md.) 63.

Wills.

A will is held not to be subscribed at the end as required by statute, where it consists of four pages in one sheet folded lengthwise down the middle, where the signature is on the second page after a portion of the will, while the third page contains other portions of the will without anything to connect those portions with what appears above the signature. (N. Y.) 662.

An antenuptial contract by which a wife, for a specified sum, agrees to release all claims on her husband's estate in order that

his property may pass under his will, is held binding on her so as to prevent her from contesting the rights of the beneficiaries under the will on the ground that it was revoked by the marriage. (Ill.) 557.

A legacy conditioned on the legatee's being declared at the expiration of a certain time to be a reformed man is held to make a condition precedent, and the condition is not void for uncertainty. (Mich.) 580.

A will giving a young man an estate for his education, requiring him to complete a course at one of two universities named, and providing that the estate shall pass from him if, through his own disinclination or incapacity or the indifference of his parents or guardians, he shall fail to do so, is held to vest the estate in him, subject to the condition subsequent, so that his death during his college course will not divest his estate or prevent it from passing to his heirs. (Md.) 58.

Trusts.

An allowance out of the income of a trust estate for the maintenance of an infant is made, although the trust provided for its use only for his education, where the infant's mother, who was the only other person interested in the income, agreed to the allowance. (R. I.) 783.

The premium paid on an investment of trust funds the income of which is given by will to testator's daughter for life, with remainder to nephews and nieces, is held not to have been intended by the testator to be deducted from the daughter's income in order to restore the principal of the fund. (N. Y.) 126.

Charitable gifts.

A charitable gift to a foreign city is upheld under a treaty provision authorizing such gifts to citizens of the foreign country, and notwithstanding the fact that the capacity of the city was for a time suspended by the necessity of obtaining a permit from the council of state. (La.) 77.

A trust for the saying of masses is upheld as a charitable use because the public service is religious and the money expended therefor supports the clergy. (N. H.) 100.

VIII. CIVIL REMEDIES.

Appearance.

The voluntary appearance of a defendant without reservation and without objection to jurisdiction in a divorce proceeding, in which he seeks the advantage of the decree in opposition to an application for an amendment to allow alimony, is held to authorize a binding judgment against him, although the original decree was void for want of service of process. (N. J.) 679.

Legal notices.

The fact that a newspaper published at regular, or nearly regular, intervals is devoted particularly to some class of business, is held insufficient to destroy its character as a newspaper with respect to the publication of legal notices therein. (Neb.) 409.

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Withdrawing juror.

The practice of withdrawing a juror in a civil case as a means of postponing the trial is not recognized in Oregon. (Or.) 432.

Appeal.

A finding of facts made after the expiration of the term at which judgment was rendered, and after the time for an appeal has expired without an appeal being taken, is held to be beyond the power of the court to make part of the record of judgment. (Conn.) 217.

Costs.

A statute allowing the successful plaintiff in a mechanic's lien case an attorney's fee in addition to costs otherwise allowed is held to be in violation of a constitutional

provision that courts of justice shall be open to every person, and that justice shall be administered without sale, denial, or delay. (Colo.) 340.

Foreign judgments.

The probate in common form of a will under statutes making it an exercise of judicial power, and the judgment conclusive as to all matters properly cognizant in probate proceedings, and as to the property covered by the will, is held to be, so far as regards personalty, within the constitutional provision as to giving full faith and credit in every state to the judicial proceedings in every other state. (Tenn.) 130.

Evidence.

The provision of the war revenue act requiring stamps on instruments before they can be used in evidence is held inapplicable to state courts. (Nev.) 305.

Pleading.

The use of inconsistent defenses is discussed at length, with the conclusion that they cannot stand if the admission of the truth of one proves the falsity of the other, and that the averment in an answer of a fact which has been denied makes proof of it unnecessary. (Wash.) 177.

Damages.

The measure of recovery in trover by one who had regained title to the property only as security for the purchase price is held limited to the balance due thereon, less any depreciation by use authorized by the contract. (R. I.) 773.

Mesne profits.

A defaulting vendee is held chargeable with mesne profits for the time he withholds possession of land pending ejectment against him. (N. C.) 751.

Statute of limitations.

Concealment of the defalcation of a bank teller is held to prevent the running of the statute of limitations, not only in his favor, but also in favor of his surety, until the discovery of the defalcation. (Del.) 514.

A special statute of limitations governing liabilities under acts of incorporation is held

to be by implication a part of a subsequent act of incorporation, and therefore binding in a suit in another state to enforce the liability of a stockholder in such corporation. (C. C. A. 4th C.) 625.

Subrogation.

A peculiar case as to subrogation holds that a purchaser on foreclosure, who voluntarily pays a claim for taxes before the sale is affirmed, but without knowledge of any dispute as to the validity of the taxes, is entitled to subrogation to a claim for such part of the taxes as was certainly valid, but the court refuses to require a receiver to recognize the payment of the disputed part of the taxes, or to assume the burden of any litigation concerning it. (C. C. A. 4th C.) 503.

Garnishment.

A debt of an insurance company for loss in another state is held to have no situs in a third state for the purpose of garnishment therein, by reason of the fact that the insurance company had an agent therein on whom process could be served. (N. C.) 452.

Partition.

A decree of partition setting off a part of the property to a life tenant, made upon a petition which shows that the plaintiff was only a life tenant, is held void on collateral attack for want of jurisdiction. (Kan.) 257.

Injunction.

The rule that equity will not enjoin criminal prosecutions is applied in a case for an injunction against the enforcement of a statute requiring the inspection of beer. (Mo.) 596.

An injunction against the passage of an ordinance which will create a contract is held to be in excess of jurisdiction, whether the ordinance will be valid or not if passed. (Wis.) 819.

An injunction against a wrongful assessment for paving is held properly limited to that assessment, where the order for the paving was legal, thus leaving opportunity for a new assessment. (Wis.) 851.

IX. CRIMINAL LAW AND PRACTICE.

Conviction of being a suspicious person, when the suspicion is wholly undefined, without reference to any particular crime, is held to be in violation of the constitutional provisions against unreasonable searches and seizures, and against cruel and unusual punishments. (D. C.) 220.

A state statute making it an offense to solicit a seaman to desert from any vessel within the jurisdiction of the state is held not to be in violation of the constitutional provision as to commerce, in the absence of any act of Congress to the contrary. (Or.) 153.

Indictment.

An indictment found on a legal holiday
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is held not to be invalid for that reason, where the statutes do not provide that courts shall not sit on holidays. (Ohio) 459.

Double jeopardy.

A plea of former jeopardy is held not to constitute in itself a jeopardy, or a discharge thereon an acquittal. (Kan.) 254.

A sentence imposed after reversal of a former sentence on the prisoner's application is held not to constitute double jeopardy, although he had partly served the first sentence, including one day's solitary confinement, which was included also in the second sentence. (Mass.) 393.

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4. One who causes noxious vapors to rise upon the land of an adjoining proprietor by wrongfully obstructing the natural drain of surface water therefrom is liable for the damage the same as if such vapors had been wrongfully caused to rise on and from his own land. *Carland v. Aurin* (Tenn.) 862

5. The occupant of premises, whether owner in fee, life tenant, or lessee, may maintain an action for damages, measured by the injury to his particular estate or interest in the property, by an obstruction of the flow of surface water therefrom. *Id.*

6. When an action is begun, the object of which is only to determine the validity of an act or thing done by an officer, and not 48 L. R. A.

involving his integrity or want of good faith, the officer himself is not a necessary party to the suit. *Oliver v. Jersey City* (N. J. Err. & App.) 412

7. One not a party, but having an interest in the subject-matter of a pending action, that may be adversely affected by the suit, will be permitted by the court, upon a proper showing, under Burns's (Ind.) Rev. Stat. 1894, § 273, to come into the case for the protection of whatever right or interest he may have in the subject-matter. *Union Trust Co. v. Richmond City R. Co.* (Ind.) 41

8. The heirs of a deceased partner are not necessary parties to a proceeding to adjust the partnership affairs, although a part of the assets consists of real estate, if, as between the partners and their representatives, it has been converted into personality. *Darrow v. Calkins* (N. Y.) 299

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2. An appeal as from a final order in a special proceeding or a final judgment in an action lies from an order of the appellate division of the supreme court to the court of appeals, reversing an order of a special term, which modified provisions of a former decree in a divorce proceeding as to payment of income of a trust fund as alimony, which proceeding was instituted in accordance with permission contained in the former decree upon affidavits that were given the effect of pleadings, the facts becoming the subject of reference, and the order being based upon the report of the referee. *Wetmore v. Wetmore* (N. Y.) 666

3. Judicial inquiry on a general appeal from a judgment in an equitable action to sell part of a trust estate, presenting the question whether the judgment is proper on the undisputed facts, is not by any means circumscribed by the assignment of errors. *Ruggles v. Tyson* (Wis.) 809

4. A party fearing that an instruction will be taken by the jury in a broader sense than he deems consistent with the law must 48 L. R. A.

call the court's attention to the language, to render it subject to review. *McKee v. Tourtellotte* (Mass.) 542

Transfer of cause.

5. An appeal by the owners of the property from a decision establishing a mechanic's lien can be maintained without joining other defendants, under Mill's (Colo.) Ann. Stat. § 1085, which provides that appeals may be taken by any person aggrieved. *Davidson v. Jennings* (Colo.) 340

6. An executor acting in his individual capacity is competent as surety on an appeal bond for a legatee who has appealed. *Succession of Meunier* (La.) 77

7. The amount of a suspensive appeal bond may be fixed by the trial judge, where the judgment annulled a will and probate thereof, recognizing plaintiffs as heirs, but did not in terms send them into possession or make an award against the executors specifically for the net proceeds of the estate in their hands. Id.

Record and case in appellate court.

8. The special finding of facts provided for by Conn. Pub. Acts 1897, chap. 194, § 6, is not for the purpose of spreading those facts upon the records as part of the judgment, but is only to be made after judgment has been rendered, to become part of an appeal, and it cannot be made in the absence of an appeal and after the expiration of the time for taking one. *Corbett v. Matz* (Conn.) 217

9. A statement in an order of the appellate division, that it reverses the judgment of the trial court "upon the law and the facts," will not prevent a review by the court of appeals if the only question is whether the transaction as disclosed by the facts was forbidden by a statute. *O'Brien v. East River Bridge Co.* (N. Y.) 122

Review of discretion.

10. The grant of an injunction will not be disturbed on appeal, unless the discretion of the court was abused. *Platt Bros. & Co. v. Waterbury* (Conn.) 691

Review of verdict or findings.

11. All controverted facts and all inferences therefrom must be deemed conclusively established in favor of the party for whom judgment is rendered, when both parties are in the position of having asked for a direction of the verdict. *Trimble v. New York C. & H. R. R. Co.* (N. Y.) 115

12. Both parties are deemed to have asked for a direction of the verdict, where defendant's counsel, after moving unsuccessfully for a nonsuit, replied to an inquiry from the court, that he did not care to have any question submitted to the jury, and, after a request by plaintiff's counsel for the direction of a verdict, stated that he desired to stand on his motion for a nonsuit, while neither party asked to have any question of fact submitted to the jury. Id.

13. A general verdict for plaintiff is not conclusive in the appellate court upon the question whether or not the declaration

states a cause of action. *Pontiac v. Talbot Paving Co.* (C. C. App. 4th C.) 326

14. The sufficiency of facts found to support a judgment may be raised by writ of error, when the facts are made part of the record of the judgment. *Corbett v. Matz* (Conn.) 217

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15. Prejudicial error must be made affirmatively to appear in order to cause the reversal of a judgment. *Franke v. Mann* (Wis.) 856

16. The failure to specify in the order of record granting a new trial the ground on which it was granted, as required by Mo. Rev. Stat. 1889, § 2241, is not reversible error. *Smith v. Sedalia* (Mo.) 711

17. Sustaining a demurrer to special defenses is not prejudicial error, when defendant has had the benefit on the trial of all evidence that could have been introduced under those defenses. *Platt Bros. & Co. v. Waterbury* (Conn.) 691

18. The fact that defendant in a divorce suit is guilty of contempt in refusing to come into the jurisdiction of the court and submit to cross-examination is not sufficient, where the record does not show a reversal on the facts and the statute requires the reviewing court under such circumstances to presume it was on the law, to authorize the court of appeals to affirm an order of the appellate division of the supreme court which reversed an order of the special term modifying a decree awarding the income of a fund held in trust for his benefit, as alimony, but some legal error in the order must be pointed out. *Wetmore v. Wetmore* (N. Y.) 666

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A camp-meeting association which has made perpetual leases of cottages on its grounds, without any restriction except that they are "subject to such rules and regulations as the association may from time to time adopt," and which also owns a store on the grounds which it has leased for a rental, cannot impose a revenue tax on the 48 L. R. A.

business of taking orders for fruit, groceries, and provisions from cottagers upon the grounds of the association. *Northport Wesleyan Grove Camp Meeting Asso. v. Perkins* (Me.) 272

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A bid at a public sale by one who does not desire the property, and who is employed to bid in the interests of persons who are interested in having the property bring a good price, but who are not conducting the sale so as to be able to release a bidder from responsibility, does not constitute "puffing" or such a fraud on other bidders as to release them from responsibility for their bids. *McMillan v. Harris* (Ga.) 345

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1. A false certificate by the cashier of a bank, stating that an insurance company had on deposit subject to check certain amounts of paid-up capital and net surplus, made to assist the company to obtain a license, and authorized by the board of directors, who knew it to be false, and the publication of the same statement in the public press, to which the bank was privy, for the purpose of securing a large bank deposit and of selling stock held by the bank as collateral, render the bank liable for deceit to a person who bought worthless stock of the insurance company in reliance on these statements. *Hindman v. First Nat. Bank* (C. C. App. 6th C.) 210

2. The holder of a check drawn by a bank which becomes insolvent before its presentation, whereupon the drawee bank, without knowledge of the check, applies the deposit upon its own claims against the insolvent bank, is entitled to be subrogated to any collateral which the drawee bank has after its own claims are satisfied. *Wyman v. Ft. Dearborn Nat. Bank* (Ill.) 565

Collections.

3. Sending a certificate of deposit directly to the drawer for collection without instructions to do so constitutes negligence on the part of a collecting bank, for which it will be liable in case of a resulting loss.

First Nat. Bank v. Citizens' Sav. Bank (Mich.) 583

4. A collecting bank is impliedly instructed to send a certificate of deposit for collection directly to the bank which made it, when this is the only bank in the place and is rated and supposed to be responsible, and the instructions received by the collecting bank, after calling attention to the fact that it had a correspondent at that place, said, "Please collect for us at your best rate of exchange." Id.

Lien on stock.

5. The invalidity of a lien on shares of stock in a national bank, under a by-law in conflict with the national banking act of Congress, can be asserted by the owner of the stock to defeat the lien, and the right to raise the question of its invalidity is not restricted to the Federal government. Buffalo German Ins. Co. v. Third Nat. Bank (N. Y.) 107

6. An equitable lien in favor of a national bank upon its shares of stock cannot be asserted against a third person by virtue of a loan to a stockholder on the security of the shares, under a by-law providing that any liability of the stockholder should be a lien upon the stock, which by-law is printed on the face of the certificate of stock so as to be notice to all persons dealing therein, since such by-law is in conflict with the provisions of the national banking act of 1864, § 35, prohibiting any loan by such bank on the security of its own shares of stock. Buffalo German Ins. Co. v. Third National Bank (N. Y.) 107

Insolvency.

7. A withdrawal of the funds of a corporation from a bank that is about to fail, under advice of the president of the corporation, who also signed a check for the money, although he was also a director of the bank and his knowledge of its condition was acquired by him as such director, does not violate the New York stock corporation law, § 48, which prohibits any transfer of assets or payment by the bank or any officer, director, or stockholder thereof, with intent to prefer any creditor, when the bank is insolvent or its insolvency imminent. O'Brien v. East River Bridge Co. (N. Y.) 122

8. A communication by a director of a bank of his knowledge that it is about to fail, though made to a depositor which is a corporation of which he is president, does not violate the New York stock corporation law, § 48, which prohibits a bank which is insolvent or the insolvency of which is imminent, or any officer or director thereof, from giving a preference to any particular creditor by transfer of assets, payment, suffering judgment, the creation of a lien, or the giving of security. Id.

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1. Statements made by the cashier of a bank without authority, for the purpose of inducing a person to become a surety on the bond of a teller, will not bind the bank so as to relieve the surety if the statements are not true. Lieberman v. First Nat. Bank (Del.) 514

2. The published reports of a bank purporting to show its resources and liabilities, but which were not made to induce a person to sign the bond of an employee of the bank, will not relieve such surety, who relied upon them, from liability because the reports failed to show previous defalcations by such employee, which he had concealed by false entries. Id.

3. Certificates signed by the mayor, auditor, and attorney of a city, stating what steps had been taken preliminary to the issuing of certain bonds and as to the financial condition of the city, though used by the person who negotiated the bonds, are inadmissible in an action thereon to create an estoppel against the city's asserting that the bonds were in excess of the limit of the city's indebtedness, when the making of such

a statement was not within the scope of the official duty of the officers making it. *National Life Ins. Co. v. Mead* (S. D.) 785

4. A recital in city bonds as to the amount of indebtedness of the city does not create an estoppel against showing that the indebtedness was greater, when the statutes require the public records of the city to show the amount of the existing indebtedness, as well as the amount of the taxable property. *Id.*

5. Bonds issued for the purpose of refunding an existing indebtedness are not to be regarded as creating any new or additional indebtedness, and should not be considered in determining whether or not a city had reached or exceeded its constitutional debt limit. *Id.*

6. The issuance of bonds to fund the floating indebtedness of a city, where the electors have voted therefor, is authorized by S. D. Laws 1890, chap. 37, art. 5, § 1, authorizing a city council to borrow money on the city's credit for municipal purposes and issue bonds therefor on a majority vote of the electors. *Id.*

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1. The legislature may require a town to contribute a portion of the cost of maintaining a highway or bridge wholly outside of its territorial bounds, but which specially benefits the town. *State ex rel. Bulkeley v. Williams* (Conn.) 465

2. A statute by which the maintenance of a bridge is taken upon the state has no element of a contract, and gives rise to no vested rights such that the legislature cannot afterwards charge the expense of the bridge upon towns specially benefitted thereby. *Id.*

3. The legislature may reconsider an apportionment of the expense of a highway and bridge over a river between a city and certain towns, although its former apportionment was based on a determination by judicial proceeding. *Id.*

4. Failure to require any estimate of the amount needed for the ensuing year to be submitted to a town by a bridge district which includes it, before the time for laying a tax, does not make void a statute charging the town with a portion of the expenses of the district on the ground that it does not provide the necessary means. *Id.*

5. A town tax for moneys to be paid over 48 L. R. A.

to the treasurer of a bridge or highway district in which the town is included, for district expenditures, may be required by the legislature. *Id.*

6. A person is not chargeable with contributory negligence in assuming that a bridge is in safe condition for travel over it in any usual and ordinary way. *Hardin County v. Coffman* (Ohio) 455

7. A person who chooses to subject a bridge to some extraordinary burden by placing upon it some unusual weight and causing it to be moved in an unusual manner takes upon himself the risk of any injury thereby sustained, although the bridge was defective and out of repair and he was not aware of its condition and did not have good reason to believe that it was insufficient to sustain the load. *Id.*

8. The duty of commissioners to keep bridges under their control in a safe condition extends to the use of the bridges for all usual and ordinary modes of travel and transportation of property over them, but does not require the commissioners to anticipate the unusual and extraordinary use, subjecting the bridge to an unusual and extraordinary burden involving peculiar danger. *Id.*

9. An action to recover damages caused by the negligence of the county commissioners in failing to keep a bridge in repair is properly brought under Ohio Rev. Stat. § 845, as amended April 13, 1894 (91 Ohio Laws, p. 142), against the board in its official capacity, and the county is bound for the payment of the judgment recovered. *Id.*

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2. Ordinary care is not the full measure of the duty of one who arranges a roof and gutter in such a way that the first will collect water and the second discharge it through an aperture upon a neighbor's land. *Fitzpatrick v. Welch* (Mass.) 278

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1. The duty of a street-railway company to sell tickets in quantities at reduced rates on each car, by virtue of the terms of its franchise from a certain town from which it runs to a neighboring city, extends to a passenger on the line who gets on the car and offers to buy such tickets at a point outside the town. *Rice v. Detroit, Y. & A. A. Ry.* (Mich.) 84

2. A street-railway company which has assumed to comply with the terms of its franchise requiring sales of tickets at reduced prices for a certain trip, by providing separate tickets for different parts of the trip, without offering any through-trip tickets for sale, and which has accepted a ticket for one portion of the trip, cannot escape liability for refusing to sell tickets at the reduced price for the remaining part of the trip, on the ground that its franchise obliges it to sell through tickets only. *Id.*

3. A usage or practice of passengers to carry small packages of merchandise into a car in derogation of the common-law contract of carriage must, in order to become a part of a contract so that it may be relied upon by the passengers, be so general, certain, uniform, and notorious, and must be so clearly proved, that it can be concluded that the officers and agents of the carrier possessed knowledge of such usage and acquiesced therein as part of the contract. *Runyan v. Central R. Co.* (N. J. Sup.) 744

4. A habit of one particular passenger to carry a package of merchandise into the passenger cars, and with him on his journey, will not constitute a usage or practice which can be relied on by passengers as a general regulation of the railroad company. *Id.*

5. The mere indulgence by servants of a railroad company of the practice by passengers to carry packages of merchandise, when it is not in obedience to duty or contract, cannot bind the carrier or prevent it from discontinuing the practice. *Id.*

6. A railroad company is liable for the loss of a sample trunk on a contract for its transportation as freight, where it was checked without any misrepresentation, and without any release of liability or any request therefor, on payment of a charge for excess baggage, which was the same for sample trunks as for ordinary baggage, and the baggage-man had constructive notice of the character of the trunk from its appearance and from other circumstances, although there was a rule of the company prohibiting

the checking of sample trunks without a release of liability. *Trimble v. New York C. & H. R. R. Co.* (N. Y.) 115

7. The communication of Texas fever by infected cars to cattle transported in them renders the railroad company liable for the damages. *Illinois C. R. Co. v. Harris* (Ill.) 175

NOTES AND BRIEFS.

Carriers; liability for loss of sample trunk; payment of excess baggage therefor; regulation restricting liability. 115

Compelling free transportation of shippers of stock. 251

Statute providing for mileage books. 670

CASHIER.See **BANKS**, 1; **BONDS**, 1.**CERTIFICATE.**See **BONDS**, 3.**CERTIORARI.****NOTES AND BRIEFS.**

Certiorari; interest of prosecutor. 419

CHAMPERTY.

1. A deed of a tract of land by one in possession of only a part of it, at a time when third persons were in possession of the greater portion claiming under a superior title, is not absolutely void under the champerty statute, but only voidable at the instance of the parties in adverse possession. *Fort Jefferson Improv. Co. v. Dupoyster* (Ky.) 537

2. A deed to one who purchases when a portion of the tract is in adverse possession of third persons cannot be attacked by his vendee after the former has purchased in the outstanding title, to avoid taking the title tendered under the contract. *Id.*

NOTES AND BRIEFS.

Champerty; in deed of land held adversely; effect as to innocent purchasers. 537

CHARITIES.See also **MASSES**.

1. A legacy to the commune of Carouge, canton of Geneva, Switzerland, which is directed to be placed at interest, and with the interest to endow annually two poor girls and to give a pension to ten old persons of the two sexes, is sustainable as a legacy to pious and charitable uses. *Succession of Meunier* (La.) 77

2. Permission given to trustees to receive donations and bequests for educational, charitable, or literary purposes, or for the benefit of institutions to promote those purposes, is restricted by La. act 1892, No. 124, to objects and institutions within the state. *Id.*

NOTES AND BRIEFS.

Charities; incapacity of trustee to take gift; capacity subsequently acquired; trustee in foreign country; gift to foreign city. 79

CHECKS.**NOTES AND BRIEFS.**

Checks; as assignment of deposit. 565

CHURCH.

See RELIGIOUS SOCIETIES.

CIGARETTES.

See CONSTITUTIONAL LAW, 8; MUNICIPAL CORPORATIONS, 6, 7.

CIVIL RIGHTS.

See also SCHOOLS, 1.

The right of colored children to attend any school they or their parents may choose, instead of being restricted to the separate schools established for colored children, is not conferred by N. Y. Pen. Code, § 383, which makes it a misdemeanor for teachers or officers of schools to exclude any citizen from the equal enjoyment of any accommodation or privilege, if the schools for colored children furnish facilities and accommodations equal to those which are furnished by the other schools. *People ex rel. Cisco v. School Board (N. Y.)* 113

NOTES AND BRIEFS.

Civil rights; separate schools for colored children. 114

CLOUD ON TITLE.

A claim of the right to inspect beer under a statute cannot constitute a cloud upon title which equity may prevent, even if a cloud upon title can arise with reference to personal property, when the inspection law makes no charge against property and provides for no remedy except by indictment or criminal information against individuals. *State ex rel. Kenamore v. Wood (Mo.)* 596

NOTES AND BRIEFS.

Cloud on title; necessity of plaintiff's possession. 320

COLLATERAL SECURITY.

See BANKS, 2; PLEDGE.

COLLECTION.

See BANKS, 3, 4.

COLLEGE.

See also TAXES, 2-5.

NOTES AND BRIEFS.

Colleges; character of buildings; community life in; occupancy of officers and students. 547

COLORED PERSONS.

See CIVIL RIGHTS.

COMMERCE.

See also TAXES, 7.

1. A state statute requiring the issuance of mileage books at reduced rates for transportation wholly within the state is not invalid as an attempt to regulate interstate commerce, although a railroad affected 48 L. R. A.

thereby extends into other states. *Purdy v. Erie R. Co. (N. Y.)* 669

2. A state statute making it an offense to solicit a seaman to desert from any vessel within the jurisdiction of the state is not in violation of U. S. Const. art. 1, § 8, subd. 3, as a regulation of foreign or interstate commerce, in the absence of any act of Congress repugnant thereto. *Re Young (Or.)* 153

3. A territorial statute which imposes a license fee as a condition upon which coal oil may be sold in the territory is unconstitutional and void, in so far as it applies to sales in original packages by the importer of coal oil produced and refined without the territory. *Re Wilson (N. M.)* 417

NOTES AND BRIEFS.

Commerce; regulation of; statute imposing burden on. 418

Regulation of, by state statute, as to soliciting seamen to desert. 153

Regulation of, by statute, as to railroad mileage books. 669

COMMUNE.

See CHARITIES, 1.

COMPOUNDING CRIME.**NOTES AND BRIEFS.**

Compounding crime; injunction against enforcing contracts for. 848

COMPULSORY SERVICE.**NOTES AND BRIEFS.**

Compulsory service; by corporations impressed with public interest. 570

CONDITION.

Estate on, see REAL PROPERTY.

Of Legacy, see WILLS, 4, 5.

See also DEEDS, WILLS, NOTES AND BRIEFS.

CONFEDERATE MONEY.**NOTES AND BRIEFS.**

Confederate money; injunction against enforcing contracts for. 843

CONFLICT OF LAWS.

1. That promissory notes bequeathed by will are secured by mortgage on real estate does not deprive them of the character of personal property so as to prevent their passing by a foreign will duly probated at testator's domicile, and recorded in the state where the land is situated, as provided by the laws of the latter state. *Martin v. Stovall (Tenn.)* 130

2. A special statute of limitations applicable to liabilities arising under statutes, acts of incorporation, or by operation of the law, such as Ga. Code 1882, § 2916 (Code 1895, § 376G), is to be considered as forming a part of and as read into a subsequent act of incorporation as much as if it were formally incorporated therein, and therefore it will govern in an action in another state

to enforce the liability of a stockholder in such corporation. *Brunswick Terminal Co. v. National Bank of Baltimore* (C. C. App. 4th C.) 625

NOTES AND BRIEFS.

Conflict of laws; when statute of limitations will govern action in another state or country:—(I.) General rule; (II.) exceptions; (III.) where there is no statutory provision in forum as to effect of bar of other state: (a) contracts: (1) in general; (2) cases in which the doctrine that the law of the forum governs questioned or denied; (3) when right of action extinguished, as well as the remedy affected; (b) judgments: (1) in general; (2) where right of action extinguished as well as the remedy affected; (c) decedent's estates; (d) adverse possession; (e) usury; (f) liability of stockholders; (g) personal injuries; (h) death; (i) miscellaneous cases; (IV.) where statutes of forum provide as to effect of bar of other state. 625

CONSOLIDATION.

See STREET RAILWAYS.

CONSPIRACY.

See also MUNICIPAL CORPORATIONS, 12.

A malicious conspiracy to injure a dealer by refusing to deal with him and by inducing others to do likewise, when not made with the purpose of serving any legitimate interest of the conspirators, renders them liable for the damages caused if his business is ruined in consequence. *Ertz v. Produce Exchange* (Minn.) 90

NOTES AND BRIEFS.

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Conspiracy; combination of dealers against another; attempt to drive him out of business. 90

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As to Rights of Colored Person, see SCHOOLS, 1.

As to Effect of Judgments in Other States, see JUDGMENT, 5.

As to Right of Fishery, see FISHERIES, 2.

As to Taking or Damaging of Property for Public Use, see EMINENT DOMAIN.

As to Rights of Criminal, see CRIMINAL LAW.

As to Suspicious Persons, see DISORDERLY PERSONS.

Decision as to, see COURTS, 5.

See also TOWN, 1, 2.

1. No legislation is necessary to the operation of Ga. Const. art. 2, § 2, ¶ 4 (Civ. Code, § 5800), prohibiting the legislature from authorizing a corporation to buy stock or shares in another company or make any contracts with it, when the effect will be to create a monopoly or lessen competition, since this provision is simply the embodiment of a principle of the common law. *Trust Company of Georgia v. State* (Ga.) 520

2. There is no exercise of judicial power by the legislature in a statute providing for the recovery of a penalty against a county for the death of a person caused by lynching. *Champaign County v. Church* (Ohio) 733

3. Legislative power is not conferred upon a commission and the executive by statute which authorizes the commission to select school books, make contracts with the lowest bidder for obtaining them for all the schools of the state from one publisher, and perfect the details of the general plan of providing all schools with such books, and gives to the commission and the governor, as an incident to this, the authority to announce when the details have been arranged so that the law may be put into operation. *Leeper v. State* (Tenn.) 167

Amendments.

See also VOTERS AND ELECTIONS.

4. The question whether a proposed constitutional amendment is in conformity with the constitutional requirements in constituting but a single amendment, and also the question whether the proposition has received such a majority as the Constitution prescribes for its adoption, are judicial questions for the courts to decide, notwithstanding the fact that the legislature has declared that the amendment is adopted and that it is a part of the Constitution of the state. *State ex rel. McClurg v. Powell* (Miss.) 652

5. A proposed constitutional amendment providing in one proposition for the election of all judges, and fixing their terms of office, as well as for the division of the state into circuit and chancery court districts, with party nominations by districts, while it proposes to repeal Miss. Const. §§ 147, 149, 151-153, one of which provides for the appointment of supreme court judges, another fixes their term of office, another provides for appointments to fill vacancies, another for the division of the state into circuit and chancery court districts, while the other provides for the appointment of circuit and chancery court judges, is void for lack of conformity to Miss. Const. 1890, § 273, requiring amendments, if more than one shall be submitted at one time, to be submitted in such manner and form that the people may vote for or against each amendment separately. 1d.

Equal protection of the laws.

See also *infra*, 10.

6. A right to the equal protection of the laws is not secured to a municipal corporation as against the state by the 14th Amendment to the Federal Constitution, so as to limit in any way the power of the state legislature to charge the municipality with public obligations; nor have the inhabitants in their capacity of members of such corporation any greater rights or immunities. *State ex rel. Bulkeley v. Williams* (Conn.) 465

Due process of law.

See also CRIMINAL LAW, 3.

7. Due process of law is denied when any particular person of a class or of a commun-

ity is singled out for the imposition of restraints or burdens not imposed upon, or to be borne by, all of the class or of the community at large, unless the imposition or restraint be based upon existing distinctions that differentiate the particular individuals of the class to be affected from the body of the community. *State ex rel. Wyatt v. Ashbrook* (Mo.) 265

8. An ordinance prohibiting the sale of cigarettes without a license does not violate the constitutional provision as to due process of law, or any constitutional rights. *Gundling v. Chicago* (Ill.) 230

9. An ordinance which provides that a city shall do the work and furnish the materials for making a sewer connection up to within 3 feet of the building to be connected is void as an unreasonable invasion of the rights of property owners, although the city may properly specify the materials to be used and provide that the work shall be done only by some person licensed by the city to make such connections, and that the work shall be done under the supervision of the city inspector. *Slaughter v. O'Berry* (N. C.) 442

10. The free transportation of shippers of stock to and from the destination of the stock, which is required of railroad companies by Kan. Laws 1897, chap. 167, is in violation of the constitutional guaranties of due process of law and of the equal protection of the laws. *Atchison, T. & S. F. R. Co. v. Campbell* (Kan.) 251

11. A railroad company which was incorporated and acquired its property rights and franchises after the enactment of N. Y. Laws 1895, chap. 1027, requiring such companies to issue 1,000-mile tickets at reduced prices, is not deprived of property without due process of law by the enforcement of such statute. *Purdy v. Erie R. Co.* (N. Y.) 669

12. Property of taxpayers is not taken without due process of law by a statute imposing a penalty upon a county for lynching and authorizing its collection in the tax levy. *Champaign County v. Church* (Ohio) 738

13. A town is not deprived of property without due process of law by a statute making it a part of an incorporated highway or bridge district under the control of commissioners who may draw upon the town for a fixed portion of the expenses of the district. *State ex rel. Bulkeley v. Williams* (Conn.) 465

14. An ordinance fixing the rate per thousand gallons to be paid for discharging a sewer from private premises into a common sewer is not invalid for failure to provide for a hearing on the question as to the rate to be fixed, although there is a mere possibility that the rate fixed may in fact exceed the benefit received. *Carson v. Sewerage Comrs.* (Mass.) 277

Police power.

15. To sustain a statute as an exercise of the police power, the courts must be able to see that its object to some degree tends toward the prevention of some offense or manifest evil, or that it has for its aim the pres-

ervation of the public health, morals, safety, or welfare. *State ex rel. Wyatt v. Ashbrook* (Mo.) 265

16. In order to sustain legislative interference with the business of the citizen by virtue of the police power, it is necessary that the act should have some reasonable relation to the subjects included in such power. *Chicago v. Netcher* (Ill.) 261

17. A statute which nowhere attempts to protect any public interest, or defend against any public wrong, which shows upon its face that regulation is not its purpose, but that revenue or undue restriction of a business in the interest of others is the aim in view, cannot be sustained as an exercise of the police power, although it purports to be "An Act to Regulate Business and Trade." *State ex rel. Wyatt v. Ashbrook* (Mo.) 265

18. The constitutional guaranties of liberty and the protection of property rights are violated by an arbitrary prohibition of the sale of provisions where dry goods, clothing, jewelry, and drugs are sold, since such a prohibition is not an exercise of the police power. *Chicago v. Netcher* (Ill.) 261

19. The sale in one store or building under one head or unit of management, of different articles enumerated in the different classes or groups designated by the Missouri anti-department store act of May 16, 1899, cannot be deemed harmful and dangerous so as to be subject to regulation by the police power, merely because fifteen or more persons may be employed in the establishment, if it is innocent and harmless to sell articles of any one class or group, and also to sell those of different classes or groups in establishments employing less than fifteen persons. *State ex rel. Wyatt v. Ashbrook* (Mo.) 265

20. A statute which prohibits a person who sells an article from giving to the purchaser as part of the same transaction a stamp, coupon, or other device which will entitle him to receive from a third person some other well-defined article in addition to the one sold, is an unwarrantable interference with individual liberty guaranteed by R. I. Const. 14th Amend. § 1. *State v. Dalton* (R. I.) 775

21. The business of a barber involves the public health and interests to such an extent that the requirement by Minn. Gen. Laws 1897, chap. 186, of a license or certificate as a condition of carrying on the business, is a valid exercise of legislative power. *State v. Zeno* (Minn.) 88

22. Imposing upon mine owners the burden of paying the cost of inspection of the mines, as provided by Ill. act July 1, 1895, as amended in July, 1897, is a valid exercise of the police power which does not depend upon any constitutional grant of power to legislate concerning mines. *Chicago, W. & V. Coal Co. v. People* (Ill.) 554

23. No restriction on the police power of the legislature to provide for the safety of miners by means of the inspection of mines or otherwise is made by Ill. Const. art. 4, §

29. which expressly requires the legislature to pass laws for the protection of operative miners by providing for ventilation and for the construction of escapement shafts or such other appliances as may secure safety in all coal mines. Id.

Guaranty of justice.

24. The allowance of an attorney's fee in addition to costs that would otherwise be allowed by law to successful lien claimants, in pursuance of Colo. Sess. Laws 1893, chap. 117, p. 325, § 18, which provides for such allowance only to plaintiffs, is in violation of Colo. Bill of Rights, § 6, providing that courts of justice shall be open to every person, and that right and justice shall be administered without sale, denial, or delay. Davidson v. Jennings (Colo.) 340

NOTES AND BRIEFS.

See also DEPARTMENT STORES; MUNICIPAL CORPORATIONS.

Deprivation of property without due process; equal privileges and immunities of citizens. 470

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Delegation of power of taxation; arbitrary distinction between merchandise; interference with liberty; equal privileges and immunities of citizens. 266

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CONTRACTS.

Estoppel as to Acceptance of, see ESTOPPEL, 2.

Injunction against Enforcement of, see INJUNCTION, 5.

See also HUSBAND AND WIFE, 6; PRINCIPAL AND AGENT.

1. The construction which the parties themselves place upon a contract will be adopted by the court, when its terms are uncertain. Union Trust Co. v. Richmond City R. Co. (Ind.) 41

2. A contract by which a sheriff and tax collector turns over the tax list to another person, with an agreement to give him a certain commission for collecting the taxes for certain years, is illegal and void on grounds of public policy, under N. C. Code, § 2084, which provides that the sheriff shall not "let to farm in any manner his county or any part of it." Cansler v. Penland (N. C.) 441

3. A contract by which a person agrees to draft a bill, have it introduced in the legislature, explain it to, and make arguments in its favor before, committees of the legislature, and do all things needful and proper to secure its passage, such party to receive no compensation unless the passage of the bill (an appropriation act) is procured, if successful the fees not fixed, but to be liberal,—is vicious, illegal, and void. and, in the event of the passage of the bill, there can be no recovery of a fee in a suit upon the contract, nor as upon an implied contract, nor a *quantum meruit* for the services performed. Richardson v. Scotts Bluff County (Neb.) 294

4. An agreement for expenses and compensation for services to influence or procure appointment to office is void. Basket v. Moss (N. C.) 842

5. The rule denying a remedy to a person *in pari delicto* will not prevent equitable relief against the enforcement of the power of sale in a mortgage which is against public policy because it was given in compensation for services to influence or procure appointment to a public office. Id.

6. A general assignment for creditors made by a contractor does not abrogate the contract or constitute a breach of it so as to entitle the other party to take possession of the property on which the work is being done before the expiration of the time agreed upon for performance, although the assignment contains no provisions with respect to the assignee's power to carry out contracts. Vandegrift v. Cowles Engineering Co. (N. Y.) 685

7. Taking possession of a vessel which is being built by a contractor before its completion or the expiration of the time there-

for, merely because the contractor has made an assignment for creditors, though it might be treated by his assignee as a trespass, may be regarded instead, at his option, as an acceptance under the contract. Id.

8. A penalty which by the terms of a contract is to be paid only by a deduction from the final payment cannot be recovered when no part of that payment has been made. Id.

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CORPORATIONS.

As to Banks, see BANKS.

Injunction to Enforce Rights of Stockholder, see INJUNCTION, 6.

See also ASSOCIATIONS; CONFLICT OF LAWS, 2; PLEDGE; STREET RAILWAYS.

1. A constitutional provision against granting to any corporation any special or exclusive privilege is not infringed by an act allowing trustees, etc., to charge the estate a reasonable sum which they may have paid "to a company" authorized by law to do so, for becoming surety on their bonds. *Re Clark (Pa.)* 587

2. Power to authorize the purchase by a corporation of shares or stock in another corporation is denied to the general assembly by Ga. Const. art. 4, § 2, ¶ 4 (Civ. Code, § 5800), only when such purchases tend to create a monopoly or lessen competition. *Trust Company of Georgia v. State (Ga.)* 520

See also CONSTITUTIONAL LAW, 1.

3. A combination of railroads is not in violation of Ga. Const. art. 4, § 2, ¶ 4 (Civ. Code, § 5800), prohibiting a corporation to buy shares or stock in, or make contracts with, any other corporation which shall have the effect of creating a monopoly or lessening competition, if, as a general result of the combination, the public at large, as distinguished from the people of special or particular communities, are in consequence benefited. *State v. Central of Georgia R. Co. (Ga.)* 351

4. As incident to a right to inspect books of a corporation is the right to have such inspection by a proper agent, and to take copies from such books and records. *Cincinnati Volksblatt Co. v. Hoffmeister (Ohio)* 732

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5. The right to inspect books of a corporation does not depend upon the motive or purpose of the stockholder in demanding such inspection; and a petition which shows that the plaintiff is a stockholder, that he has requested the defendant to allow him to inspect the books and records of the corporation, and fix a reasonable time for the same, which request has been refused, states a cause of action. Id.

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See also SURETY COMPANIES.

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COTENANCY.

See HUSBAND AND WIFE, 1.

COUNTIES.

Compelling Payment of Penalty for Lynching, see EMINENT DOMAIN, 9.

See also BRIDGES, 9.

A county may be liable for the death of a person by mob violence under Ohio act April 10, 1896, although the individuals composing the mob had assembled without any unlawful purpose and had not afterwards specifically agreed to be a mob. *Champaign County v. Church (Ohio)* 738

NOTES AND BRIEFS.

Counties; liability of, for mobs. 739

COURTS.

Passing on Constitutional Amendment, see CONSTITUTIONAL LAW, 4, 5.

Constitutional Provisions as to, see CONSTITUTIONAL LAW, 24.

See also RECEIVERS, 3.

1. The failure of the judges to apportion the labor of holding the courts among themselves, and issue an order specifying the terms to be held by each judge, as required by Ohio Rev. Stat. § 468, will not invalidate an indictment found and returned at a term held by one of them in his district. *State v. Thomas (Ohio)* 459

2. The limitation of liability of the owners of vessels, for maritime losses, by U. S. Rev. Stat. 1878, § 4283, may be administered in an action at law against them in a state court to recover for death caused by a collision. *Loughin v. McCauley (Pa.)* 33

3. State courts are not within the provision of the Federal statute for raising revenue to meet war expenditures that no instrument not stamped as required by the provisions of the statute shall be used in evidence in any court. *Knox v. Rossi* (Nev.) 305

4. The jurisdiction of the mayor over violation of an ordinance will not be defeated by the fact that a provision in the ordinance attempts to make his jurisdiction exclusive, if the laws give him at least a co-ordinate jurisdiction. *State v. Higgs* (N. C.) 446

5. Doubt as to the constitutionality of an ordinance relating to the construction of a public improvement will be resolved in favor of the property rights of individuals as against the power of the city to invade them. *Slaughter v. O'Berry* (N. C.) 442

6. The construction given by the highest court of a state to a statute of limitations of that state will be followed by the Federal courts. *Brunswick Terminal Co. v. National Bank of Baltimore* (C. C. App. 4th C.) 625

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COVENANT.

1. A restriction as to the building line, inserted in a deed, cannot inure to the benefit of a prior grantee of another lot on the same street, which is conveyed subject to the same restriction, when the grantor did not impose any servitude upon the land he retained and the restrictions were not part of a general plan or scheme for the benefit of all the purchasers. *Summers v. Beeler* (Md.) 54

2. A general plan or scheme for the benefit of all the purchasers of lots sold on the same street as shown by a recorded plat does not appear from the fact that most of the lots are sold subject to the same restriction as to building line, where no restrictions are shown by the plat and none are imposed on some of the lots that are first sold, while purchasers of some of the other lots have violated the restrictions upon them, 48 L. R. A.

and such violations have not been resisted by other purchasers. *Id.*

3. A covenant in a deed of land for a railroad right of way, that certain trains shall be run on the road to be built thereon, which is the chief consideration of the conveyance, and in default of which for six months a forfeiture is provided, is a covenant running with the land, on which an action may be maintained against a subsequent purchaser of the railroad who fails to run such trains, notwithstanding the fact that the covenant had been broken by the original grantee before such transfer, and although the covenant does not expressly refer to assigns. *Doty v. Chattanooga Union R. Co.* (Tenn.) 160

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Covenant; as to things *in esse* and things not *in esse*; running with land; as to operation of railroad. 160

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CREDITORS' BILL.

The superior diligence of a junior judgment creditor in bringing a suit to uncover land which had been conveyed after the judgments, in fraud of creditors, will entitle him to the proceeds. *Doster v. Maristee Nat. Bank* (Ark.) 334

CRIMINAL LAW.

See also DISORDERLY PERSONS; HABEAS CORPUS; INJUNCTION, I.

1. A discharge of a jury after they have been out for some time and their foreman has stated in the presence of all, without dissent by any, that there is no probability of their agreeing upon a verdict, will not sustain a plea of former jeopardy. *State v. Hager* (Kan.) 254

2. A hearing upon a plea of former jeopardy alone is not itself a jeopardy, and a discharge upon such a hearing is not an acquittal, since such plea does not involve the merits of the case. *Id.*

3. A sentence of conviction imposed under authority of Mass. Pub. Stat. chap. 187, § 13, after the reversal of a former judgment, on the application of the convict, because it was imposed under a statute that was passed after the offense was committed and was therefore unconstitutional so far as it related to that offense, does not violate the constitutional provision against double jeopardy, or abridge the privileges and immunities of the accused as a citizen, or deprive him of his liberty without due process of law, although he had partly served the invalid sentence before it was reversed, including one day's solitary confinement, to which each of the sentences condemned him. *Com. v. Murphy* (Mass.) 393

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CUSTOM.

See also CARRIERS, 3, 4; EVIDENCE, 10, 16; TRIAL, 4.

Custom cannot give a public right to fish in a pond on private land because a common-law custom, as distinguished from a usage of trade, must be immemorial, and in New Jersey is therefore impossible, because a custom laid in the public is bad for universality and because a right to take profit from the land of another cannot be acquired by custom. *Albright v. Cortright* (N. J. Err. & App.) 616

DAMAGES.

1. The measure of damages in ejectment for withholding possession of land is the actual rental value of the land, irrespective of what the defendant may have gathered from it. *Credle v. Ayers* (N. C.) 751

2. On condemnation of a railroad right of way after the railroad has been built on a strip of mortgaged land conveyed for that purpose by the mortgagor, and the entire premises, including the railroad, thereafter sold on foreclosure, the purchaser is entitled only to the value of the land occupied by the railroad, irrespective of the improvements. *St. Louis, K. & S. W. R. Co. v. Nyce* (Kan.) 241

3. The damages recoverable in trover by one who has retained title to the property as security for purchase money are limited to the balance due him thereon, less any depreciation in its value by the use which he had authorized. *Wood v. Nichols* (R. I.) 773

4. Fifteen thousand dollars is excessive to award an employee as damages for injuries resulting in severe pain for several months and in the loss of an eye, where he is not wholly incapacitated for labor, and the interest on the amount at 4 per cent would produce an income greater than his earning capacity before the injury. *Ribich v. Lake Superior Smelting Co.* (Mich.) 649

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Damages; compensation in eminent domain case; value of railroad previously built without right. 243

DEATH.

Liability of County for Killing by Mob, see COUNTIES.

Compelling Counties to Pay Damages for Lynching, see EMINENT DOMAIN, 9.

The provision of a state Constitution against limitation of liability for injuries resulting in death cannot prevail over the act of Congress permitting limitation of liability for maritime losses. *Loughin v. McCauley* (Pa.) 33
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Death; conflict of laws as to limitation of actions for. 639

DEEDS.

See also CHAMPERTY; VENDOR AND PURCHASER.

An instrument conveying a present interest from the grantor to her children, but postponing their enjoyment until after her death, is a conveyance, and is not testamentary in character. *Love v. Blauw* (Kan.) 257

NOTES AND BRIEFS.

Deeds; conditions in, as to building line. 54

Construction of; granting life estate; of land held adversely. 537

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See OFFICERS, 2, 3; RELIGIOUS SOCIETIES, 2.

DEFENSES.

See ACTION OR SUIT, 3.

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Voluntary Exposure to Unnecessary Danger, see INSURANCE, 7.

Provisions, see MUNICIPAL CORPORATIONS, 6.

Grain, see WAREHOUSEMEN, 1.

DELEGATION OF POWER.

See MUNICIPAL CORPORATIONS, 8.

DEMURRER.

See PLEADING, 7.

DEPARTMENT STORES.

Constitutionality of Regulation of, see CONSTITUTIONAL LAW, 18, 19.

See also LICENSE, 2; MUNICIPAL CORPORATIONS, 9-11; STATUTES, 1.

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Department stores; unconstitutional ordinance respecting. 262

Legal restrictions on. 261

Unconstitutional statute as to. 266

DESCENT AND DISTRIBUTION.

A widow's release by an antenuptial contract, of all her claims on the estate of her husband, in consideration of a specified sum, does not preclude her from being deemed his widow, or entitle the descendants of his deceased mother to take his estate, under Ill. Rev. Stat. chap. 39, § 2, providing that, when there is no widow or children of the decedent, the estate shall go to his mother and her children and their descendants. *Hudnall v. Ham* (Ill.) 557

DISORDERLY PERSONS.

A conviction and sentence on the charge of being "a suspicious person" under the act of Congress of July 8, 1898, applicable to the District of Columbia, when the suspicion of which the accused is the object

is wholly undefined and in no manner connected with any criminal act or conduct, either past or that might occur in the future, is in violation of U. S. Const. Amends. 4 and 8, prohibiting unreasonable searches and seizures and cruel and unusual punishments. *Stoutenburgh v. Frazier* (D. C. App.) 220

DOGS.

Opinion of Value of, see EVIDENCE, 7.
See also ANIMALS; TRIAL, 5.

DRAINS.

Vapors from, see ACTION OR SUIT, 4.
Constitutionality of Statutes as to, see CONSTITUTIONAL LAW, 9, 14.
Easements of Drainage, see EASEMENTS, 2-5.
Pollution of Waters by, as a Taking of Property, see EMINENT DOMAIN.
Injunction against Discharging into Streams, see INJUNCTION, 7-10.
Right to Discharge into Stream, see WATERS, 3-8.
Pollution of Waters by, see WATERS, NOTES AND BRIEFS.
See also LIMITATION OF ACTIONS, 1; MUNICIPAL CORPORATIONS, 2; PUBLIC IMPROVEMENTS, 10.

Merely granting to a city authority to construct sewers for the convenience and benefit of its inhabitants does not necessarily make their use a governmental use in the sense that there can be no remedy, unless given by statute, for consequential injuries resulting therefrom. *Platt Bros. & Co. v. Waterbury* (Conn.) 691

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 6-14.

EASEMENTS.

1. A right to fish from a boat in water that covers the land of another person cannot be claimed as an easement because an easement is a privilege without profit. *Albright v. Cortright* (N. J. Err. & App.) 616

See also FISHERIES, 3.

2. There can be no right by prescription to maintain a nuisance by the pollution of a river so as to carry filth and noxious substances to the premises of a lower proprietor, thereby endangering his health, and destroying the value of his property. *Platt Bros. & Co. v. Waterbury* (Conn.) 691

3. A prescriptive right to discharge sewers into a stream will not arise from the mere fact that they are so discharged for more than the statutory period of prescription, "without objection or hindrance," unless it is shown that the user was under claim of right and exercised adversely, and not with permission. *Smith v. Sedalia* (Mo.) 711

4. The maintenance of private sewers discharged into a stream, causing some pollution, but not creating a nuisance, will not be sufficient to create an easement by pre-

scription for the discharge into the stream of public sewers which cause much greater pollution of the stream and thereby create a nuisance. Id.

5. A prescriptive right to pollute a river in a certain manner does not justify pollution thereof by an additional and different use. *Platt Bros. & Co. v. Waterbury* (Conn.) 691

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Easement; covenant creating, as to building line. 54

EJECTMENT.

See also DAMAGES, 1; EVIDENCE, 14.

Mesne profits are recoverable from a defaulting vendee in a land contract for the time that he withholds possession of the premises pending an action of ejectment against him, in which he gives a defense bond under N. C. Code, § 237. *Credle v. Ayers* (N. C.) 751

NOTES AND BRIEFS.

Ejectment; damages on loss of title pending suit. 751
Interest of possessor. 831

ELEVATORS.

See EVIDENCE, 17; MASTER AND SERVANT, 13, 16.

EMBLEMENTS.

See also LIFE TENANTS, 3.

The right to harvest growing crops on land subject to a life lease is preserved to the administrator of the life tenant, or to a lessee of the life tenant, by Ohio Rev. Stat. §§ 6026, 6027, in case of the death of the life tenant after crops have been sown. *Noble v. Tyler* (Ohio) 735

NOTES AND BRIEFS.

Emblements; right to, on termination of tenancy. 736

EMINENT DOMAIN.

As to Consequential Injuries, see also DRAINS.

See also DAMAGES.

1. The lessening of the value of an estate by destruction of the grass and the creation of some personal discomfort to the owner by the discharge of sewage thereon is not such a taking of his property as entitles him to compensation, where the damage results from the discharge of sewage into a stream by a city in a skillful manner and in conformity to statute, since the damage is merely consequential. *Valparaiso v. Hagen* (Ind.) 707

But see next case.

2. Property of riparian owners is taken for public use within the meaning of a constitutional provision as to eminent domain, when they are damaged by the pollution of the waters above the ebb and flow of the tide, but not when the water is polluted at a place where the tide ebbs and flows. *Grey*

ex rel. *Simmons v. Paterson* (N. J. Err. & App.) 717

3. Damages resulting to the property of riparian owners by the discharge of city sewage into a stream in a skilful manner and in conformity to statute are merely consequential, and give them no right to compensation. *Valparaiso v. Hagen* (Ind.) 707

But see cases following.

4. Damage to a riparian owner by noxious and filthy substances deposited on his premises in consequence of the pollution of the river by sewers emptying into it above his land is not a mere consequential damage, but a direct appropriation of his well-recognized property rights which are within the guaranty of the Constitution. *Platt Bros. & Co. v. Waterbury* (Conn.) 691

5. The pollution of a river by city sewers, though it may become justifiable when done for a public purpose, is subject to payment of compensation for the invasion of the property rights of riparian owners. Id.

6. Lack of charter authority to condemn the property rights of a riparian owner will not relieve a city from liability to make compensation for damage to such rights by the unlawful pollution of a river by sewers. Id.

7. The facts that sewers are necessary to a city, and that a statute directs that they shall follow as near as practicable the natural drainage of the country, do not justify the city in discharging sewers into a stream to the damage of a landowner, without just compensation to him, as required by a constitutional provision against taking or damaging private property without just compensation. *Smith v. Sedalia* (Mo.) 711

8. The destruction of oysters by the casting of sewage upon them, though the sewer was constructed by a city under legislative authority, is as clearly a taking of the property of the owner of the oyster bed, for which he has a constitutional right to compensation, as if there had been a physical removal and conversion of the oysters. *Huffmire v. Brooklyn* (N. Y.) 421

9. There is no taking of private property within the meaning of the constitutional provisions as to eminent domain by a statute making a county liable to a penalty, to be collected by taxation, for the death of a person caused by mob violence. *Champaign County v. Church* (Ohio) 738

NOTES AND BRIEFS.

Eminent domain; taking or damaging property by discharging sewers into waters. 698

Taking property without just compensation for public use. 251

Compensation for consequential injuries. 714

Liability for consequential damages on account of public work. 421

EMPLOYERS' LIABILITY.

See *INSURANCE*, 3, 4.
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ENTIRETIES.

See *HUSBAND AND WIFE*, 1.

EQUITY.

Power over Trusts, see *TRUSTS*.

Setting up unconstitutionality of a statute in defense of a criminal information or indictment gives an adequate remedy at law against the statute, which will preclude equitable relief, where it can be enforced only by such criminal proceedings. *State ex rel. Kenamore v. Wood* (Mo.) 598

ERROR.

See *APPEAL AND ERROR*.

ESTOPPEL.

See also *BONDS*, 3, 4.

1. The mere silence of a person owning a one-fourth interest in a mine, with respect to his lack of interest in a contract for work and materials made by lessees of the mine, will not estop him from denying that his interest is subject to a lien for such work and materials, although, as an employee of the lessees, he may have given directions as to the performance of such contract, where the nature of the interests of all parties clearly appeared upon the records. *Davidson v. Jennings* (Colo.) 340

2. One who takes possession of a vessel which a contractor is building is estopped from denying that he has accepted it under the contract, when he could lawfully take it only by accepting it. *Vandegrift v. Cowles Engineering Co.* (N. Y.) 685

NOTES AND BRIEFS.

Estoppel; of surety. 515

To contest public improvement. 285

To deny regularity or validity of contract. 204

EVIDENCE.

See also *BONDS*, 3; *COURTS*, 3; *GRAND JURY*, 1; *PLEADING*, 7.

Judicial notice.

1. Judicial notice may be taken of the fact that the people come in contact with and engage the services of barbers, and that a spreading of diseases may be caused by uncleanliness or incompetency of barbers. *State v. Zeno* (Minn.) 88

2. The court does not judicially know that it is important or advantageous to a shipper or the carrier for the former to accompany his stock to market. *Atchison, T. & S. F. R. Co. v. Campbell* (Kan.) 251

3. It is matter of common knowledge, of which the courts will take notice, that oil and gas lie far below the surface of the ground, and may flow unrestrained if the owner of adjoining land bores a well down to the stratum which holds them, so that they may be taken from the land without any compensation. *Huggins v. Daley* (C. C. App. 4th C.) 320

4. The court cannot take judicial knowledge of the history of railroad lines operated

by a particular railroad company. *Purdy v. Erie R. Co.* (N. Y.) 669

Presumptions and burden of proof.

See also **GRAND JURY**, 1.

5. The burden of proof is upon the plaintiff in a libel suit to establish actual malice, where the communication is of a privileged character. *Redgate v. Roush* (Kan.) 236

6. The burden of proof that death by accident was within an exception in an accident insurance policy is upon the insurer after proof of accidental death. *Fidelity & C. Co. v. Sittig* (Ill.) 359

Opinions.

7. The value of a dog which has no market value may be shown by proving the pedigree, characteristics, and qualities of the dog, and then proving by witnesses who know these things their opinions as to the value. *Hodges v. Causey* (Miss.) 95

Declarations.

8. A conversation with an attorney upon a railway train with reference to a contemplated law suit, in which an opinion is sought and obtained from the attorney, but without any retainer or payment of any fee, and although there has been no relation of attorney and client between the parties, constitutes a privileged communication within the protection of Wis. Rev. Stat. 1898, § 4076. *Bruley v. Garvin* (Wis.) 839

9. Evidence that a foreman refused to take charge of premises because of a stench is admissible to prove that fact, though not to prove the fact of the stench. *Platt Bros. & Co. v. Waterbury* (Conn.) 691

Relevancy.

10. Evidence that it is not customary in factories to have collars with projecting set screws placed on revolving shafts near pulleys, where it is necessary for employees to go frequently, is not admissible to show the duty of a particular employer towards his employees. *Ford v. Mt. Tom Sulphite Pulp Co.* (Mass.) 96

11. Evidence that a person refused to work on certain premises because of a stench is not inadmissible because the refusal was made pending an action, although that fact might affect its weight. *Platt Bros. & Co. v. Waterbury* (Conn.) 691

12. Evidence that a city at a special meeting voted not to accept a certain act which provided for its acceptance at a meeting held for that purpose is inadmissible for the purpose of proving the construction of the act. *Id.*

13. Evidence of the acts of a city with respect to the construction of sewers is inadmissible for the purpose of showing that it was compelled to build a sewer. *Id.*

14. Evidence of the rental value of adjoining farms is not admissible on the question of the amount recoverable as mesne profits for withholding possession of land. *Credle v. Ayers* (N. C.) 751

15. An estoppel to deny liability under a contract made by others cannot be proved 4S L. R. A.

under a pleading which merely avers the execution of a contract. *Davidson v. Jennings* (Colo.) 340

Weight; sufficiency.

16. Proof of usage of passengers to carry packages of merchandise into a passenger car must not only be clear and explicit, but also distinguish it from mere acts of accommodation. *Runyan v. Central R. Co.* (N. J. Sup.) 744

17. That failure to comply with an ordinance requiring the openings into elevator shafts to be kept closed when not in use was negligence, and was the proximate cause of the death of a person who fell down the shaft, may be found from evidence showing that such person, who was attempting to ascend on the elevator, was required to stand near the edge to operate it, and that the opening was protected only by a bar across, while the lining of the elevator shaft made a horizontal edge above the opening, so that one standing near the opening might come in contact with such bar or edge and be dragged from the elevator and precipitated down the shaft. *Dallemand v. Saalfeldt* (Ill.) 753

NOTES AND BRIEFS.

Evidence; judicial notice of lake. 617

Presumption as to probate of will in other state. 136

Presumption as to due care in employing servants. 377

Effect of omission of stamp upon use of instrument as. 305

Of title by possession of land. 831

Proof of circumstances as basis of inference. 175

EXECUTION.

See **LEVY AND SEIZURE**.

EXECUTORS AND ADMINISTRATORS.

See also **APPEAL AND ERROR**, 6; **TRIAL**, 6; **TRUSTS**, 5.

The failure to apply for an extension of a vacancy permit for premises that are still vacant at the expiration of the time for which such a permit has been granted, with an agreement by the insurer to extend the time on application therefor, constitutes negligence on the part of an executor or administrator with the will annexed, who is in possession of the premises and of the policy of insurance thereon, which will make him liable in damages in case the property is destroyed by fire, and the insurance cannot be collected because of the failure to procure the extension of the vacancy permit. *Henderson Trust Co. v. Stuart* (Ky.) 49

EXEMPTION.

See **LEVY AND SEIZURE**, **NOTES AND BRIEFS**.

EXPLOSION.

See **TRIAL**, 15.

FACTORS.

See **TRIAL**, 12.

FEDERAL COURT.

See COURTS, 6.

FEDERAL LAWS.

See COURTS.

FINDINGS.

See APPEAL AND ERROR, 8.

FISHERIES.

Damage to, by Sewage, see EMINENT DOMAIN, 8.

See also CUSTOM.

1. The common law gives no right to fish in a pond on private land of another person, even if the fish are the property of the state, when they cannot be reached without trespassing on private property. *Albright v. Cortright* (N. J. Err. & App.) 616

2. A license to trespass on private property to fish in a pond which has been stocked by the public is not given by the New Jersey statutes concerning fish and game, and could not be given by the legislature. *Id.*

3. A person cannot claim by prescription merely, as one of the public, a right to fish on private land of another, because the public cannot prescribe. *Id.*

See also EASEMENTS, 1.

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Fisheries; rights of public in; in tidal waters; common right. 617

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See also MORTGAGE, 3.

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See also JUDGMENT, 4.

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See MASTER AND SERVANT, 12; NEGLIGENCE, 1.

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GAMBLING.**NOTES AND BRIEFS.**

Gambling; injunction against enforcement of contract of. 844

GARNISHMENT.

A debt due from an insurance company for loss in another state has no situs in a third state, so as to sustain a garnishment there by a creditor of the insured, merely because the insurance company has appointed an agent in that state on whom process can be served, in pursuance of the state statutes as a condition of the right to do business therein. *Strause Bros. v. Aetna Ins. Co.* (N. C.) 452

NOTES AND BRIEFS.

Garnishment; of debt for insurance; situs of. 453

GAS.

See EVIDENCE, 3; MINES, 2-4.

GRAIN.

See WAREHOUSEMEN, 1.

GRAND JURY.

1. The records of the court need not show how or by whom grand jurors were selected and drawn, as the presumption is that that duty was regularly performed by the proper officers. *State v. Thomas* (Ohio) 459

2. It is not necessary that a foreman be again appointed for a grand jury or the oath readministered to him or to the other members as a body, where, after the grand jury have been sworn, a member is discharged on account of sickness and another person having the legal qualification is sworn in his stead, as provided by Ohio Rev. Stat. § 7202. *Id.*

NOTES AND BRIEFS.

Grand jury; organization of; failure to challenge. 460

GUARANTY.

See SURETY COMPANIES.

GUARD RAIL.

See MASTER AND SERVANT, 12; NEGLIGENCE, 1.

HABEAS CORPUS.

A person may be discharged on habeas corpus from a judgment and sentence under an act of Congress which is unconstitutional or so indefinite as to the offense charged as to be void and without effect. *Stoutenburgh v. Frazier* (D. C. App.) 220

NOTES AND BRIEFS.

Habeas corpus; not to be used as writ of error; scope of writ. 220

HAWKERS.

See PEDDLERS.

HEALTH.

Police Regulation of, see CONSTITUTIONAL LAW, 21.

HEIRS.

As Parties, see ACTION OR SUIT, 8.

HIGHWAYS.

See also BRIDGES, 1, 5; PUBLIC IMPROVEMENTS, 3-5, 14.

1. An indictable nuisance is created by a bay window which extends 4 feet and 7 inches over a street, at a point 8 feet above the ground, although it does not interfere with travel on the highway, where the statute declares that a building, structure, or fence shall be deemed a public nuisance if "erected or continued upon or over any highway so as to obstruct the same or lessen the full breadth thereof." *State v. Kean* (N. H.) 102

2. An ordinance making it a penal offense to maintain a sign suspended or projecting over a sidewalk is not included in charter power to open streets and keep streets and sidewalks free and clear from obstructions, and is unreasonable, oppressive, and void as applied to a sign which does not impede, delay, obstruct, or in any way endanger the use of the sidewalk. *State v. Higgs* (N. C.) 446

3. The lack of barriers on the side of approaches to a bridge will not make a municipality liable for injuries caused by a team going off the bank, when the roadway was wide enough for two teams to pass without difficulty and the proximate cause of the accident was the fact that the horse became frightened and so unmanageable that the driver could not keep him within the limits of the road. *Bell v. Wayne* (Mich.) 644

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Highways; encroachment on, by signs. 446

Liability for changing grade. 853

Liability for defects in; injury to runaway horse. 644

HOLIDAYS.

An indictment is not invalid because found by a grand jury sworn and impaneled on the statutory holiday known as Labor Day, in the absence of any statutory provision that the courts shall not sit on a holiday. *State v. Thomas* (Ohio) 459

HUSBAND AND WIFE.

See also JUDGMENT, 6, 7.

1. An estate by entireties, and not one of joint tenancy, is created by a deed made to husband and wife "jointly," and the word "jointly" will be construed as surplusage. *Simons v. Bollinger* (Ind.) 234

2. A woman's mere ignorance of the rule of law that marriage will revoke her intended husband's will is not sufficient to overturn an antenuptial settlement by which she 48 L. R. A.

agrees to permit his property to go as provided in the will. *Hudnall v. Ham* (Ill.) 557

3. An antenuptial contract by which a wife agrees, in consideration of a certain sum of money, to release all her interest in her husband's estate in order that it may pass by certain provisions of his will, with a covenant not to interfere in any way with the disposition of the property made by the will, will preclude her from contesting the right of the beneficiaries under the will on the ground that the will was revoked by the marriage,—especially when she has ratified the contract after her husband's death by accepting the consideration agreed upon. *Id.*

4. A binding judgment against defendant in a divorce proceeding is authorized by his voluntary appearance, without reservation and without objection to jurisdiction, seeking advantage of the decree in opposition to an application for amendment of the decree so as to allow alimony, although it is void as to him for want of service of process. *Lynde v. Lynde* (N. Y.) 679

5. The remarriage of a divorced woman to one whose ability to support her is unquestionable will prevent the further application for her benefit as alimony of the income of a testamentary trust instituted for the support of the husband from whom she was divorced. *Wetmore v. Wetmore* (N. Y.) 666

6. A contract by which a husband agrees to pay certain moneys to his wife in discharge of his obligation to support her is not against public policy, when made, not for the purpose of a voluntary separation, but after a separation has actually occurred on account of the misconduct of one of the parties which justified it. *Henderson v. Henderson* (Or.) 766

7. A decree based on a post-nuptial agreement by which a wife is given a certain sum per month for her maintenance constitutes a contract which cannot be modified by the court on account of a change in the husband's financial condition, so as to reduce the amount payable, without the wife's consent. *Id.*

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Husband and wife; injunction against enforcing invalid contracts relating to marriage. 842

Estates by entireties; how created. 234

Validity of contracts for support on separation. 767

INCOME.

Of Life Tenant, see LIFE TENANTS, 1.

INCOMPETENT PERSONS.

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See PLEADING.

INDICTMENT.

See COURTS, 1; GRAND JURY; HOLIDAYS.

INFANTS.

See also **UNBORN CHILDREN, TRUSTS, NOTES AND BRIEFS.**

1. Nonresident infants are not bound by a judgment settling their rights in real estate belonging to a partnership of which their deceased father was a member, entered before the service of summons by publication was complete, so that there was no jurisdiction to appoint a guardian *ad litem* for them. *Darrow v. Calkins* (N. Y.) 299

2. An allowance necessary for the maintenance of an infant may be ordered by a court of equity out of the income of a trust in the residue of an estate created by a will giving the trustee discretion to apply a portion of such income to the education of the infant, but making no provision for his maintenance, where the mother of the infant is the only other person entitled to any part of the income, and she joins in a request for the allowance. *Pitts v. Rhode Island Hospital Trust Co.* (R. I.) 783

INJUNCTION.

Appeal from, see **APPEAL AND ERROR, 10.**

Against Enforcing Illegal Contract, see **CONTRACTS, 5.**

See also **EQUITY.**

1. An injunction against the enforcement of a statute requiring the inspection of beer cannot be granted on the ground that the statute is unconstitutional, where the statute is enforceable only by criminal proceedings, since equity has no jurisdiction to enjoin criminal prosecutions. *State ex rel. Kenamore v. Wood* (Mo.) 596

2. An injunction to prevent the consolidation of competing street railways in violation of the Constitution may be granted without compelling a resort to the harsher method of forfeiting the charters. *Trust Company of Georgia v. State* (Ga.) 520

3. An injunction against the passage of an ordinance, within the general power of the municipality, creating a contract between a city and a street-railway company, is void for want of jurisdiction, whether the ordinance is authorized by law or not, since the passage of such an ordinance is a legislative act which the court has no power to supervise. *State ex rel. Rose v. Superior Court of Milwaukee County* (Wis.) 819

4. Failure to submit to a committee an amendment to an ordinance as originally proposed does not constitute any ground on which a court of equity can grant an injunction against passing the ordinance. *Id.*

5. An injunction may issue against the exercise of the power of sale under a mortgage which is void as against public policy. *Basket v. Moss* (N. C.) 842

6. Injunction is the proper form of remedy to enforce the right of a stockholder in a private corporation, given by Ohio Rev. Stat. § 3254, to inspect the books and records of the corporation. *Cincinnati Volksblatt Co. v. Hoffmeister* (Ohio) 732

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7. An injunction to protect riparian proprietors against the pollution of a river by city sewers cannot be refused because of the possibility of future legislative action respecting a plan of sewerage. *Platt Bros. & Co. v. Waterbury* (Conn.) 691

8. Riparian owners having no title to the bed of a stream where the tide ebbs and flows are not entitled to an injunction against a city on account of the pollution of the stream. *Grey ex rel. Simmons v. Paterson* (N. J. Err. & App.) 717

9. By reason of the great injury which would fall upon a city by restraining the continuous use of its sewerage system, and the acquiescence of riparian owners above where the tide flows, where their injury is comparatively small, it would be inequitable to grant them an injunction against draining sewage into the river. *Id.*

10. A city cannot be enjoined from discharging sewage into a stream, when it acts skilfully and in conformity to statute, and the stream constitutes the only natural and reasonably possible line of drainage. *Valparaiso v. Hagen* (Ind.) 707

See also **EMINENT DOMAIN AND WATERS.**

11. An injunction against a wrongful assessment for the grading and paving of an alley, where the work had been legally authorized, should not include an order for the restoration of the alley to its original condition, but should extend only to a stay of proceedings under the invalid assessment, and under Wis. Rev. Stat. 1898, § 1210c, the court may direct a reassessment. *Kersten v. Milwaukee* (Wis.) 851

12. The remedy by appeal from a wrongful assessment under the charter of Milwaukee, Wisconsin, subchap. 7, § 11, is not exclusive of a remedy in equity, where the assessment is shown to be arbitrary and fraudulent. *Id.*

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Injunction; against nuisance. 717,722

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Against violation of law by corporation; against boycott. 569

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INSURANCE.

See also EVIDENCE, 6; EXECUTORS AND ADMINISTRATORS; GARNISHMENT; TRIAL, 6, 13.

1. The construction most favorable to the assured is to be adopted in case of doubt as to the proper construction of an insurance policy. *Fenton v. Fidelity & C. Co. (Or.)* 770

2. A member of a mutual benefit society cannot be compelled to pay an assessment, where his contract does not provide that he shall pay assessments or make any provision as to nonpayment, except that his certificate shall be forfeited therefor. *Gibson v. Megrew (Ind.)* 362

3. An assignment of a claim on an employer's liability policy for imperative surgical relief furnished to an injured employee under an emergency clause in the policy, though made before there has been any judgment establishing the claim, is not made invalid by a clause in the policy giving the insurer the right to defend actions on claims for damages. *Fenton v. Fidelity & C. Co. (Or.)* 770

4. An indemnity against liability for damages on which an assignable cause of action will arise as soon as the accident occurs, although the assured is insolvent and cannot pay the claim, is created by a policy insuring an employer against liability for damage through injury to employees, and providing that the insurer shall have immediate notice of an accident and exclusive power to settle and adjust the claim. *Id.*

5. The amputation of about one fourth of a person's foot does not give any right to the full amount of insurance on the ground that all the use of the foot is lost, under a by-law of a mutual benefit association providing for full payment in case of the "amputation of a limb (whole hand or foot)," as the word "whole" applies to the foot as well as the hand, and the injury insured against is not the loss of the use of a hand or foot but the amputation of a limb that should include a

whole hand or a whole foot. *Fuller v. Locomotive Engineers' Mut. L. & A. Ins. Assn. (Mich.)* 86

6. The attempt of a traveling salesman to get upon a train which is already in motion is not, as matter of law, a voluntary exposure to unnecessary danger, within the meaning of an exception in an insurance policy. *Fidelity & C. Co. v. Sittig (Ill.)* 359

7. A voluntary exposure to unnecessary danger within the meaning of an insurance policy does not mean simply a voluntary performance of the act which results in injury, but also that it is performed with a consciousness of the danger, or that the danger is so apparent that a man of ordinary intelligence would under the circumstances necessarily know it. *Id.*

8. The acceptance of a proposition to buy real property, which is definite in nothing except the amount to be paid, does not defeat insurance thereon under a policy providing that it shall be void if the interest of the assured becomes other than "the entire, unconditional, unencumbered, and sole ownership." *Arkansas Fire Ins. Co. v. Wilson (Ark.)* 510

9. The rights of one whose property is destroyed by fire after an oral contract to insure it, but before a policy therefor is issued, are subject to the provisions of the standard policy prescribed by law, and he can recover only by compliance with the conditions required by such policy, including that as to furnishing proofs of loss within a specified time. *Hicks v. British America Assur. Co. (N. Y.)* 424

10. The value of property destroyed by fire after an oral contract to insure it, but before the issuance of a policy thereon, cannot be recovered as damages for breach of the agreement to issue the policy, where the failure to deliver the policy did not cause any damage to the insured, since the oral agreement constituted a binding contract of insurance which could be enforced against the insurer except for the failure of the insured to comply with the conditions contained in the standard policy of insurance, which were by law made a part of the contract. *Id.*

11. The denial by a local insurance agent that any contract of insurance had been made, when in fact there was an oral agreement to insure which was binding, will not waive the condition as to proofs of loss which is by law made a part of the contract because contained in the standard policy of insurance, since that policy also provides that no such agent shall have power to waive any condition therein, except in writing. *Id.*

12. A denial in an answer by an insurance company of all allegations in the complaint will not have the effect of ratifying an unauthorized denial by a local agent of the existence of any contract of insurance, so as to waive a condition as to proofs of loss, when the agent's denial was by the terms of the policy ineffectual to constitute such waiver because not in writing. *Id.*

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See HUSBAND AND WIFE, 1.

JUDGE.

See COURTS, 1.

JUDGMENT.

See also HUSBAND AND WIFE, 4, 7; INFANTS, 1; TAXES, 1.

1. A finding of facts made after the end of the term at which judgment was rendered, when the court had no power to modify or change the judgment, and after the time for an appeal had expired without an appeal being taken, cannot be made by the court a part of the judgment, nor of the record of 48 L. R. A.

judgment, nor the foundation of a writ of error to reverse the judgment, although there are statutory provisions (such as Conn. Gen. Stat. §§ 1107, 1111) to the effect that any party is entitled to have a finding of the facts on which judgment is founded appear on the record and become part of the judgment. *Corbett v. Matz* (Conn.) 217

2. A decree partitioning lands between a life tenant and remaindermen, setting off a part of the property in fee simple to the life tenant, when based on a petition that avers that the plaintiff is a life tenant, is wholly void for lack of jurisdiction. *Love v. Blauw* (Kan.) 257

3. Failure of a life tenant to challenge a deduction of interest, on an annual accounting by a trustee, from her income, does not prevent her from raising the question thereafter as to the distribution of moneys then in the hands of the trustee. *Re Hoyt* (N. Y.) 126

4. A judgment is not a lien on lands which the judgment debtor has previously conveyed, though with intent to defraud creditors, under *Sand. & H.* (Ark.) Dig. § 4204, which provides that judgments shall be liens on lands of the judgment debtors, and § 3049, providing for the sale on execution of lands of which the judgment debtor, or any person for his use, is seised in law or equity. *Doster v. Manistee Nat. Bank* (Ark.) 334

5. The probate in common form of a will under statutes making it an exercise of judicial power, and the judgment conclusive as to all matters properly cognizant in the probate proceedings, and as to the property covered by the will, is, so far as regards personalty, within the provision of the United States Constitution requiring full faith and credit to be given in each state to the judicial proceedings of every other state, even as against persons not made parties to the proceeding. *Martin v. Stovall* (Tenn.) 130

6. The supreme court of New York will enforce a final decree of the New Jersey chancery court adjudging a defendant in a divorce proceeding over whom it has jurisdiction indebted to plaintiff in a definite sum as alimony, but it will not enforce provisions as to future alimony and as to equitable remedies to enforce compliance with the decree. *Lynde v. Lynde* (N. Y.) 679

7. The provisions of the New York statute upon the subject of alimony in divorce proceedings are not available to a plaintiff seeking to enforce in the courts of that state a decree of another state granting alimony and providing for its own enforcement. *Id.*

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JUDICIAL SALE.

1. The owners in being of real estate stand not only for themselves, but for all that may come after them, for all the purposes of litigation affecting the jurisdiction of the court to deal with the whole title. *Rugles v. Tyson* (Wis.) 809

2. The entire property of a trust estate may be laid hold of and administered by a court of equity so as to protect the interests in remainder of infants or persons unknown who are likely to be interested in it against the danger of destruction by tax and other liens, when the matter is brought before the court in a proceeding instituted by the life tenant to obtain authority to sell a part of the property, although the primary object of the proceeding was to get an adjudication as to the power to authorize a sale which should bar possible remaindermen, and all the counsel representing the different parties attempt to limit the investigation to a part of the property. Id.

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LEVY AND SEIZURE.

1. The fact that a wife claims to be the owner of exempt property the greater portion of which belongs to her insane husband will not defeat her claim of exemption set 48 I. R. A.

up thereto by her as the head of a family, if no injury results from the failure to state the particulars as to the title. *Ecker v. Lindskog* (S. D.) 155

2. A selection of the exempted property which is allowed to the head of a family by South Dakota Constitution and Laws 1890, chap. 86, may be made by the wife, when the husband is incompetent to make it because he has been adjudged insane and is confined in a state hospital, although most of the property claimed belongs to him. Id.

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Levy; exemption for benefit of family; right of wife to make selection; when husband is insane. 155

LIBEL AND SLANDER.

See also EVIDENCE, 5.

1. A publication in church papers by officers of a church, concerning the character of their pastor, is privileged, if they honestly believe it to be their duty toward other members of churches of the same denomination to publish it. *Redgate v. Roush* (Kan.) 233

2. The fact that a publication in a church paper, which is privileged as a communication to church members, incidentally may have been brought to the attention of other persons, will not take away its privileged character. Id.

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Constitutionality of Statutes as to, see CONSTITUTIONAL LAW, 17, 21.

See also COMMERCE, 3; CONSTITUTIONAL LAW, 8; FISHERIES, 2; MUNICIPAL CORPORATIONS, 7, 8; PEDDLERS; TIMBER.

1. An exercise of the power of taxation for the sole purpose of revenue or undue restraint or prohibition of a business will not be saved from the constitutional restrictions that apply to it as the imposition of a tax, by its designation in the statute as a "license fee." *State ex rel. Wyatt v. Ashbrook* (Mo.) 265

2. The requirement of uniform taxation upon the same class of subjects made by Mo. Const. art. 10, § 3, is violated by the anti-department store act of May 16, 1899, imposing license taxes upon those merchants in cities having 50,000 or more inhabitants who employ fifteen or more persons in the same establishment, and sell goods enumerated in more than one of the classes or groups designated in the act, while the amount of tax to be imposed in any city is within certain limits left to the discretion of commissioners who may fix different rates for the different cities governed by the statute. Id.

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Right to Crops, see **EMBLEMENTS**.
Rights in Trust Estate, see **TRUSTS**.
See also **ACTION OR SUIT**, 5; **JUDGMENT**, 3.

1. A premium on bonds paid on investing trust funds the income of which, under a will, is to be paid to testator's daughter for life, with remainder to certain nephews and nieces, cannot be charged to the daughter and the amount thereof deducted from her income so as to restore the principal of the trust fund in order that it may be turned over unimpaired at the termination of the life estate, where testator has expressly declared his intention to provide for his daughter in the "most bounteous and liberal manner as to expenditure," and obviously intended to devote to her use the entire income of the fund, making the disposition of the principal after her death a secondary consideration. *Re Hoyt* (N. Y.) 126

2. A deed to one during his natural life, who is to deed or will the lands to the bodily heirs of another, the former having the discretion of allotting the lands as he may see proper, confers a life estate on the first taker, with vested remainder to the heirs of the other person mentioned, which will open to let in afterborn children; and the interests of children dying before the life tenant will pass to their heirs. *Fort Jefferson Improv. Co. v. Dupoyster* (Ky.) 537

3. Notes given for rent to a life tenant, though not due at the time of her death, and although a crop of corn is then still on the ground, belong entirely to her estate and are not apportionable between it and the remainderman, where the lease has expired during her lifetime and the lessee has gathered, or is entitled to gather, all the crops raised on the premises, and has had the full benefit of the lease. *Noble v. Tyler* (Ohio) 735

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Life tenants; charging with premium paid on investment in bonds. 127

LIMITATION OF ACTIONS.

See also **ADVERSE POSSESSION**, 1; **CONFLICT OF LAWS**, 2.

1. The rule that the right of action for trespass to real estate accrues to the one owning the property at the time the trespass is committed does not apply to the emptying of a sewer system into a stream to the injury of a riparian owner, where the extent of the injury cannot then be for all time estimated, while subsequent change of the 48 L. R. A.

outlet and enlargement of the system materially increase the injury after the change in the ownership of the riparian property. *Smith v. Sedalia* (Mo.) 711

2. Concealment of the defalcation of a bank teller prevents the running of the statute of limitations in favor of the surety on his bond, as well as in his own favor, until the discovery of the defalcation. *Lieberman v. First Nat. Bank* (Del.) 514

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LOGS.

See also **SALE**, 1, 2.

A log-driving company's possession of logs in a river while driving them, not as agents of the person to whom they have been sold and are being sent, but by virtue of the charter of the company, although all owners of logs driven by it are made members of the company by force of the statute, does not constitute the possession of the person to whom they are being taken so as to preclude the stoppage of the logs *in transitu* by the seller. *Johnson v. Eveleth* (Me.) 50

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Mandamus to the treasurer of a town to compel payment of a share of the expense of a bridge district to which it belongs is properly issued against him without making the bridge district or the towns which belong to it parties defendant. *State ex rel. Bulkeley v. Williams* (Conn.) 465

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A will creating a trust for the saying of masses may be upheld as a "charitable use," since the saying of mass in open church, where all who choose may be present and participate therein, is a solemn and impressive ritual, from which many may draw spiritual solace, guidance, and instruction, and the money expended therefor is of benefit to the clergy, thus accomplishing one of the cherished objects of religious uses. *Webster v. Sughrow* (N. H.) 100

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MASTER AND SERVANT.

See also ACTION OR SUIT, 2; DAMAGES, 4; TRIAL, 9, 10, 15.

1. An employer is not liable for the services of a physician summoned by his manager or foreman to attend an employee in case of an injury by accident in a laundry during the employer's absence. *Holmes v. McAllister* (Mich.) 396

2. A railroad company is not liable to an employee for injuries caused by the incompetence of a coemployee, because of its negligence in employing him, if his incompetence was not with respect to acts for the performance of which he was employed. *Smith v. St. Louis & S. F. R. Co.* (Mo.) 368

3. A railroad company is not bound to use the same degree of care in employing a wiper or fire puller to work in a roundhouse that is necessary in employing an engineer or hostler. *Id.*

4. A master is not bound to furnish the safest and best appliances that could be used; but he is acquit of fault if what he furnishes is reasonably safe and suitable. *Grattis v. Kansas City, P. & G. R. Co.* (Mo.) 399

5. The breaking of a railroad trestle by a flood and the drift carried thereby renders the railroad company liable to an employee injured thereby on the ground of negligence, if the character of the flood and drift is such as might reasonably have been anticipated. *Terre Haute & I. R. Co. v. Fowler* (Ind.) 531

6. A railroad company cannot be held negligent for placing a switch signal target on the same side of the main track with the side track, although an injury which happened might have been avoided if the target had been on the other side of the track, where there is no uniform rule as to which side of the track such target shall be placed on, and under some circumstances it is better to have it on one side and under other circumstances it is better to have it on the other side. *Grattis v. Kansas City, P. & G. R. Co.* (Mo.) 399

7. It is not negligent on the part of a railroad company towards its servants to use a stub switch which is safe when used in the proper manner, although it is unsafe to run a train through it from the wrong direction. *Id.*

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Warning.

8. An employer need not warn an employee whose special business is to oil a shaft and bearing, of his introduction of a set screw to fasten a collar near the end of the shaft, although it projects in such a manner as to be likely to catch the clothing of persons coming near it. *Ford v. Mt. Tom Sulphite Pulp Co.* (Mass.) 96

Scope of employment.

9. A brakeman who goes upon a caboose attached to a moving train in search of his working clothes, which he had left according to custom in the caboose when he finished his last previous trip, and who jumps from the caboose when through with his search, is not acting within the scope of his employment or of the license which custom may have given him to return to the caboose for his clothes. *Olson v. Minneapolis & St. L. R. Co.* (Minn.) 796

10. The conductor of a freight train who takes the engine and goes forward a mile or two from a station by order of the road superintendent, to see whether certain culverts are safe or whether they have been injured by a recent heavy storm, is within the scope of his employment while riding on the engine between two of such culverts over a trestle, which breaks down, causing his death. *Terre Haute & I. R. Co. v. Fowler* (Ind.) 531

Assumption of risk.

11. Assumption of risk is a term of the contract of employment, expressed or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of his duty shall be at his risk. *Naramore v. Cleveland, C. C. & St. L. R. Co.* (C. C. App. 6th C.) 68

12. A statute requiring railway companies to block guard rails and frogs on penalty of a fine changes the rule of liability and relieves an employee who continues to work with knowledge of the violation of the statute by his employer from the effect of the assumption of risk which would otherwise be implied against him. *Id.*

13. The dangers attendant upon the running of an unsafe elevator are not assumed by one employed to wash bottles in the basement, and whose duty does not involve the use of the elevator. *Dallemand v. Saalfeldt* (Ill.) 753

14. An employee who performs a particular service by order of the foreman, which is outside the scope of his employment, does not thereby assume risks incident thereto unless they are such that an ordinarily prudent man would not encounter them. *Id.*

Contributory negligence.

15. The mere fact that in an employee's judgment an act required by the employer is unsafe does not, as matter of law, render him guilty of negligence in performing it, if the employer assures him that there is no danger. *McKee v. Tourtellotte* (Mass.) 542

16. A youth nineteen years old, employed only five to seven weeks at work in which

he occasionally uses an elevator, is not, as matter of law, charged with knowledge that it is unsafe, where no instruction upon the matter is given him, and there is nothing to show that the danger is apparent. *Dallemand v. Saalfeldt* (Ill.) 753

17. That an employee is told by a third person that the work is not safe will not prevent his recovery for an injury, if he believes his employer's assurance that it is safe. *McKee v. Tourtellotte* (Mass.) 542

Fellow servants.

18. The head hostler in a roundhouse, who has no power to hire or discharge anyone, is the fellow servant of a fireman on an engine, so that his knowledge of the incompetence of a wiper, and that he attempts to move engines without authority, will not charge the railroad company with liability for injury to the fireman through the wiper's negligently moving an engine. *Smith v. St. Louis & S. F. R. Co.* (Mo.) 368

19. The conductor and engineer of a freight train are both fellow servants of a fireman, so as to preclude him from recovering for injuries received by reason of the derailment of the train at a switch that was caused by the negligence of the engineer and the conductor. *Grattis v. Kansas City, P. & G. R. Co.* (Mo.) 399

20. A servant of a truckman who is sent with a horse by his master, by whom he is paid, to a warehouse, to use the horse in operating tackle for hoisting goods, which work is under the direction of the foreman of the warehouseman, is not a fellow servant with the warehouseman's servants, by whose negligence in putting in place the pulley blocks and tackle he is injured. *Murray v. Dwight* (N. Y.) 673

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2. Equity regards and treats that as done which in good conscience ought to be done. Wyman v. Ft. Dearborn Nat. Bank (Ill.) 565

3. *Res ipsa loquitur*. Dettmering v. English (N. J. Sup.) 106

4. *Vigilantibus non dormientibus equitas subvenit*. Doster v. Manistee Nat. Bank (Ark.) 334

5. *Volenti non fit injuria*. Walters v. Charleston Mills (C. C. App. 4th C.) 503

6. When the law gives priority, equity will follow it. Doster v. Manistee Nat. Bank (Ark.) 334

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MILEAGE BOOKS.

See COMMERCE, 1; CONSTITUTIONAL LAW, 11.

MINES.

Inspection of, see CONSTITUTIONAL LAW, 22, 23.

See also ESTOPPEL, 1; EVIDENCE, 3.

1. The failure to limit the number of inspections of mines does not make Ill. act July 1, 1895, as amended July, 1897, providing for an inspection of mines at the cost of the mine owners, void on the ground that it is oppressive and may impose a burden by imposition of fees which would destroy the business of the mine owners, where the statute, after providing that the inspection shall be made at least four times a year and as often as the inspectors deem necessary, provides that they may be removed for neglect or malfeasance, and prohibits them from doing any act to the injury of the operators of mines. Chicago, W. & V. Coal Co. v. People (Ill.) 554

2. The boring of a well within ninety days is a condition precedent to the continuance of an oil and gas lease which, in consideration of \$1, grants all the oil and gas in certain land, with the privilege of operating therefor for the term of five years, and as much longer as oil or gas is found in paying quantities, not exceeding thirty-five years from date, with a royalty of one-seventh part or share of the oil produced and saved, but with a proviso that a well shall be completed within ninety days, in default of which the lessee shall pay a forfeiture of \$50, since the only substantial consideration consists of the prospective royalties. Huggins v. Daley (C. C. App. 4th C.) 320

3. No judicial proceeding is necessary to avoid an oil and gas lease for failure to comply with a condition precedent by boring a well, where the lease merely gave the right to the oil and gas, with the privilege of operating therefor on the land, since the landlord has never been out of possession and cannot re-enter upon himself. Id.

4. A gas pump may lawfully be used to increase the production of an oil well, although the production of wells on adjoining property is thereby diminished. Jones v. Forest Oil Co. (Pa.) 748

NOTES AND BRIEFS.

Mines; forfeiture of oil lease; delay in drilling well. 320

MOB.

Liability for, see COUNTIES.

See also CONSTITUTIONAL LAW, 2, 12; EMINENT DOMAIN, 9; MUNICIPAL CORPORATIONS, 12; PLEADING, 4.

MONEY.

See CONFEDERATE MONEY.

MONOPOLY.

See also NEWSPAPERS, 2; SCHOOLS, 4.

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Monopoly; illegality of; created by by-laws of press association. 568

MORTGAGE.

Injunction against Sale under, see CONTRACTS, 5; INJUNCTION, 5.

Notice of Infirmary in, see NOTICE.

See also PUBLIC IMPROVEMENTS, 16; RECEIVERS, 1, 2.

1. A bona fide purchaser for value and without notice of a mortgage given without any consideration and which is not accompanied by any negotiable obligation holds it as a valid encumbrance as against creditors of the mortgagor, since his equities are at

least equal to theirs, and in such case the legal title prevails. *Economy Savings Bank v. Gordon* (Md.) 63

2. A mortgagee of a street-railway company, though not bound by a compromise contract between the mortgagor and the city, with respect to liens on the property for paving, cannot accept the benefit of such contract for the relief of the property from a lien existing under the company's charter ordinance without being subjected to the burden of a lien which the contract provided for. *Union Trust Co. v. Richmond City R. Co.* (Ind.) 41

3. Railroad structures and improvements placed upon land acquired by purchase, but which was subject to a prior mortgage, do not constitute a part of the security under the mortgage, because they do not go to the betterment of the mortgagor's estate, and do not pass to a purchaser of the land on foreclosure sale, but are to be regarded as trade fixtures which the railroad company may remove. *St. Louis, K. & S. W. R. Co. v. Nyce* (Kan.) 241

4. Damages by the construction or operation of a railroad to land outside the right of way cannot be recovered by a purchaser on foreclosure sale who first bid off the tract outside the right of way and then the right of way, even if the former owner might have had a right of action for such damages. *Id.*

5. A purchaser of land of a corporation on foreclosure who, before the sale is approved or he has complied with his bid, voluntarily pays a claim for taxes, without knowledge of any dispute as to its validity, and is denied credit therefor when completing his purchase, may be subrogated to the claim for such part of the taxes as the property was certainly subject to; but the court will not require a receiver of the property to recognize such voluntary payment of that part of the taxes which was in dispute, or to assume the burden and responsibility of litigation upon it. *Walters v. Charleston Mills* (C. C. App. 4th C.) 503

6. A purchaser at a sale under foreclosure is not such a party to the suit as to entitle him to bring in a new party or to raise new issues, although he becomes subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase, with the right to be heard upon all questions thereafter arising which affect his bid and are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by such decree. *Id.*

NOTES AND BRIEFS.

Mortgage; rights of mortgagor to use of property. 751

Title to railroad built on mortgaged land. 244

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As Affecting Right of Action, see ACTION OR SUIT, 1.

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MUNICIPAL CORPORATIONS.

Imposing Burden on, see ACTION OR SUIT, 3.

Constitutional Rights of, see CONSTITUTIONAL LAW, 6, 13.

Unconstitutional Ordinance as to Sewers, see CONSTITUTIONAL LAW, 9.

Liability for Discharging Sewers into Streams, see also EMINENT DOMAIN.

Right to Take Legacy, see TREATIES; WILLS, 3.

Injunction against, see INJUNCTION, 7-12.

Right to Discharge Sewers into Streams, see WATERS, 3-9.

See also BONDS, 3-6; CHARITIES, 1; DRAINS; INJUNCTION, 3, 4; NUISANCES, 3; PUBLIC IMPROVEMENTS, 13; TOWNS.

1. Implied authority to operate a rock quarry outside the limits of a city is not conferred upon the city by general provisions in its charter for the purchase, holding, sale, and conveyance of real and personal property necessary for its uses and purposes. *Duncan v. Lynchburg* (Va.) 331

2. A city is responsible for the acts of a board of sewer commissioners within the scope of their authority under a charter which gives the board authority to execute certain powers vested in the city. *Platt Bros. & Co. v. Waterbury* (Conn.) 691

3. An ordinance is not void for uncertainty by reason of a provision giving the mayor discretion to impose a fine of \$50 or imprisonment for thirty days upon conviction, where the statute makes the violation of the ordinance a misdemeanor and the Constitution of the state makes exactly the same provision as to the punishment for misdemeanors. *State v. Higgs* (N. C.) 446

4. The cost of providing water for a city, although expressly authorized by charter, is not a "necessary expense" of the city, within the meaning of N. C. Const. art. 7, § 7, which prohibits indebtedness or taxation of a city for anything except necessary expenses, without a two-thirds vote of the qualified voters. *Edgerton v. Goldsboro Water Co.* (N. C.) 444

5. A mayor cannot veto the judicial action of the board of aldermen sitting as a court in a matter of which the statutes have made it the exclusive and final judge, as in the determination of the election of its members, under N. H. Pub. Stat. chap. 48, § 11, although by chap. 47, § 7, it is provided that "he shall have a negative upon the action of the aldermen in laying out highways, and in all other matters; and no vote can be passed or appointment made by the board of aldermen over his veto, unless by a vote of two thirds at least of all the aldermen elected." *Cate v. Martin* (N. H.) 613

6. Cigarettes are not included among the "other provisions" referred to in Ill. Rev. Stat. chap. 24, art. 5, § 1, ¶ 50, providing for the regulation by cities of sales of specified articles of food "and all other provisions." *Gundling v. Chicago* (Ill.) 230

7. An ordinance requiring a license for the sale of cigarettes is within the authority given by Ill. Rev. Stat. chap. 24, art. 5, § 1, ¶ 66, authorizing the enforcement of "all necessary police ordinances," and § 78, authorizing all acts and regulations "which may be necessary or expedient for the promotion of health or the suppression of disease." *Id.*

8. An ordinance providing that the mayor shall grant licenses in certain cases does not delegate the power of the city council to him, when the council in substance grants the licenses by authorizing him to do so when certain conditions are complied with. *Id.*

9. An ordinance prohibiting the sale of "any meats, fish, butter, cheese, lard, vegetables, or any other provisions" where dry goods, clothing, jewelry, and drugs are sold, is not authorized by Ill. general incorporation law, art. 5, cl. 50, § 1, under which the city was organized, providing that the city council may "regulate" the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, since the ordinance does not provide a regulation of the sale of provisions, but makes an arbitrary prohibition of such sales where certain other goods are sold. *Chicago v. Netcher* (Ill.) 281

10. An ordinance prohibiting the sale of any intoxicating liquors in any place of business where dry goods, clothing, jewelry, and hardware are kept for sale is not authorized by Ill. general incorporation act, art. 5, cl. 46, § 1, giving cities power to "license, regulate, and prohibit" the sale of such liquors, since the ordinance is not an exercise of the police power, but is purely arbitrary, not having any connection with and not tending in any way towards the protection of the public against the evils arising from the sale of intoxicating liquors. *Id.*

11. The imposition by the general assembly of taxes upon municipal corporations or the inhabitants or property thereof for municipal purposes, in violation of Mo. Const. art. 10, §§ 1, 10, is made by the Missouri anti-department store act of May 16, 1899, § 6, providing that the two thirds of the license fee or tax imposed upon department-store merchants is to be paid to the treasurer of the city wherein such stores are located, and the remaining third in the state treasury for the use of the state. *State ex rel. Wyatt v. Ashbrook* (Mo.) 265

12. A municipality is not liable for the participation by its officers in a conspiracy or in a mob, since such acts of the officers are not within the scope of their duties, but must be deemed to be performed by them as individuals. *Wallace v. Norman* (Okla.) 620

13. A city is not liable for a nuisance created by the pollution of a stream by its employees and chain gang while operating a rock quarry outside the limits of the city, which its charter gives no authority to operate, unless it is implied from certain provisions which expressly include a denial of liability for the failure to exercise, or the improper exercise of, the powers thereby conferred. *Duncan v. Lynchburg* (Va.) 331
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14. The city of Brooklyn is the proper party defendant in an action for damages caused by a sewer constructed by the town of Flatbush before the town was merged in the city, since N. Y. Laws 1894, chap. 356, limiting and defining the liability of the city for debts and obligations of the town, merely confines the area of taxation for such debts and obligations to the territory which would have been liable but for its annexation to the city. *Huffmire v. Brooklyn* (N. Y.) 421

NOTES AND BRIEFS.

Turning Sewage into Waters, see **WATERS**.
See also **PUBLIC IMPROVEMENTS**.

Power of the legislature to impose burdens upon municipalities, and to control their local administration and property:—
(I.) Introductory; (II.) power to impose burdens: (a) generally; (b) public and quasi-public improvements; (c) compelling payment of nonlegal demands; (d) validating defective obligations; (III.) power in respect to officers and local administration; (IV.) power in respect to property and franchises. 465

Board of education of, as a mere incident. 786

Delegation of power by common council as to license; ordinance unconstitutional. 230

Increase of indebtedness by funding bonds. 785

Liability for acts of mobs; for acts of officers. 622

Liability for maintaining pond as a nuisance. 291

Liability for nuisance; for *ultra vires* act. 231

Necessary expenses of. 444

Ordinance restricting a lawful trade. 443

Veto power of mayor. 613

Violation of ordinance as a crime; prohibiting encroachment on streets by signs. 446

NATIONAL BANKS.

See **BANKS**, 5, 6.

NEGLIGENCE.

See also **BRIDGES**, 6, 7; **BUILDINGS**: EVIDENCE, 10, 17; **EXECUTORS AND ADMINISTRATORS**; **MASTER AND SERVANT**, 2-4, 6-8, 15-17; **PLEADING**, 1; **TRIAL**, 6-12.

1. An employee's contributory negligence is a defense to an action founded on a violation of the statutory duty of a railroad company to block guard rails and frogs. *Naramore v. Cleveland, C. O. & St. L. R. Co.* (C. C. App. 6th C.) 63

2. One who has constructed a wall owes a duty to persons lawfully on the premises to take reasonable care that the wall shall be so constructed as not to fall. *Dettmering v. English* (N. J. Sup.) 106

3. One who causes the fall of a wall on a neighbor's land by allowing water collected from a roof to be discharged through an

aperture in a gutter upon the other's land is not relieved from liability for the damage because of the fact that the wall was not well constructed. *Fitzpatrick v. Welch* (Mass.) 278

4. The owner of a building standing on a business street, who, knowing that it was negligently constructed by the use of improper materials and liable to fall of its own weight, continues to use the building or permit it to be used, is guilty of continuing a nuisance, and is liable for injuries caused by its collapse to a person lawfully standing in front of it at the time, although it was then in the possession of a lessee. *Waterhouse v. Joseph Schlitz Brew. Co.* (S. D.) 157

5. The drowning of children in a pond while skating on the ice formed upon it does not render the owner of the land liable, in the absence of anything to show that the children were there by permission or invitation. *Arnold v. St. Louis* (Mo.) 291

NOTES AND BRIEFS.

See also MASTER AND SERVANT.

Negligence; as to unsafe building; liability for its fall when occupied by tenant. 157

Custom as test of. 98, 106

Liability for maintenance of dangerous pond. 291

NEGROES.

See CIVIL RIGHTS; SCHOOLS, 1.

NEWSPAPERS.

1. A corporation engaged in collecting and vending news, with charter power to own and operate telegraph lines and exercise the right of eminent domain, cannot discriminate between newspaper publishers in the sale of its news, since its business is affected with a public interest. *Inter-Ocean Publishing Co. v. Associated Press* (Ill.) 568

2. A by-law of a press association which provides that its members shall not furnish its special news to or receive news from any person or corporation which shall have been declared antagonistic to such association is void as creating a monopoly. *Id.*

3. A weekly publication circulating among various classes of people within the county and state of publication, the contents of which consist principally of legal notices and information regarding the courts and of legal matters in general, while it also contains advertising of a miscellaneous character, literature of a general kind, and a limited amount of general news of current events, is a newspaper, within the meaning of Neb. Code Civ. Proc. § 497, which provides for publication of legal notices in a newspaper. *Hanscom v. Meyer* (Neb.) 409

4. The principal distinguishing feature of a newspaper in contemplation of a statute providing for the publication of notices in newspapers is that it be a publication appearing at regular or almost regular intervals, at short periods of time, as daily or weekly, usually in sheet form and containing 48 L. R. A.

news; that is, reports of happenings of recent occurrences of a varied character, such as political, social, moral, religious, and other subjects of a similar nature, local or foreign, intended for the information of the general reader. *Id.*

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Newspapers; what are. 410

Boycott of, by press association. 568

NEW TRIAL.

See APPEAL AND ERROR, 16.

NORMAL SCHOOLS.

See also PUBLIC MONEY.

NOTES AND BRIEFS.

Normal schools; appropriating public money for. 576

NOTICE.

See also MASTER AND SERVANT, 16.

A savings bank is not charged with notice of infirmity in a mortgage an assignment of which it takes as security for a loan, by the fact that its treasurer is cashier of the bank at which the mortgagee, mortgagor, and a corporation of which they are members, and to raise money for which the mortgage is executed, keep their accounts, so that he might have learned the disposition made of the money borrowed. *Economy Savings Bank v. Gordon* (Md.) 63

NUISANCES.

Of Vapors, see ACTION OR SUIT, 4.

Of Sewage in Streams, see WATERS, 4-6.

Prescriptive Right to Maintain, see EASEMENTS, 2-5.

See also HIGHWAYS, 1; MUNICIPAL CORPORATIONS, 13; NEGLIGENCE, 4.

1. What the law grants cannot constitute a nuisance *per se*, either public or private, and, if the law is obeyed, no actionable wrong can result. *Valparaiso v. Hagen* (Ind.) 707

2. A nuisance caused by the pollution of a stream to the damage of riparian owners whose injuries are similar in kind, though different in degree, is not a public, but is a private, nuisance such that a single landowner may maintain a private action for damages. *Smith v. Sedalia* (Mo.) 711

3. A city cannot be held liable for the drowning of children in a pond which is situated partly upon a street and partly upon private premises, on the ground that the pond is a nuisance which the city has failed to abate, where it does not appear that the accident happened upon that portion of the pond which is located upon the street. *Arnold v. St. Louis* (Mo.) 291

NOTES AND BRIEFS.

See also WATERS.

Nuisance; of bay window in street. 103

Polluting waters. 718

Effect of prescription.	718
Effect of license or prescription.	714
By performance of public work authorized by statute.	722

OFFICERS.

As Parties, see ACTION OR SUIT, 5.
See also CONTRACTS, 4.

1. When a person legally holding one office is elected or appointed to another, but is prohibited by a statute from holding both, upon accepting the second his *de jure* title to the first ends, and his successor may at once be appointed or elected; but, if the former occupant refuses to vacate the office, his successor will be compelled to take the necessary legal steps to oust him. *Oliver v. Jersey City* (N. J. Err. & App.) 412

2. An officer legally elected and qualified, who enters upon the duties of his office, and afterwards is appointed to and accepts another office, but in good faith continues to publicly discharge the duties of the first, his term not having expired, and no successor having been appointed or elected in his stead, nor any adjudication made against his title,—is an officer *de facto*. Id.

3. The official acts of an officer *de facto* are valid, as far as the rights of third persons and the public are concerned, unless the defects in the officer's title are notorious, and sufficient to overcome the apparent evidence to the contrary; but when they see a person occupying an important public office by virtue of an election by the people, and publicly exercising its duties within the period for which he was elected, they are entitled to consider him to be such officer, and will be protected in their rights if they do so. Id.

NOTES AND BRIEFS.

Officers; <i>de facto</i> .	412
Injunction against enforcing contracts to obtain office.	842

OIL.

See COMMERCE, 3; EVIDENCE, 3; MINES, 2, 3.

OPINIONS.

As Evidence, see EVIDENCE, 7.

ORDINANCE.

Injunction against Passage of, see INJUNCTION, 3, 4.

Passage of, see MUNICIPAL CORPORATIONS.

ORIGINAL PACKAGES.

See COMMERCE, 3.

OYSTERS.

Destruction of, by Sewers, see EMINENT DOMAIN, 8.

PARLIAMENTARY LAW.

See also MUNICIPAL CORPORATIONS, 5.
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Declaration of result of vote; vote by presiding officer; casting vote. 613

PARTIES.

See ACTION OR SUIT, 6-8; APPEAL AND ERROR, 5; MORTGAGE, 6; MUNICIPAL CORPORATIONS, 14.

PARTITION.

See also JUDGMENT, 2.

NOTES AND BRIEFS.

Partition; what lands subject to; in case of life tenants. 25b

PARTNERSHIP.

Heirs of Partners as Parties, see ACTION OR SUIT, 8.
See also INFANTS, 1.

1. Partnership real estate retains its character of realty in the absence of any express or implied agreement to the contrary between the partners, for the purpose of adjusting the rights of a surviving partner and the heirs of a deceased one, except so far as is necessary to adjust the partnership obligations and the accounts between the partners. *Darrow v. Calkins* (N. Y.) 299

2. The intention to convert real estate into personality is manifested by its purchase for partnership purposes with partnership funds, and its use in the partnership business indiscriminately with chattel property. Id.

3. A conveyance of his interest in the partnership real estate by one partner to the other in trust to hold as partnership property, and to return the proper portion of the proceeds at the winding up of the partnership, is not in contravention of § 55 of the New York statute of uses and trusts, which contemplated merely the creation of original trusts. Id.

4. A conveyance of his undivided half in the partnership real estate by one partner to the other, to be held as partnership property, with power to manage and sell, and to pay over to the grantor, his heirs, assigns, or other legal representatives "such portion thereof as shall, at the closing of the partnership business," belong to the grantor, discloses an intention to change the interest of the grantor and his representatives from one in lands to one in the surplus which shall remain after a sale of the property and the adjustment of the partnership affairs. Id.

NOTES AND BRIEFS.

Partnership; real estate of; rights of survivors and representatives of partners. 301

PAVEMENTS.

See PUBLIC IMPROVEMENTS.

PEDDLERS.

One who solicits orders for a firm having a permanent place of business in the state, without carrying any goods except those which have been previously ordered

by his customers or exposing any goods for sale, is not doing "business as a hawker or peddler," nor "exposing for sale or selling" goods, within the meaning of N. H. Laws 1897, chap. 76, requiring a license from peddlers. *State v. Wells* (N. H.) 99

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PENALTY.

For Breach of Contract, see *CONTRACTS*, 8.

See also *TRIAL*, 1.

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Perpetuities; rule of, as to trust for saying masses. 101

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See also *MASTER AND SERVANT*, 1.

NOTES AND BRIEFS.

Physicians; employment of; continuation of employment. 397

PLEADING.

Questions as to, on Appeal, see *APPEAL AND ERROR*, 17.

Effect of, as Waiver, see *INSURANCE*, 12.

See also *EVIDENCE*, 15.

1. A complaint alleging the negligent maintenance of a building that was improperly constructed is not insufficient because it fails to state specifically in what respects it was negligently constructed, or in what respect the materials used were insufficient for such a structure. *Waterhouse v. Joseph Schlitz Brew. Co.* (S. D.) 157

2. An allegation that inspection of beer as required by statute would cause irreparable damage is insufficient basis for equity jurisdiction, when it has no other foundation except a legal conclusion from the statute, and the statute properly construed is satisfied by inspection of the beer while in vats in a manner that would cause no damage. *State ex rel. Kenamore v. Wood* (Mo.) 596

3. An allegation that the wrongful creation of a stagnant pond caused the ill health of the plaintiff is sufficient without averring in terms that such 'wrong' was the natural and proximate cause of the sickness. *Carland v. Aurin* (Tenn.) 862

4. Allegations that a person was lynched by a mob of individuals who had assembled for an unlawful purpose and attempted to exercise correctional power over such person and his fellows are not negated by specific averments that the person was struck by an article "thrown at him by one of the mob," and shot with a bullet from a revolver in the hands of some of the mob. *Champaign County v. Church* (Ohio) 738

5. An amendment to an answer by setting up the statute of limitations is permissible under Wis. Rev. Stat. § 2830, authorizing amendments in furtherance of justice to correct a mistake in any respect, where the defendants are poor people, unacquainted with legal matters, and the failure to plead the statute was due to a mistake of their attorney. *Illinois Steel Co. v. Budzisz* (Wis.) 830

6. The imposition of terms as a condition of granting leave to amend a pleading is not absolutely required by Wis. Rev. Stat. § 2830, authorizing amendments in the discretion of the court "upon such terms as may be just." Id.

7. A question as to the powers conferred by a city charter may be raised by demurrer in an action against the city for an alleged nuisance, since the court will take judicial notice of the charter. *Duncan v. Lynchburg* (Va.) 331

8. The defense that a contract is invalid on grounds of public policy cannot be waived by failure to plead it. *Cansler v. Penland* (N. C.) 441

9. Inconsistent defenses cannot stand when the admission of the truth of one necessarily proves the falsity of the other. *Seattle Nat. Bank v. Jones* (Wash.) 177

10. The denial of an allegation by a general denial is nullified, so that proof of the allegation is unnecessary, by a special averment in an affirmative defense of the truth of the allegation which had been denied. Id.

NOTES AND BRIEFS.

Pleading as answer and as cross complaint; allegations of law or fact; theory of. 42

Of estoppel. 341

As to omission of stamp from instrument. 317

Right to plead inconsistent defenses:— (I.) Scope of note; (II.) inconsistency in single plea; (III.) original common-law rule as to inconsistency between pleas; (IV.) the rule under the statute of Anne: (a) with reference to inconsistent facts; (b) with reference to different modes of trial; (c) relaxation of the rule; (V.) The rule in equity; (VI.) the rule under reform procedure: (a) general statement of the doctrine; (b) what defenses are inconsistent: (1) distinction between inconsistency in fact and inconsistency by implication of law; (2) test as to what inconsistency is objectionable; (c) application of the rule to particular actions: (1) actions pertaining to contracts generally; (2) actions pertaining to bills and notes; (3) actions pertaining to sales; (4) actions pertaining to negligence and for assault; (5) actions pertaining to personal property; (6) actions pertaining to realty; (7) actions for libel or slander; (8) miscellaneous actions; (VII.) effect of inconsistency as a waiver or admission: (a) the prevailing rule; (b) exceptions to the rule; (c) explanation of the apparent conflict; (VIII.) inconsistency, how taken advantage of; (IX.) conclusion. 177

Discretion to permit amendment. 831

PLEDGE.

A statement to a bank by a borrower, that stock in his safe may be considered as collateral for his loans, is executory in its nature so long as the stock remains in his possession and until it is in fact pledged to the bank by a delivery. *Buffalo German Ins. Co. v. Third Nat. Bank* (N. Y.) 107

POLICE POWER.

See CONSTITUTIONAL LAW, 15-23.

PONDS.

See NEGLIGENCE, 5.

POSSESSION.

Of Logs Driven in River, see LOGS.

POWERS.

Of Appointment, see LIFE TENANTS, 2.

Authority to execute a power by will is exclusive of its execution in any other manner. *Kuggles v. Tyson* (Wis.) 809

PREMIUM.

On Investment of Trust Funds, see LIFE TENANTS, 1.

PREScription.

Easement by, see EASEMENTS, 2-4.
See also FISHERIES, 3.

PRESS ASSOCIATION.

See NEWSPAPERS, 1, 2.

PRESUMPTION.

See EVIDENCE.

PRINCIPAL AND AGENT.

A promise to pay for services engaged by an employee without any authority, for the benefit of a third person, when accompanied by a denial of any liability, does not constitute a ratification, but is a mere promise to pay the debt of another, which is void under the statute of frauds. *Holmes v. McAllister* (Mich.) 396

PRINCIPAL AND SURETY.

See also APPEAL AND ERROR, 6; BONDS, 1, 2.

NOTES AND BRIEFS.

See also SURETY COMPANIES.

Limitation of surety's liability; delay of creditor; rule in equity. 514

PRIVILEGED COMMUNICATIONS.

See EVIDENCE, 8; LIBEL.

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See EVIDENCE, 17; HIGHWAYS, 3.

PUBLIC IMPROVEMENTS.

Injunction against Assessment for, see INJUNCTION, 11, 12.

Decision as to Constitutionality of, see COURTS, 5.

Constitutionality of Statutes as to, see CONSTITUTIONAL LAW, 13, 14.

See also BRIDGES, 1-5; MORTGAGE, 2.

1. A petition from abutting lot owners is 18 L. R. A.

not a necessary condition of the improvement of an alley, under the charter of Milwaukee, Wisconsin, subchap. 7, § 6, when the council follow the technical course of procedure therein mapped out. *Kersten v. Milwaukee* (Wis.) 851

2. An undertaking to maintain a new pavement for a series of years, required as a guaranty of the perfection of the work, is not a contract for repairs within the meaning of a statute requiring contracts for repairs to be let to the lowest bidder. *Seaboard Nat. Bank v. Woesten* (Mo.) 279
Barber Asphalt Paving Co. v. Hezel (Mo.) 285

3. The construction of a street, and its maintenance for a term of years at a cost sufficient to preserve good work and good material from becoming imperfect from natural and unavoidable causes, may be included in a single contract by a municipality having complete control over the construction and repair of its streets, where the object is to obtain a better quality of construction, although the charter provides for letting the contract for "repairs" to the lowest bidder, which are to be paid for out of the general fund, while the cost of construction is to be charged on adjoining property. *Id.*

4. The fraudulent purpose of the public authorities in fixing the minimum price to be paid for maintaining at public expense a pavement constructed at the expense of the abutting owner, both of which items are included in a single contract, so low that an unlawful burden will be cast on the abutting owner, will not, after the completion of the pavement, defeat the contractor's right to recover on the tax bills, unless he participates in the fraud. *Id.*

5. That the price for maintenance of a pavement is below what would be fair compensation for the work is not sufficient to avoid, in favor of the abutting owner, a contract covering its construction and maintenance, under a charter requiring the city to pay for maintenance, and the abutting owner for construction, where there is nothing to show that the contract price for construction is not fair and reasonable, and the contract is in fact but for a single work,—that of construction with a guaranty of endurance. *Id.*

6. An assessment purporting to be made according to benefits will not be sustained, although the board making it say they viewed the premises and exercised their judgment, if the facts and circumstances show quite conclusively that they could not have exercised their judgment in arriving at the result. *Kersten v. Milwaukee* (Wis.) 851

7. Assessing lots for so-called benefits in proportion to their frontage, and making the aggregate of benefits closely approximate the total cost of the work, are circumstances too significant not to arouse suspicion that benefits were not considered, although the board making the assessment say they viewed the premises and exercised their judgment,

—especially when there was a deep cut opposite some of the lots and a deep fill opposite others. Id.

8. An assessment for grading an alley, based solely on the cost of the work in front of the abutting lots, without regard to benefits and apportioned by the front foot, is arbitrary and void. Id.

9. When a municipal corporation has exercised the power conferred by Ill. Rev. Stat. art. 9, chap. 24, § 1, of prescribing the method of payment for local improvements, and the work has been done, to be paid for by special assessment, the expense cannot be made a general charge against the city. *Pontiac v. Talbot Paving Co.* (C. C. App. 4th C.) 326

10. An assessment of an annual charge for the use of a common sewer under Mass. Pub. Stat. chap. 50, §§ 1-3, authorizing just and equitable annual charges or rents for the use of such sewers to be paid by everyone who enters his sewer into the common sewer, is not unconstitutional because of the fact that the person assessed therefor had previously paid part of the cost of building the sewer, if the assessment for its use is proportional to, and not in excess of, the benefits received therefrom. *Carson v. Sewerage Comrs.* (Mass.) 277

11. Abutting property may be constitutionally assessed for benefits from the watering of streets. *Phillips Academy v. Andover* (Mass.) 550

12. A vote appropriating money for street sprinkling expressly stating that it is appropriated under Mass. Stat. 1895, chap. 186, means that the provisions of that act are to be applied in regard to the expenditure, and, in the absence of anything limiting the amount of the assessment, the fair inference is that the whole cost is to be assessed on the abutting property. Id.

13. A municipal corporation is not liable to an action for refusal to proceed to levy a new special assessment to pay for street improvements after the original one was set aside for irregularity, under a contract by which the contractor agreed to look only to such assessments for his compensation and to take the risk of their invalidity, in accordance with a statute which expressly provides that the claim shall not become a public charge in any event, but the duty, if it exists, must be enforced by mandamus. *Pontiac v. Talbot Paving Co.* (C. C. App. 4th C.) 326

14. Property abutting on a previously opened portion of a street constituting a cul de sac cannot be assessed for benefits to pay the cost of an extension which will convert the cul de sac into an open street, as the owners, by dedication or otherwise, have already borne their full share of the cost of the original improvement, and cannot be assessed again to pay the cost of extending that improvement through other properties. *Re Orkney Street* (Pa.) 274

15. A provision in an ordinance authorizing a street railway to be laid, that the space

between the tracks shall be paved in the manner specified "when and as the street may be" thus paved, must be understood to mean that the paving between the tracks shall be at the expense of the company. *Union Trust Co. v. Richmond City R. Co.* (Ind.) 41

16. A lien upon a street railway for a paving assessment to which the company is subject under its charter is superior to the lien of a mortgage upon the property. Id. See also RECEIVERS, 2.

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PUBLIC MONEY.

Appropriations of the money of the state for the general and other expenses of a private Normal University, in consideration of the gratuitous instruction of teachers for the common schools, are not an assumption of the debts or liabilities of such corporation or a loan or extension of credit in aid of it in violation of Ill. Const. art. 4, § 20, but are within the legislative discretion as to the means of carrying out the provisions of Const. art. 8, § 1, requiring the legislature to provide for a system of free schools. *Boehm v. Hertz* (Ill.) 575

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RAILROADS.

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Combination of, see CORPORATIONS, 3.
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See also DAMAGES, 2; EVIDENCE, 4;
MASTER AND SERVANT, 2, 3, 5-7, 9,
10, 12, 18, 19; MORTGAGE, 3, 4;
NEGLIGENCE, 1; TAXES, 8.

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Power to lease.	522

REAL PROPERTY.

See also ACTION OR SUIT, 5; JUDICIAL
SALE, 1; PARTNERSHIP.

1. The death of a person while in college, thereby making it impossible to perform a condition subsequent imposed by will on an estate which was given him subject to be divested if he should fail to carry out the intentions of the will "through his own disinclination or incapacity, or the indifference of his parents or guardians," will not divest the estate so as to prevent its descent to his heirs at law and next of kin, since the performance, becoming impossible by the act of God, is dispensed with. *Ellicott v. Ellicott* (Md.) 58

2. A will giving a grandnephew an estate "for the purpose of securing to him a liberal education," requiring him to finish a collegiate course at one of two specified universities, and providing that the property shall pass from him if, "through his own disinclination or incapacity, or the indifference of his parents or guardians, he should fail to carry out these intentions," with a further provision that until he is twenty-five years of age the property shall be held by a trustee, who shall "deliver over the property and estate into his hands and possession" when he is twenty-five years old, if the directions of the will have been carried out, expressing also a special desire that the grandnephew shall not sell a certain place until he shall attain the age of twenty-five years,—vests in him an equitable estate at the death of the testatrix, subject to be divested by the nonperformance of the condition imposed, which is a condition subsequent, and not precedent. *Id.*

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Real property; recording of deed as notice.	538
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RECEIVERS.

1. A street railway is within the reason of the rule of a court of equity which subjects proceeds of mortgaged railway property in the hands of a receiver to the payment of current debts made in the ordinary course of business, if there has been any diversion of the current receipts to increase the value of the security. *Union Trust Co. v. Richmond City R. Co.* (Ind.) 41

2. A preference of a claim for paving the track of a street railway out of the proceeds 48 L. R. A.

of the property on foreclosure cannot be allowed on account of the purchase by the company of cars and other equipment after the paving was begun, materially increasing the value of the mortgaged property, unless such equipment was paid for out of the current earnings of the company. *Id.*

3. An action against receivers of a railroad company appointed by a Federal court, for injuries caused by the company's negligence before their appointment, cannot be maintained in a state court without permission of the court which appointed them. *Smith v. St. Louis & S. F. R. Co.* (Mo.) 363

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See BONDS, 4.

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The court may itself find the facts in question without a reference therefor, where a referee has failed to pass upon objections to evidence. *Credle v. Ayers* (N. C.) 751

REFUNDING.

See BONDS, 5, 6.

RELIGIOUS SOCIETIES.

See also LIBEL AND SLANDER.

1. Notice of an attempt to organize a church and of the time and place of forming the organization, as required by Wis. Rev. Stat. § 1990, is not necessary where the incorporators are not members of a religious organization, but desire to organize a corporation in connection with a church of their own peculiar tenets to be associated therewith. *Franke v. Mann* (Wis.) 956

2. A religious corporation *de facto* is created where an attempt in good faith is made to comply with a statute which authorizes the formation of such corporation, articles are drawn and signed in form as the statute requires, except as to the acknowledgment, and they are recorded, the corporation organized, and the right to exercise the franchise of being a corporation asserted for several years. *Id.*

3. A majority of the members of a church corporation organized as a body of Christian believers of a particular sect cannot devote its property to a use inconsistent with the purposes of the corporation by employing a pastor whose teachings are inconsistent with those of the sect to which the church belongs. *Id.*

NOTES AND BRIEFS.

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Rights in Trust Estate, see TRUSTS.

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See BUILDINGS, 2, NOTES AND BRIEFS.

SALE.

See also LOGS.

1. Logs in a river being driven by an incorporated log company, though it is not a common carrier, but has a duty under its charter of driving the logs and the possession of them so far as the logs are susceptible of possession, are subject to the right of stoppage *in transitu* in favor of a person who had sold them and had delivered them in the river for the purpose of their being driven to the purchaser's booms and mill. *Johnson v. Eveleth* (Me.) 50

2. A contract for the delivery of logs "over the dam" at the outlet of a lake into a river, whence they are to be driven by a log-driving company down the river to the booms and mill of a purchaser, does not make the dam the final destination or place of delivery of the logs so as to terminate the right of stoppage *in transitu* while they are being driven down the river. *Id.*

3. Constructive possession of a mass of logs being driven down a river to the booms and mill of a purchaser does not result in his favor, so as to terminate the right of stoppage *in transitu*, by the fact that a few of the logs had actually floated down to his mill and been received by him. *Id.*

NOTES AND BRIEFS.

Sale; on condition; passing of title. 773

SAVINGS BANKS.

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SCHOOLS.

See also CIVIL RIGHTS; CONSTITUTIONAL LAW, 3.

1. The constitutional requirement of the maintenance and support of a system of free common schools wherein all the children of the state may be educated does not require a school board to admit to any school under its control all the children who may desire to attend that particular school, or prevent the legislature from exercising its discretion as to the best method of educating the different classes of children in the state, whether those classes are determined by nationality, color, or ability, so long as it provides for all alike in the character and 48 L. R. A.

extent of the education furnished and facilities for its acquirement. *People ex rel. Cisco v. School Board* (N. Y.) 113

2. The authority of the state to regulate and control public schools includes the power to provide for the selection of uniform text-books for all the schools of the state, and to provide for the purchase thereof under a contract with the lowest bidder. *Leeper v. State* (Tenn.) 167

3. No right of local self government is infringed by a statute which provides for the selection of uniform text-books for all the schools in the state by a commission and for letting a contract therefor to the lowest bidder. *Id.*

4. A statute prescribing uniform text-books for schools throughout the state, with provisions for their selection by a commission and the letting of a contract thereafter to the lowest bidder for supplying any books that have been approved by the commission, is not in violation of Tenn. Const. art. 1, § 22, against monopolies, since the purpose of the statute is not to confer any pecuniary benefit upon the state or school officials or publishers, but to confer a benefit upon the public. *Id.*

5. The fact that the state is not bound by an agreement authorized by statute, giving a publisher the right to furnish all the text-books used in the public schools of the state, does not make the privilege invalid, so as to relieve a school teacher from liability for violating the provisions of the statute by using unauthorized text-books. *Id.*

6. There is not such lack of safeguards against extortion and oppression as to render invalid a statute providing for the purchase of all the text-books used in the public schools of the state from the same publisher, where the statute provides for a letting at the lowest rates, in free competition, after public advertisement, and that the prices shall always be as low as the books have ever been or are now being published under contract in any state, county, or district of the United States, when like conditions prevail, while power is conferred upon a commission to judge of these conditions and enforce them. *Id.*

7. Requiring payment in advance in order to obtain school books which have to be delivered out of the county is not an arbitrary provision of a statute providing for the purchase of all the text-books used in the public schools of the state from one publisher on a contract let to the lowest bidder, and does not infringe the rights of the citizen to make purchases on credit. *Id.*

8. The right of the voters of a district township to rescind a vote for a tax to build a schoolhouse in a subdistrict, at a regular meeting subsequent to that at which the tax was voted, exists by necessary implication from the power to vote the tax, when they rescind the vote before the tax has been collected, levied, or certified to the board of supervisors for that purpose. *Hibbs v. Adams Dist. Twp.* (Iowa) 535

9. A vested right to have a tax for build-

ing a schoolhouse levied and collected is not acquired so as to prevent rescission of the vote for the tax, by commencing an action to compel the certification of the tax for levy and collection. 1d.

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SHERIFF.

See CONTRACTS, 2.

SHIPPING.

Acceptance of Vessel under Contract, see ESTOPPEL, 2.

See also COMMERCE, 2; COURTS, 2; DEATH.

The method for limitation of the ship owner's liability for maritime losses provided in the act of Congress of 1851 by transfer to a trustee is not exclusive; but the limitation may be claimed under a general denial in an action at law. *Loughin v. McCaulley* (Pa.) 33

NOTES AND BRIEFS.

Shipping; limitation of liability; assertion in state court. 34

State statute as to soliciting desertion of seamen. 153

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STATUTES.

Remedy under, see ACTION OR SUIT, 2.
See also MINES, 1.

1. The ambiguity or uncertainty in the language of the Missouri anti-department store act of May 16, 1899, which leaves it a matter purely of guess work to determine whether the license fee is intended to be exacted for selling the articles of each of the seventy-three classes or for only each of the twenty-eight groups therein designated, and also fails to define the life and duration of the license to be issued, whether it is for a day, month, or year, for the life of the applicant, or for the duration of his business at a fixed place,—is sufficient to render the statute void. *State ex rel. Wyatt v. Ashbrook* (Mo.) 265

2. Provisions of a statute which relate to a particular subject indicated in its title, and which are a part of or incident to it, or in some reasonable sense connected with or auxiliary to the object in view, must be deemed to be within the title of the act. *Boehm v. Hertz* (Ill.) 575

3. A court may punctuate a statute or disregard punctuation, as may be necessary to ascertain its true meaning and intent. *Union Refrigerator Transit Co. v. Lynch* (Utah) 790

4. An amendatory statute is not invalid on the ground that it imposes burdens on a pre-existing corporation, if the amendments merely modify a statute to which the corporation was subject by making the provisions more favorable to the company. *Purdy v. Erie R. Co.* (N. Y.) 669

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STREET RAILWAYS.

See also CARRIERS, 1, 2; INJUNCTION, 2, 3; MORTGAGE, 2; PUBLIC IMPROVEMENTS, 15, 16; RECEIVERS, 1, 2.

A consolidation of street-railway companies is not in violation of Ga. Const. art.

4, § 2, ¶ 4 (Civ. Code, § 5800), which prohibits the purchase by one corporation of shares or stock in another, or the making of contracts between them, when the effect will be to create a monopoly or lessen competition, if the consolidated street railway will furnish greater and less expensive facilities and conveniences of transportation, and the competition between the old companies was at certain points only and unimportant and insignificant as compared with the general interests of the public. *Trust Company of Georgia v. State* (Ga.) 520

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Street railways; consolidation of; competition of. 520

Right to use streets as a franchise; contractual relations with city; property rights in streets. 823

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See also CORPORATIONS, 1.

A statute permitting trustees to charge against the estate in their hands such sums as they have paid to any company for becoming surety on their bonds gives no lien in favor of the company, in the absence of express provision to that effect. *Re Clark* (Pa.) 587

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Surety companies; legal powers and privileges of surety and trust companies:— (I.) In general; (II.) special act creating; (III.) granting special or exclusive privileges to; (IV.) power to act as guardian, etc., without bond; (V.) power to act as surety: (a) in general; (b) on appeal bond; (VI.) right to counter security; (VII.) right to relief from suretyship; (VIII.) right to tax, amount paid to, as costs; (IX.) right of personal representative, etc., to credit for amount paid to; (X.) foreign companies: (a) power to act as surety; (b) power to act as trustee, etc. 587

SURFACE WATER.

See ACTION OR SUIT, 5; WATERS, 9.

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See ACTION OR SUIT, 2; MASTER AND SERVANT, 6, 7, NOTES AND BRIEFS.

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See ADVERSE POSSESSION, 2.

TAXES.

See also BRIDGES, 5; CONSTITUTIONAL LAW, 12; LICENSE; MORTGAGE, 5; MUNICIPAL CORPORATIONS, 11; SCHOOLS, 8, 9; TOWN, 3.

1. The discrimination between different classes of judgments made by Kan. Laws 1897, chap. 243, providing for the taxation 48 L. R. A.

of personal judgments for money only, but exempting judgments on foreclosure of mortgages prior to the sale of the lands, judgments for work and labor, or for material furnished in the erection of buildings, and improvements on lands or lots, renders the statute void under Kan. Const. art. 11, § 1, requiring uniformity of taxation. *Hamilton v. Wilson* (Kan.) 238

2. The occupancy of real estate by an educational institution or its officers for the purposes for which it was incorporated, in order to exempt the property from taxation under Mass. Pub. Stat. chap. 11, § 5, cl. 3, as amended by Stat. 1889, chap. 465, must have, or be supposed to have, a direct connection with such purposes. *Phillips Academy v. Andover* (Mass.) 550

3. Dormitories and dining halls furnished by a college for the use of students are devoted to college purposes and therefore exempt from taxation under Mass. Pub. Stat. chap. 11, § 5, cl. 3, as amended by Stat. 1889, chap. 465. *Harvard College v. Cambridge* (Mass.) 547

4. A dwelling house occupied by the president of a college and his family, built with funds given expressly for the purpose of erecting a dwelling house for the president and his successors in office, and situated on the college grounds and kept in order and repair at college expense, while the whole lower floor, except possibly the kitchen, is used for class day, commencement, and other receptions, and for many hospitalities incident to the president's functions, and the hall and drawing room are also used for the convenience of the college and the president, for meetings of the faculty and committees, for conferences with university officers and students, for calls on university business, and for the annual meetings of the corporation at which degrees are voted, is exempt from taxation as property occupied by the institution or an officer thereof for the purposes for which it was incorporated. Id.

5. Houses occupied by college professors, with the permission of the college and without their having any estate therein or paying any rent therefor, but for the use of which an allowance is made as part of the compensation for their services, while the principal or dominant consideration in regard to the occupation has reference to the performance of their duties in the offices which they hold as professors and otherwise, rather than to the private benefit which they would receive in the way of homes for themselves and their families, are exempt from taxation under Mass. Pub. Stat. chap. 11, § 5, cl. 3, as amended by Stat. 1889, chap. 465. Id.

6. Premises occupied by the professors of an academy and their families are exempt from taxation, under Mass. Pub. Stat. chap. 11, § 5, cl. 3, as amended by Stat. 1889, chap. 465, exempting real estate of such institutions when occupied by them or their officers for the purposes for which they are incorporated. *Phillips Academy v. Andover* (Mass.) 550

7. A tax on property employed in interstate commerce, if it is within the jurisdiction of the state, is not a regulation of interstate commerce. *Union Refrigerator Transit Co. v. Lynch* (Utah) 790

8. Railway cars owned by a foreign corporation having no place of business in the state, when they are leased to various shippers, but come into, or pass through, and do business in the state, have a situs therein for the purpose of taxation. Id.

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TICKETS.

See CARRIERS, 1, 2.

TIDE.

See WATERS, 1, 2.

TIMBER.

1. A written contract of sale of an undivided half of land constitutes a revocation *pro tanto* of a prior license to cut timber thereon, so far as it remains unexecuted. *Bruley v. Garvin* (Wis.) 839

2. Timber cut under a parol license before any notice of revocation of the license does not become the property of a subsequent purchaser of the land who had no valid contract therefor before the timber was cut. Id.

NOTES AND BRIEFS.

Timber; oral contract for; parol license to cut.	840
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TOWN.

Imposing Burdens on, see ACTION OR SUIT, 3.

Deprivation of Property of, see CONSTITUTIONAL LAW, 13.

See also BRIDGES, 1-5.

1. The right of a town to regulate its town finances and affairs, superior to all legislative control, is not among the rights and privileges "derived from our ancestors," 48 L. R. A.

to "define, secure, and perpetuate" which the Constitution of Connecticut was adopted and to which its preamble refers. *State ex rel. Bulkeley v. Williams* (Conn.) 465

2. No such right of local self-government is given to a town, under the Constitution of the United States or that of Connecticut, as precludes the legislature from exacting of the town payment of a portion of the expense of an incorporated highway or bridge district of which the town is made a part, although the town has no share in choosing the members or directing the affairs of such district. Id.

3. The representation of a town in the state legislature, which charges the town with a portion of the expense of a highway or bridge district in which the town is placed and which is under the control of commissioners not selected by the town, but who draw orders for funds upon it, is sufficient answer to the objection that the town is taxed by these commissioners without representation. Id.

TRADING STAMPS.

Constitutionality of Statute as to, see CONSTITUTIONAL LAW, 20.

TREATIES.

A city in Switzerland is entitled to take a legacy from a citizen of the United States under the treaty with Switzerland, which permits citizens of the two nations to make such dispositions of property in favor of each other. *Succession of Meunier* (La.) 77

TRESPASS.

See FISHERIES, 1, 2.

TRIAL.

See also MASTER AND SERVANT, 16.

1. Right of trial by jury is not violated by a statute making a county liable to a penalty of a specified amount for the death of a person caused by mob violence. *Champaign County v. Church* (Ohio) 738

2. The practice of withdrawing a juror for the purpose of postponing or continuing the trial of a civil case does not prevail in Oregon. *Usborne v. Stephenson* (Or.) 432

3. The only cause for withdrawal of a juror in a civil case, if that practice can be resorted to for any reason, is surprise on the trial, and a motion therefor cannot be based upon matters happening long prior to the trial, which had been considered on motion for a continuance before the jury were impaneled. Id.

4. The question whether a usage has been established and its binding force upon the parties is a question of law, when the facts are undisputed. *Runyan v. Central R. Co.* (N. J. Sup.) 744

5. The reasonable necessity for killing a trespassing dog is a question for the jury under all the facts and circumstances of the case. *Hodges v. Causey* (Miss.) 95

6. The negligence of an executor in fail-

ing to apply for an extension of a vacancy permit for insured premises which continue vacant, which had been granted with an agreement to extend it on application, is held to be a question of law for the court. *Henderson Trust Co. v. Stuart* (Ky.) 49

7. It is a question for the jury whether the crossing of a bridge by a steam traction engine drawing a water tank is a usual and ordinary mode of travel and transportation of property over bridges in that locality, such as should have been anticipated and provided for in the exercise of ordinary care. *Hardin County v. Coffman* (Ohio) 455

8. The necessity of bracing a wall in the course of construction is a question for the jury, and not for the court, where there is evidence that bracing was provided for by the plans. *Dettmering v. English* (N. J. Sup.) 106

9. The negligence of the conductor of a freight train in going forward with the engine to examine culverts after a storm, under the order of the road master, is a question for the jury. *Terre Haute & I. R. Co. v. Fowler* (Ind.) 531

10. Whether or not an employee acts properly in obeying an order of a foreman to take bottles to an upper floor by the use of an elevator is a question for the jury. *Dallemand v. Saalfeldt* (Ill.) 753

11. The question whether or not a flood which broke a railroad trestle was such as could have been reasonably anticipated is for the jury. *Terre Haute & I. R. Co. v. Fowler* (Ind.) 531

12. The question of care and diligence in respect to the disposal of goods received on consignment, which had been retained for almost a year, when they were consumed by fire, may be submitted to the jury, where there is evidence of their value in the market. *Uaborne v. Stephenson* (Or.) 432

13. Whether or not an accepted offer to purchase insured property constitutes a breach of the condition in the policy against change of ownership is a question for the court, and not for the jury. *Arkansas Fire Ins. Co. v. Wilson* (Ark.) 510

14. It is erroneous to instruct the jury as to what their verdict shall be if they find certain facts, when there is no evidence on which those facts can be found. *Smith v. Sedalia* (Mo.) 711

15. A charge that a master should instruct his employee as to the nature, force, and probable effect of an explosion of a pot of molten metal taken by the employee from a blast furnace, in case it comes in contact with water, and that it is not sufficient merely to instruct that an explosion is likely to follow such contact, is not erroneous as requiring more than a warning that an explosion would be likely to cause injury. *Ribich v. Lake Superior Smelting Co.* (Mich.) 649

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Trial; withdrawal of juror:—(I.) Power to withdraw juror: (a) in civil cases; (b) 48 L. R. A.

in criminal cases: (II.) effect of withdrawal of juror in civil cases: (a) English cases: (1) in general; (2) as to costs; (b) American cases; (III.) effect of withdrawal of juror in criminal cases. 432

TROVER.

See also DAMAGES, 3.

A purchaser of property in good faith from a person who holds it under an agreement by which a third person has retained the title thereto, if he sells the property again, is liable for conversion, although he is not in possession of the property. *Wood v. Nichols* (R. I.) 773

TRUST COMPANIES.

See SURETY COMPANIES.

TRUSTS.

Sale of Property by Court of Equity, see JUDICIAL SALE, 2.

Premium on Investment of Funds, see LIFE TENANTS, 1.

See also CHARITIES; HUSBAND AND WIFE, 5; JUDGMENT, 3; MASSES; PARTNERSHIP, 1-3; SURETY COMPANIES.

1. The interposition of a court of equity to preserve a trust estate from destruction by reason of some circumstance not foreseen and provided for by the creator of the trust cannot extend to any change of the trustee's scheme further than is necessary for the preservation of the property. *Rugles v. Tyson* (Wis.) 809

2. The best interest of infant owners of an estate in remainder requiring an allowance to them of an immediate benefit therefrom for their maintenance and education will not warrant a court of equity in making an allowance to them from the trust estate during the existence of a life tenancy, where the trust not only fails to give any interest to the remaindermen until after the life tenant's death, but also makes their interest contingent by providing that the life tenant may, by her will, in her discretion, distribute the estate among her surviving children and grandchildren, and, in default of her appointment, gives the estate to her surviving children and the descendants of deceased children by right of representation. Id.

3. A life tenant of a trust estate to whom is given a power of appointment by will for the distribution of the remainder at her discretion among her surviving descendants, in default of which the remainder shall go to her living children and to the descendants of those who are dead by right of representation, though competent to sell her life interest so as to separate it from the power of appointment, has no authority to separate her estate from the estate in remainder, and should not be given that power by a court of equity without some overpowering necessity existing to demand it, because that course would substitute a mere expectancy for a certainty, contrary to the settlor's scheme. Id.

4. On the sale of part of a trust estate to discharge liens which exist by fault of the life tenant such portion of the proceeds as would go to the life tenant if the value of her life estate were estimated and paid to her may be paid over to her, not as a payment of the value of her interest, but as an investment, if secured by life insurance on her life in reputable level premium companies authorized to do business in the state, and if she adequately secures payment of the premiums and also secures prompt payment of future taxes on the unsold property by mortgage to the trustee upon her life estate therein, making it a first lien on such estate. *Id.*

5. A separate fund for the care of a burial lot and another for the saying of masses cannot be set aside by an executor under a will creating a trust "to pay the expense of keeping my burial lot in a proper and respectable condition and for having anniversary mass said annually," leaving it entirely to the executor's discretion to provide for the perpetuation of such services in any way he may deem proper, since the branches of the trust are to be administered together by the same trustee. *Webster v. Sughrow (N. H.)* 100

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UNBORN CHILDREN.

See also JUDICIAL SALE, 1; LIFE TENANTS, 2.

An infant has not before birth such an independent existence that a negligent injury to him will sustain an action in his favor after he is born. *Allaire v. St. Luke's Hospital (Ill.)* 225

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See CUSTOM.

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Usury; conflict of laws as to limitation of actions for. 637

VAPORS.

From Drain, see ACTION OR SUIT, 4.

VENDOR AND PURCHASER.

See also CHAMPERTY, 2.

Upon rescission of a deed of real estate because the grantors had, to their knowledge, no title which they could convey, of which fact the vendee was ignorant, a lien for purchase money wrongfully received by the vendors may be decreed upon any portion of the land of which the vendors were 48 L. R. A.

the owners. *Fort Jefferson Improv. Co. v. Dupoyster (Ky.)* 537

VERDICT.

Review of, on Appeal, see APPEAL AND ERROR, 11-13.

VETO.

See MUNICIPAL CORPORATIONS, 5.

VOTERS AND ELECTIONS.

A majority of all the electors voting at the election for any purpose, and not simply all who vote on the adoption or rejection of the constitutional amendment submitted at a general election, is necessary for the adoption of a constitutional amendment under Miss. Const. 1890, § 273, requiring "a majority of the qualified electors voting." *State ex rel. McClurg v. Powell (Miss.)* 652

WAIVER.

See INSURANCE, 11.

WALL.

See NEGLIGENCE, 2, 3.

WAREHOUSEMEN.

See also MASTER AND SERVANT, 20.

1. Flax is included in the word "grain." within the meaning and intent of Minn. Gen. Stat. 1894, §§ 7645 *et seq.*, providing that grain delivered for storage in a warehouse shall be received as a bailment, and not as a sale. *State v. Cowdery (Minn.)* 92

2. Authority to sell property described in a storage receipt issued under Minn. Gen. Stat. 1894, § 7640, is not conferred upon a warehouseman by a provision that the property may be mingled with other property of the same kind or transferred to other elevators or warehouses. *Id.*

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WATERS.

Easements in, see EASEMENTS.

Pollution of, by Sewers, as a Taking of Property, see EMINENT DOMAIN.

Injunction against Pollution of, see INJUNCTION, 7-10.

See also ACTION OR SUIT, 5; BUILDINGS, 2; LIMITATION OF ACTIONS, 1; MUNICIPAL CORPORATIONS, 4, 13, 14; NEGLIGENCE, 3; NUISANCE, 2.

1. The title of riparian owners above the ebb and flow of tide extends to the middle of the stream, subject only to a servitude to the public for purposes of navigation. *Grey ex rel. Simmons v. Paterson (N. J. Err. & App.)* 717

2. Riparian owners along the Passaic river where the tide ebbs and flows have title only to high-water mark. *Id.*

3. The right to use tidal streams as outlets for public sewers carrying off surplus water and the sewage from buildings may be

conferred by the legislature upon municipalities. *Sayre v. Newark* (N. J. Err. & App.) 722

4. The use of a stream for drainage is unreasonable, when it results in the concentration of filth and its discharge into the stream in such quantities that it is necessarily carried to the premises of another, where it produces a nuisance dangerous to health and destructive of the value of the property. *Platt Bros. & Co. v. Waterbury* (Conn.) 691

5. The right of surface drainage into a river does not include the right to discharge into it from sewers such noxious substances and in such quantities that the river cannot dilute them or safely carry them off without injury to the property of lower proprietors. *Id.*

6. A city which has legislative authority to construct its system of sewers, discharging their contents into a river, is not subject to the charge of maintaining a public nuisance. *Grey ex rel. Simmons v. Pater-son* (N. J. Err. & App.) 717

7. The grant to a city of a right to withdraw from a river such quantity of water as may be required to furnish a supply of pure and wholesome water does not vest in the city any right to the waters of the stream distinct from the rights of the general public, or preclude the legislature from subsequently authorizing another city to drain sewers into the stream where the tide ebbs and flows. *Id.*

8. The use of city sewers by connecting property therewith does not preclude the owner from recovering damages to his riparian property rights in premises farther down the river on account of the pollution of the waters by the sewers, where it does not appear that the damage was due in part to his fault. *Platt Bros. & Co. v. Waterbury* (Conn.) 691

9. The owner of a city lot has not the right to fill in or raise the surface so as to prevent the natural flow upon it of surface water from the higher ground of an adjoining owner, but is subject to the same rule which governs rural property. *Carland v. Aurin* (Tenn.) 862

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Waters; easement of riparian proprietors; pollution of, by sewers. 718

Pollution of, by sewage. 708, 714

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Right of municipal corporation to drain sewage into waters:—(I.) Introduction: (II.) statutory authority; (III.) taking or damaging property; (IV.) miscellaneous. 691

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Tidal streams; rights of riparian proprietors; pollution of. 722

Title to lake; to bed of river. 617

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See DESCENT AND DISTRIBUTION.

WILLS.

See also CHARITIES, 1; CONFLICT OF LAWS, 1; DEEDS; HUSBAND AND WIFE, 2, 3; JUDGMENT, 5; POWERS; REAL PROPERTY.

1. An instrument is not subscribed at the end thereof, as required by statute to constitute a valid will, where it consists of four pages in one sheet folded lengthwise down the middle, with the formal opening and a portion of the bequests on the first page of the sheet, another portion on the third page, which is marked page 2, while the remainder and the signature are on the second page, which is marked page 3, there being nothing to connect the portions on the third page with those above the signature. *Re Andrews's Will* (N. Y.) 662

2. An antenuptial agreement in support of a will will not prevent the revocation of the will by the subsequent marriage, where the statute says that "a marriage shall be deemed a revocation of a prior will." *Hudnall v. Ham* (Ill.) 557

3. The capacity of a foreign city to accept a legacy is not wanting so as to defeat the gift, merely because the capacity for a time is suspended until a permit is obtained from the council of state. *Succession of Meunier* (La.) 77

4. The interest of a legatee in a legacy to which he is entitled only on condition that he be declared by the executors to be a reformed man at the expiration of a certain period is not vested until such decision is made. *Re Jones* (Mich.) 580

5. A condition in a legacy that the legatee's right thereto shall depend upon the decision of the executors at the end of a certain time, that he is a reformed man, is not void for uncertainty, and such decision is a condition precedent to his right to the legacy. *Id.*

6. Courts will not refuse to give effect to statutes providing for the recording of foreign wills, and giving them the same effect as if made and proved in the state, because such effect is not given to foreign wills by the state from which the record comes. *Martin v. Stovall* (Tenn.) 130

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